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Jennifer R. Duncan

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“We are not makers of history. We are made by history.”

—*Martin Luther King Jr.*

BY BARBARA R. CHRISTY

Martin Luther King Jr. was partially right. We are definitely made by history, but we are also making history. As I finish this article, I am watching a virtual inauguration in front of a plaza filled with flags representing US lives lost in a worldwide pandemic. The large amount of civilian and military police is a reminder of the deep division and simmering anger of many. History is being made. It seems perfectly fitting that against such a backdrop, this edition of the *State Bar Journal* contains articles about significant events that continue to shape our history.

One of these articles is about North Carolina's role, or lack thereof, in ratification of the 19th Amendment a scant 100 years ago. It brought to mind a story I heard recently about Inez Milholland. Born in Brooklyn, New York, in 1886, Inez attended Vassar where she was an outstanding student, thespian, and athlete. She started the suffrage movement at Vassar, enrolling two-thirds of the students. When the president of Vassar forbade suffrage meetings, Inez and others instead held “classes.” Upon graduation, she applied to study law at Oxford, Cambridge, and Harvard, but was denied admission because she was a woman. She was finally admitted to NYU Law School, and upon graduation in 1912 opened her own practice



to help women, the poor, and labor. Her passions were evidenced by her participation in the NAACP, the Women's Trade Union League, the Equality League of Self Supporting Women in New York, the National Child Labor Committee, and the National American Woman Suffrage Association.

Inez participated in her first suffrage parade in 1911 carrying a sign that read, “Forward, out of error,/Leave behind the night,/Forward through the darkness,/Forward into light!” Because of her passion, courage, and her striking good looks, she soon became the face of the suffrage movement. On March 3, 1913, the day before President Woodrow Wilson's inauguration, Inez, 27 years old at the time, made a memorable appearance on horseback at the Woman Suffrage Procession in Washington, DC, which she had helped organize.

In today's parlance, Inez “went viral” as headlines called her “A Superwoman, a Rare Radiant Creature” and touted “The Beauty of the Suffrage Workers.” Due to her popularity, she was asked to speak on a nationwide tour to promote the suffrage movement. She and her sister, Vida, headed west by train and traveled through nine states in 30 days, giving at least 50 speeches. The grueling schedule took its toll and by the time she reached Los Angeles on October 24, 2016, her health was in serious decline. Speaking before an estimated crowd of 1,500 she implored women in the west (who had already won the right to

vote) to use their votes to advance voting rights for all women. Her last public words before she collapsed at the podium were, “President Wilson, how long must women wait for liberty?” She died three weeks later of pernicious anemia at the age of 30.

I will betray my age by telling you that I loved Paul Harvey's “The Rest of the Story” which was a feature on his radio show in the 1970s. He would tell an interesting story that always had a twist at the end—the “rest of the story.” Well, the “rest of this story” is that Judge Allegra Collins of the North Carolina Court of Appeals is the great niece of Inez Milholland. Judge Collins is known to be an analytical thinker, a thorough researcher, and an articulate writer. Like her Great Aunt Inez, she is an excellent athlete who used natural talent combined with discipline and determination to play collegiate and professional tennis and to represent the United States in the Pan American Games twice with the US Women's Handball Team.

I love the parallels in these stories. Inez Milholland made a public stand for women's right to vote in connection with the inauguration of President Wilson. Now, 100 years after that right to vote was granted, Kamala Harris was sworn in as this country's first female vice-president, and in between those two events are the achievements of a multitude of female attorneys, judges, and politicians.

Another one of this edition's articles is about the deadly confrontation and ensuing trial that took place 40 years ago in Greensboro, North Carolina, between

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The Day North Carolina Voted “Nay” to History

BY PHILIP GERARD

On a typically humid August morning in 1920, 50 senators and 120 representatives—all of them men, most of them wearing vested suits and ties knotted around celluloid collars—filed into their respective chambers in the state Capitol in Raleigh for a special session called by Governor Thomas W. Bickett.



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The Old Farmer's Almanac reminded its readers that, according to an old Irish superstition, this day, August 17th, marked the beginning of “Cat Nights”—the date when witches who had turned themselves into cats during eight former “lives” could no longer return to human form. For their ninth life, they were fated to prowl the lengthening nights, hunting prey with their keen nocturnal vision. And, of course, in those benighted days of yore, any independent-minded woman, especially an unmarried one, ran the risk of being branded a witch.¹

Such was the dual curse of American womanhood: On the one hand, women were often placed on a pedestal, considered too frail or virtuous for politics or business; on the other, they were also credited with possessing devious and uncanny powers. In truth they were neither madonnas nor sorceresses. In North Carolina they formed a rugged working class in the textile and tobacco factories and had achieved considerable influence over cultural and civic life—largely through indirect means.

Though the members of the General

Assembly were likely unaware of the fact, this August 17th marked the last chance they would have to act as champions of enlightenment—or forever be relegated to the dark void of missed opportunity.

They had come together to decide whether women—who made up a little more than half the state's voting-age population of 1.2 million—should be granted the right to vote. They carried into their respective chambers their own superstitions, prejudices, and strong opinions.²

The campaign for women's suffrage was

born in 1848 at the first women's rights convention in Seneca Falls, New York, and the first suffrage amendment was voted down by Congress in 1878. An 1897 amendment was put forward to the North Carolina General Assembly and—in keeping with the prevailing ethos that regarded women as unfit for politics—summarily relegated to the Committee on Insane Asylums. But by 1919, women had demonstrated considerable political acumen and Congress, urged on by President Woodrow Wilson, passed a joint resolution adopting the Nineteenth Amendment.

In the interim, suffragists had tirelessly campaigned, courting the press, cajoling legislators, and launching 56 separate state referenda.³

By the time the North Carolina legislature convened in August 1920, 35 states had already ratified the 19th Amendment to the Constitution granting full women's suffrage—one vote shy of ratification. This was the day when the North Carolina Senate could signal strong progressive vision, faith in the political judgment of more than half of the adult population of the state who had been denied the chance for political participation for all the generations since the founding of the republic—some 600,000 women. Governor Bickett read the writing on the wall, “arguing for a graceful accession to the inevitable.”⁴

Now the Senate was gavelled into session. The senators would not have the luxury of debating and voting *in camera*: they would do so fully in the public eye. Indeed, the public galleries were mobbed with spectators—ardently supporting or opposing ratification. To maintain decorum, in an unprecedented move, the seating was segregated—not by race, but by politics. To the left were gathered the suffragists, dressed in white or yellow, the colors of their campaign. Many wore armbands or sashes bearing the slogan “Votes for Women.”⁵

On the right side congregated the antisuffragists—while their sisters in the other camp carried white roses as symbols of their fight, they handed out red roses.⁶

The issue had proved so contentious that the North Carolina House had for the moment dodged the issue—tabling any consideration of the amendment until all its regular business should be concluded. A few days earlier, on August 11th, in a back-door move, 63 antisuffrage members of the House

had sent a telegram to their counterparts in Tennessee urging them to help thwart the national suffrage amendment on the grounds of states' rights:

We, the undersigned members of the House of Representatives of the General Assembly of North Carolina, constituting a majority of said body, send greetings to the General Assembly of Tennessee, and assure you that we will not ratify the Susan B. Anthony Amendment, interfering with the sovereignty of Tennessee and other States of the Union. We most respectfully request that this measure be not forced upon the people of North Carolina.⁷

The opposition legislators had plenty of allies—including not just men, but, surprisingly to a later generation, a cadre of powerful women who had devoted themselves to the antisuffragist cause. Mary Hilliard Hinton, a noted heraldic artist from a plantation family, led the state branch of the aptly-named Southern Rejection League. Her cohort included Sallie Mayo Cameron, another plantation belle; Elizabeth Cheshire, whose husband was an Episcopal bishop; Musette Kitchin, wife of a former governor; and Gabrielle DeRosset Waddell, married to former Congressman and Confederate Colonel Alfred Moore Waddell, who had led the white supremacist coup in Wilmington in 1898. Their husbands and other powerful men collaborated wholeheartedly in the effort at rejection.⁸

Indeed, the Southern Rejection League counted among its staunch supporters Furnifold Simmons, who had orchestrated the Democratic Party's White Supremacy Campaign in 1898 that resulted in the Wilmington racial massacre, and Judge George Rountree, another conspirator, who was elected to the legislature in the wake of the coup. Rountree had authored a constitutional amendment requiring that voters be able to read and write a section of the state constitution and pay a poll tax, and it included the so-called “Grandfather Clause,” exempting whites from the strict literacy test requirement “if he or a lineal ancestor could vote under the law of his state of residence on 1 January 1867.” The new requirements had prevented blacks from voting in any numbers in the state for an entire generation.⁹

Though opposing suffrage seemed counter to their own interests, in fact these women were against allowing *working class women* to vote—especially Black women. True, they be-

lieved along with their wealthy husbands that a woman properly found fulfillment in being a wife and mother, her “pure nature” unsullied by politics. More pragmatically, they feared that working class white women would use their votes to push for equal pay in the textile mills (owned by their husbands or other members of their moneyed class) that relied on them as a force of cheap labor, as well as for reform of child labor laws for those same factories. And having relegated African American citizens to the political sidelines through violence and insidious law, they now feared that literate Black women voting would threaten white supremacist rule. And any national mandate regarding elections might open the door for federal intervention to reinstate fair voting rights for Black citizens.¹⁰

On the suffragist side were even more formidable women. Gertrude Weil of Charlotte headed the Equal Suffrage Association of North Carolina. The daughter of a Jewish immigrant businessman, she had studied at the Horace Mann Preparatory School in New York. There, one of her teachers had been Margaret Stanton Lawrence, daughter of suffragist movement founder Elizabeth Cady Stanton—who once decried “the contempt with which women themselves regard this movement...it is met with a scornful curl of the lip, and expression of ridicule and disgust.” Stanton had collaborated with Susan B. Anthony to draft the exact language of what would become the Nineteenth Amendment way back in 1878.¹¹

Lillian Exum Clement, an attorney and outdoorswoman from Asheville who grew up at Biltmore, where her father worked to build the great estate, led the state branch of the National Woman's Party with a quiet ferocity.¹²

The presence of the suffragists in the galleries was strategic, a repeat of the tactic used during earlier attempts to get state legislators to grant suffrage, as noted in the association's 1915 convention minutes: “Whenever discussion upon any of these bills was to come up in either house, this league had a full representation in the visitors' galleries during the debates, hoping thus to show at least a passive protest against the failure to pass the measures. This proved effective, for several of our advocates freely admitted that the presence of the ladies had given courage to them in their efforts.”¹³

And in the run-up to the special session, they had campaigned actively, staging parades

and rallies, enlisting endorsements from newspapers—countered of course by antisuffragist lobbying and petitions.¹⁴

Many prominent men also supported the “great democratic movement” of suffrage, including Chief Justice Walter Clark, who addressed the Equal Suffrage League at Greenville in 1916. “To speak in its support is like advocating the Ten Commandments,” he intoned. “Some may not favor, but none are exactly in a condition to say that they are opposed.”

The judge’s long oration was studded with biting, folksy humor: “No matter how bad a character a man has, if he can only keep out of the penitentiary and the insane asylum we permit him to vote and to take a share in the government, but we are afraid to trust our mothers, wives, and daughters to give us the aid of their intelligence and clear insight.”

With logic that makes a contemporary reader cringe he argues, “In North Carolina the white population is 70% and the negro 30%, hence there are 50,000 more white women than all the negro men and negro women put together. The admission of the women to the suffrage therefore could not possibly jeopardize white supremacy, but would make it more secure.”¹⁵

After five hours of exhaustive debate, at last on the verge of a vote, Senator Lindsay C. Warren of Beaufort County offered a surprise motion, one contrary to the express wishes of the governor: table a vote on the amendment until the 1921 session. The motion carried 25-23.¹⁶

Between the delaying tactics by both houses of the General Assembly and the seemingly shrewd preemptive move to enlist the Tennessee legislature, the antisuffrage legislators must have felt smugly victorious in preserving the status quo without having to take a public stand. Because of the supposed threat of suffrage to white supremacist rule, they were confident that the other southern states would also reject it.

But the next day, August 18, 1920, the Tennessee State Legislature ratified the Nineteenth Amendment—and in what has been called “the single biggest democratizing event in American history,” some ten million women across the nation finally enjoyed the right to vote.¹⁷

Harry Burn, at age 24 the youngest member of the Tennessee State Legislature, showed up for the suffrage vote wearing a red rose pinned to his lapel—the emblem of the

antisuffragists. But then he received a note from his mother, Phoebe Ensminger Burn, admonishing him: “Hurrah, and vote for suffrage!” She praised the spirit of Carrie Chapman Catt, a suffrage leader, and told her son to “be a good boy and help Mrs. Catt put the ‘rat’ in ratification.” To the shock of his colleagues, he obeyed his mother and cast the deciding “yea” vote.

As he told the assembly in a speech the following day, “I know that a mother’s advice is always safest for a boy to follow, and my mother wanted me to vote for ratification.”¹⁸

Fittingly, the Nineteenth Amendment borrowed language straight out of the Fifteenth Amendment, which had enfranchised Black citizens after the Civil War, with a single crucial substitution: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of *sex*.”¹⁹

North Carolina had effectively voted “nay” to history.

In the upcoming election, Lillian Exum Clement, a democrat from Buncombe County, would become the first woman in history to take her seat in the legislature—voted in by the staggering mandate of 10,368 to 41. Shortly after assuming office, she confided to a reporter for the *Raleigh News and Observer*, “I am by nature a very timid woman and very conservative too, but I am firm in my convictions. I want to blaze a trail for other women.”²⁰

That trail was well traveled by 1971, when the General Assembly at long last ratified the Nineteenth Amendment—the second to last state to do so, ahead of Mississippi. Weeks later, on May 30, Gertrude Weil, aged 91, passed away quietly in the Goldsboro house where she was born.²¹ ■

Philip Gerard is the author of 13 books of fiction and nonfiction. In 2019 he received the North Carolina Award for Literature, the state’s highest civilian honor.

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Combating an Eviction Crisis in the Midst of a Global Pandemic

BY HOLLY ONER

Over the past many months, politicians, the press, the legal community, and tenants' advocates warned of a COVID induced housing crisis and an impending "tsunami" of evic-



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tions. As a tenants' lawyer on the front lines of eviction defense, I can tell you: it's here.

Voices for Civil Justice, a nonprofit organization in Washington, DC, wrote in their August 2020 newsletter "[w]e have all seen the beginnings of what promises to be a wave of pandemic-driven evictions, dutifully processed by court systems too often passively playing their part in the housed-to-homeless pipeline." COVID-related evictions are not only for nonpayment of rent. Since June 2020, landlords have also filed summary ejection actions for breach of lease. Some are alleged to have unauthorized occupants in the home after family members arrived to help provide childcare. Others have allegedly breached their lease based on incidents of domestic violence. The issues that give rise to these evictions have only been aggravated

over the past year.

As of the date of this writing, tenants will have no protection against eviction after January 31, 2021—in the dead of winter at the height of the pandemic. Evicting people during this pandemic not only threatens the health and safety of those evicted, it puts everyone in the community at greater risk. A recent study found that COVID-19 incidents significantly increased in states where evictions were allowed to proceed. Nationally, the results translated to a total of 433,700 excess cases and 10,700 excess deaths associated with eviction moratoriums lifting.¹ In North Carolina alone, 15,690 cases and 304 deaths were directly related to the lapse in eviction protection between June

20, 2020, and September 4, 2020.² North Carolina was found to be the 10th worst in terms of coronavirus spread from eviction of the 27 states studied.³

The Housing Crisis

Frankly, North Carolina faced a housing crisis among low-income families long before the virus. In NC there are currently 135,575 affordable housing units available for a low-income population of approximately 3 million.⁴ Housing is considered affordable when a person pays no more than 30% of her annual income toward rent and utilities.⁵ Families paying more than 30% of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation, and medical care.⁶ In order to afford the NC average monthly rent for a two-bedroom apartment plus utilities—without paying more than 30% of income on housing—

a household must earn \$35,256 annually.⁷ The average household gross income for a Legal Aid of North Carolina client is less than half of that.

An analysis by the Eviction Lab at Princeton University listed eight North Carolina cities (Greensboro, Winston-Salem, Fayetteville, Charlotte, High Point, Durham, Wilmington, and Raleigh) among the 100 American cities with the highest eviction rates. The COVID-19 pandemic has intensified the housing crisis in our state, the exact numbers of which are still hard to predict. There have been estimates that over 700,000 North Carolinians could be at risk of eviction.⁸

Tenants Affected

In his 2016 critically acclaimed book, *Evicted: Poverty and Profit in the American City*, Professor Matthew Desmond wrote, “If incarceration had come to define the lives of men from impoverished Black neighborhoods, eviction was shaping the lives of women. Poor Black men were locked up. Poor Black women were locked out.”⁹ In July 2020 the Center for Public Integrity released a report that nearly two-thirds of eviction cases nationwide were filed against tenants living in communities of color. On July 22, 2020, the US Census Bureau reported that 56% of renters afraid they could not pay their next month’s rent were Black or Latinx. Eviction cases are filed against Black women at almost twice the rate of all white renters.¹⁰

Not only do people of color make up a disproportionate number of tenants in eviction court; Black and Latinx people disproportionately suffer economic inequality, discrimination in healthcare, increased rates of food insecurity, disparity in the child welfare system, and are overwhelmingly over-policed and arrested. Additionally, the CDC reports higher COVID-19 infection and death rates among Black Americans.

Then Chief Justice Cheri Beasley spoke publicly on June 2, 2020, to address racial inequity in America and, specifically, in the court system. She said, “[i]t is essential to understand the root cause of the pain that has plagued African-Americans and the complexities of race relations in America... [a]nd while we rely on our political leaders to institute those necessary changes, we must also acknowledge the distinct role that our courts play.”

Policies in renting, lease enforcement, and eviction filing and judgements that disparately impact people of color all contribute to housing instability which, in turn, can have devastating and long-lasting effects on individuals, families, and their communities.

How Evictions Impact Tenants

Evictions have a lingering effect. Families and individuals who are evicted have increased physical and mental health issues, children experience educational disruption, parents lose jobs, and families become homeless.¹¹ In North Carolina, landlords regularly search databases for tenants’ previous evictions, even when those evictions were dismissed in court. Oftentimes the filing itself will compromise a tenant’s credit score or rental history. With an already inadequate supply of affordable housing, families are forced into overcrowded shelters, poorly maintained homes, or vulnerable and often exploitative situations.

For low-income families generally, it is not hard to imagine the consequences of the COVID-19 pandemic: loss of hourly wage work, cost-prohibitive childcare, meeting the needs of school age children whose schools have closed, and lack of transportation, to name a few. In 2018, the Federal Reserve found that 40% of Americans would not be able to afford a \$400 emergency. Many families live paycheck to paycheck with no health care benefits and struggle to make ends meet. They have no savings to rely on to fix a car in need of repairs, let alone financially survive during a global economic crisis due to an unprecedented and highly contagious virus. These circumstances coupled with an eviction paint tenants with a scarlet “E” and exact a heavy toll on the tenant, her family, and the community.

On September 5, 2020, the American Bar Association wrote a letter to Congress requesting support for emergency rental assistance to end the COVID-19 eviction crisis. In it, they described the devastating impact the pandemic has had on both tenants and landlords. They wrote, “[t]his assistance is desperately needed...[f]ailure to act will lead to a sharp spike in unemployment and homelessness, as well as extreme demands on community health and housing services during a time of year when such resources are in highest demand.”

Legal Protections during COVID-19

From March 27, 2020, through July 25, 2020, there was a federal eviction moratorium included in the CARES Act that prevented landlords from evicting tenants for nonpayment of rent from federally subsidized homes, including homes with federally subsidized mortgages. On May 30, 2020, Governor Cooper initiated an eviction moratorium preventing landlords from evicting tenants for nonpayment of rent. The governor’s moratorium lasted for three weeks and required landlords to give tenants a minimum of six months to pay back June rent.

On September 4, 2020, the federal government initiated a sweeping national moratorium—the Center for Disease Control order (“CDC order”) published in the federal register. It prevents all evictions for nonpayment of rent through January 31, 2021. The CDC order applies to all residential tenancies; however, it only helps tenants who know how to invoke its protections. It requires that tenants sign a declaration under penalty of perjury and deliver the declaration to their landlords. In the declaration the tenant swears, among other things, that he or she makes under a certain income, has suffered substantial loss of income, and has applied for governmental rental assistance.

The CDC order sparked controversy and widespread confusion among landlords, tenants, lawyers, and judges. On September 16, 2020, the *New York Times* published an article titled, “How Does the Federal Eviction Moratorium Work? It Depends Where You Live.” The article addressed the vastly different ways that judges across the country responded to the order—from ignoring it altogether to dismissing cases on the spot. On October 28, 2020, Governor Cooper issued Executive Order No. 171, “Assisting North Carolinians at Risk of Eviction,” which attempted to clarify the CDC Order’s application in North Carolina. However, there continues to be a lack of uniformity in how the order is applied and, in some cases, an outright refusal to comply.

Some landlords and landlord-advocates across the country challenged the constitutionality of the CDC order; however, a federal court in Georgia denied a preliminary injunction to stop its enforcement.

On October 15, 2020, North Carolina introduced the Housing Opportunities and Prevention of Evictions (“HOPE”) program. The HOPE program provided \$117 million

of rental assistance for tenants that made 80% or lower than the area median income and got behind on rent or utility payments. On November 11, 2020, less than one month later, the funds ran out and the program stopped accepting applications.

Although eviction moratoriums and rental assistance undoubtedly provide relief for struggling tenants, they ultimately delay the inevitable. The tsunami continues to grow and will hit harder without more comprehensive relief. Eviction moratoriums do not address the deeper issues that plague tenants facing housing instability.

Legal Aid of North Carolina Responds

Legal Aid of North Carolina has a robust eviction defense practice, with 20 offices covering all 100 counties. But the demand is overwhelming and both legal and financial resources are limited. While some funds have become available for rental assistance that will help both tenants and landlords, there is no guarantee of ongoing financial support for even the poorest tenants. Landlords have also been severely impacted by this pandemic and some are beginning to face foreclosure with months of unpaid rent accumulating. Even so, many landlords have shown compassion towards tenants falling behind on rent and have been willing to waive late fees and implement payment plans to help residents catch up.

In an effort to respond to the overwhelming demand, Legal Aid's Statewide Volunteer Lawyer Program has organized and provided ongoing training to a cohort of *pro bono* lawyers who have volunteered to help prevent evictions and avoid homelessness. The project, called the Eviction Negotiation Project (ENP), partners volunteer attorneys with tenants facing eviction for nonpayment of rent. Volunteer attorneys represent the tenants to negotiate with landlords in order to maintain the tenancy and to compromise the rent owed.

The project is now placing appropriate cases with volunteers to help tenants avoid homelessness and ensure public health and safety. More attorneys are needed to meet the ongoing demand, and Legal Aid would welcome additional volunteers for this project as well as our other *pro bono* projects. (Attorneys interested in volunteering may send an email to probono@legalaidnc.org.)

Nationwide, tenants who are represented by a lawyer are twice as likely as *pro se* litigants

to keep their homes. For example, in 2017 New York City implemented a law guaranteeing a court-appointed lawyer in housing cases. Since the law went into effect, 84% of tenants who had a lawyer avoided an eviction.

Investing in lawyers to advocate for tenants has multiple benefits: cities and counties save money paying less for homeless services, courtrooms run more efficiently, and tenants maintain housing stability which leads to economic stability and fewer incidents of crimes of poverty. There are even benefits for landlords. Tenant lawyers can help to mediate disputes before a summary ejection case is filed, diverting cases from ever entering the courtroom. Landlords save money by not paying court costs and attorneys' fees, avoiding the cost of tenant turnover, and increasing the likelihood of getting back-rents paid.

Conclusion

COVID-19 knocked out the shaky foundation supporting many tenants across North Carolina. Anita Johnson¹² was one of these tenants. In the beginning of 2020, Ms. Johnson had a stable job working as a home health aide. She had never missed a rent payment or been late on rent. When her car broke down requiring \$1,000 to repair, she started riding the city bus to work. In March she was let go from her job because, according to her employer, riding the city bus presented too strong a risk of COVID for her patients. She immediately applied for unemployment assistance. In June she received a determination denying her benefits. Currently, there is a 20,000-case backlog of unemployment benefits cases and almost half a million people unemployed in North Carolina.

Ms. Johnson's landlord filed a summary ejection action against her on August 7. Ms. Johnson continues to ride the bus every day diligently applying for jobs. She remains terrified of becoming homeless, and she fears that without stable shelter it will only make it more difficult for her to climb out of the hole. "[I]t is hard to argue that housing is not a fundamental human need. Decent, affordable housing should be a basic right for everybody in this country. The reason is simple: without stable shelter, everything else falls apart."¹³

In a *New York Times* opinion article on August 29, 2020, Professor Desmond wrote, "[b]efore the COVID-19 pandemic, more than 800,000 people around the nation were

threatened with eviction each month. Today, with unemployment levels unseen since the Great Depression and the expiration of federal benefits along with national and several state eviction moratoriums, millions of renters are at risk of losing their homes..."

Fortunately, Ms. Johnson was represented by Legal Aid in both her housing and unemployment cases. Legal Aid was able to successfully settle the housing case. She promptly appealed the unemployment denial and, though her hearing was not held until December 15, 2020, Legal Aid won her unemployment appeal hearing, securing thousands of dollars of retroactive unemployment. But Ms. Johnson is one of many tenants affected by the pandemic. Between January and December 2020, Legal Aid lawyers and volunteers have assisted thousands of tenants facing eviction under similar circumstances. Over the past few years, summary ejection filings in North Carolina have sharply increased, almost doubling between 2018 and 2019. *And that was before the pandemic.*¹⁴

As a legal community we must come together to address this calamitous issue when housing instability threatens lives and evictions will help spread the virus. The tsunami is here, and I don't know any other way we will weather the storm. ■

Holly Oner is a housing lawyer for Legal Aid of North Carolina in Greensboro. She joined Legal Aid in 2017 after practicing as a public defender for The Legal Aid Society in New York City.

Endnotes

1. Leifheit, Kathryn M. Linton, Sabriya L. Raifman, Julia Schwartz, Gabriel, Benfer, Emily, Zimmerman, Frederick J., and Pollack, Craig, Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality (November 30, 2020). ssrn.com/abstract=3739576.
2. *Id.*
3. bit.ly/Spring2021-11.
4. bit.ly/Spring2021-12; Table 6, p. 22.
5. 42 U.S.C. § 1437a(a)(1)(A).
6. Affordable Housing, bit.ly/Spring2021-13.
7. That means someone working 40 hours a week for 52 weeks a year would need to earn \$16.95 an hour—more than twice the current \$7.25 per hour minimum wage in the state.
8. *The Raleigh News & Observer*, August 22, 2020, Thousands of NC Residents at Risk of Eviction after Rent Protections Expire Next Week.
9. Matthew Desmond, *Evicted: Poverty and Profit in the*

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A Common Defense—

The Defense Case in the Trial of the 1979 Greensboro Klan, Nazi, Communist Shootout

BY THOMAS J. KEITH

Part One: Pre-Trial

In April 1983, I received a call from Russell Eliason, our US Magistrate Judge for the Winston-Salem division. He was trying to appoint defense counsel for the six Klansmen and three Nazis who had just been indicted by a federal grand jury for 12 substantive crimes and for conspiracy to commit various civil rights crimes in the November 3, 1979, shootout in Greensboro where five members or associates of the Communist Workers' Party (CWP) a.k.a. Workers Viewpoint Organization (WVO)¹ had been shot and killed. Two lawyers in Winston-Salem had already accepted appointment, and three of the defendants who had been acquitted in the 1980 state murder trial would be represented by the same three experienced defense attorneys. The two largest law firms in Winston-Salem—Womble Carlyle and Petree Stockton—agreed to assign one lawyer from each firm to represent the sixth and seventh defendants. All Judge Eliason needed were two more lawyers.

I flatly informed him I could not afford to accept the appointment. The appointed rate was only \$20 an hour for out-of-court and \$30 an hour for in-court time. As a small firm practitioner, it would be financially ruinous for me to get involved in a long case. His honor informed me that the court system would probably pay higher than the indigent defense rate and that the trial would only take about a month. Neither turned out to be correct. But what convinced me to accept was his argument that even though the defendants were members of unpopular groups, they deserved good representation. I

was given a choice of which one of the two remaining defendants to represent—the one the government contended killed four CWP members or the only defendant who did not have a gun and might have been an informant. I chose Eddie Dawson, the informant.

I began to wonder if I had made the right selection when I received a copy of the indictment. Virgil Griffin, the grand dragon of the Invisible Empire of the Ku Klux Klan, was the first of nine named defendants; Eddie Dawson was second. Usually, in the Middle District, the least culpable defendants are listed last. The rest of the defendants were represented as follows:

Fred R. Harwell Jr. from Winston-Salem for Klansman Virgil Griffin. Our team elected Fred as our spokesman.

Jim D. Cooley from Winston-Salem for Klansman David Matthews, who the government contended killed four CWP members.

Roy G. Hall Jr. from Winston-Salem for Roland Wayne Wood, a self-proclaimed Nazi.

Neill A. Jennings Jr. from Greensboro for



National newspaper headlines on the day of November 4, 1979.

Photo: News & Record

Klansman Jerry Paul Smith, whom he had represented in the state trial in 1980. The government contended that Smith killed a CWP member.

Jeffrey P. Farran from Greensboro for Jack Wilson Fowler Jr., a self-proclaimed Nazi whom he had represented in the state trial in 1980.

S. Fraley Bost from Winston-Salem for Klansman Roy C. Toney.

Harold F. Greeson from Greensboro for Klansman Coleman B. Pridmore, whom he had represented in the state trial in 1980.

Leon E. Porter Jr. from Winston-Salem for Raeford Milano Caudle, a self-proclaimed Nazi.

The investigation by the USDOJ took three years. The initial trial date was only six months away in October. It was later contin-

ued to January 9, 1984.

What follows is how this disparate defense “team,” most of whom had never worked together, prepared for a trial that resulted in all nine defendants being found not guilty of all 25 charges on Palm Sunday, April 15, 1984.

The government presented us with pack mule loads of discovery. My portion filled 78 large three-ring notebooks that took up 25 linear feet of bookshelves. It included interviews of over 400 possible witnesses by multiple law enforcement agencies and grand jury testimony. There were over 850 possible exhibits and hours of videotapes taken by four television stations on the scene, which showed some portions of the shooting incident. We realized that we would have to develop unique pretrial strategies in order to deal with the massive task ahead.

The first meeting of all nine attorneys was held in Hal Greeson’s office in Greensboro on May 6, 1983. What I recall most was Greeson saying, “Don’t worry guys. We’re going to win.” Jeff Farran and Neill Jennings said the same thing. But from my experience, a multi-defendant case is a nightmare. Each defendant has a defense that may be antithetical to another defendant’s defense. For instance, my client had been an informant on the other five Klansmen.

The Greensboro attorneys recommended that we all have the same defense. Self defense was available on their substantive crimes, but we would need more than that to defend the conspiracy to violate the civil rights of parade participants, allegedly because of their race (all but one of those killed were white).² The defendants would contend their actions were political, not racial, and that they went to Greensboro to oppose Communism. It was therefore essential that we develop a new defense and act as one cohesive unit in our preparation and at trial. We acted so consistently as a team because of the common themes, that the government attorney would refer to us as “co-counsel,” while we were only appointed to represent our individual clients.

No one lawyer could do all the work himself. Just for one of the 412 possible government witnesses, there would be multiple reports from multiple investigators from the Greensboro Police Department (GPD), FBI, SBI, and ATF, plus federal grand jury interviews and state court trial testimony. I had to employ three law students and a part-time

associate to help me organize the materials related to Dawson and conduct legal research, while at the same time having to lay off one legal assistant.

Each of us was assigned certain witnesses who might be for or against us. Usually, several of us would interview one of them together in places such as China Grove, Smithfield, or even Nashville, Tennessee. We would share our notes of the interviews with all other counsel. We even cooperated on opening statements. Each one of us would touch on one part of our joint defense.

But there were also times when each of us had to take the lead when the evidence focused primarily on our client. For example, the attorneys defending alleged “shooters” had the most difficult job. They had to understand the government’s novel arguments. One FBI witness—a chemist—would testify how the lead in the unfired shells in a specific defendant’s shotgun could be “consistent with” the buckshot pellets that killed or wounded a demonstrator. Another FBI witness attempted to show that the Klan fired the first offensive shots based on his analysis of acoustic patterns from the videos.

The attorneys from the two big law firms, Fraley Bost and Leon Porter, brought a great deal of additional resources to our group. They had unlimited access to WestLaw, paralegals, and investigators. Plus, their firms had some deep pockets if we needed something special. For example, Womble Carlyle, Bost’s law firm, rented a conference room for us in a building next to the federal courthouse in Winston-Salem where the trial was held.

We also had some resources that not even the government had readily available. At trial, the government lawyers wanted to use the videotapes from the four television stations that filmed the shooting to show the action of a specific defendant at a particular point in time. They did this by going



KKK members take weapons from the back of a car prior to the shooting between them and members of the Workers Viewpoint Organization/ Communist Workers Party on November 3, 1979.

Photo: News & Record

to Hollywood, California and having the video “enhanced” by placing a round circle, or “halo,” around the defendant, which would draw the viewer’s eye to that defendant’s acts.

We also had this capability, only better. My law partner Gary Smithwick specialized in FCC matters. Gary also owned a third of a new UHF-TV station, Channel 61, in Greensboro. Whenever we needed to focus on what a Communist was doing at the scene, I would drive to Greensboro and have Gary’s staff add the “halo” to our copy of the video. At one hearing, the lead FBI agent complained that he was going to fly to California to get some tapes enhanced, so he couldn’t be in court for a few days, “...and all Mr. Keith has to do is drive to Greensboro.” The videotapes were quite helpful to the defense. One identified Dori Blitz, a Communist, emptying her revolver at defendant Smith.

Part of the division of labor included researching and drafting the pretrial motions that affected all nine defendants. Three of us were assigned to be the Motions Team: Fred Harwell, Jim Cooley, and me. Over the course of seven months, we ground out hundreds of pretrial motions. The docket entries show 222 motions (including a half dozen by the government) filed by August 10, and the trial was still five months away. This included the separate motions filed by each defense attorney for his client’s individual issues.

Several months before trial, we still did not have enough information from our vari-

ous Bill of Particulars to address all the aspects of the alleged conspiracy. As a result, Fred Harwell drafted a motion to hold a James hearing. *US v. James*, 590 F.2d 575 (5th Cir. 1979). If granted, the government would have to lay out how it would prove its conspiracy case before the court would allow statements of co-conspirators into evidence. On the assigned hearing day, Judge Thomas A. Flannery, specially assigned to the case by the DC Federal Court, denied all our other motions. But when he came to Harwell's motion, the judge ordered the government to lay out its evidence of a conspiracy for us. Shortly before trial, we received a brief from the government detailing each act in the conspiracy by each named defendant such as in their purchase of seven dozen eggs to throw at the Communists. We now knew their complete case.

Dan Bell, USDOJ lead prosecutor for the government's three-lawyer team, hounded us from the beginning to agree to scores of stipulations that would allow his evidence to be introduced into evidence without objection and streamline the government's case. As a former assistant solicitor, I knew you could spend a lot of precious time during a trial lining up chain-of-custody witnesses and exhibits. It was the prosecutor's job to do the heavy lifting, not the defense's job to make it easier for the prosecutor to convict our clients. I saw no need to stipulate to anything, unless it helped our defense, such as which guns were owned or fired by the Communists.

As a result of our refusal to stipulate to most of the government's evidence, its case dragged on for almost three months. In contrast, we decided that ours would be quick and direct. The last thing the jury would remember was our presentation, not what the government's 75 chain-of-custody witnesses had said over the three previous months.

Taking portions of our proposed jury questionnaire, the court created a 22-question short answer biographical jury questionnaire. The court gave each side its initial list of 80 prescreened jurors with their answered questionnaires. Jurors would be called in numerical order from the list.

Any peremptory challenges to seating a juror would be by the simultaneous or "blind strike" method. The government would have ten peremptory strikes, and the defense would have two each for 18 challenges. Of course, either side could try to strike a juror

for cause, and there were many strikes for cause when the jurors expressed their unwavering opinions against Klansmen, Nazis, or Communists.

Shortly before trial, we met in our rented conference room to strategize how we would approach jury selection. We had the potential jurors' answers on the jury questionnaires. We knew their job, place of employment, education, military status, religion, prior jury experience, opinion on labor unions, and their answer to question #17, "What newspapers or magazines do you subscribe to or read regularly?"

We then divided into two teams. Some of us would act like the government in jury selection. The others would act as defense attorneys. Each potential juror had an index card with the name and number on it. The potential jurors' names were then placed on a whiteboard as they would sit on the panel.

We would discuss the pros and cons of each potential juror. Each team had to figure out who the other team might strike and how not to "waste" a challenge in a blind strike. Occasionally, someone would want further information about a potential juror. This is when Bost's and Porter's investigators would gather further background information on those potential jurors. Eventually, both teams were ready to cast their challenges.

We had one problem. After the 11th potential juror was seated on the whiteboard, the defense team would be out of peremptory challenges, but the government team would still have one challenge left. For the 12th seat, the government team would also have a dilemma. Next up would be juror #67, the only potential juror with any college education. He was from a semi-rural area and had served three tours in South Vietnam in 1965-1969 as a marine sergeant, where he was wounded. If the government team cast its last peremptory challenge on the marine, it would be out of challenges. Then would come potential juror #68. He was from a rural county, where he sharpened saws at a sawmill. He received an honorable discharge from the navy in the early 1970s, and his answer to question #17 as to the only magazines he read was, "Guns & Ammo." Neither team could predict which former serviceman Dan Bell, USDOJ, would select, but we thought neither would be good for the government.

When the actual jury selection started on January 9, 1984, as a result of our motion, Judge Flannery excluded the public and press

from being present. The media sued for a *mandamus* to open the process, and jury selection halted several days until the US Court of Appeals for the Fourth Circuit could hold an emergency hearing in Charlotte. Several days later, Judge Flannery's decision was upheld and jury selection resumed. Jim Cooley argued our position in Charlotte. Chief Justice Warren Burger for the US Supreme Court denied the media's request for *certiorari* to set aside the exclusion order.

When jury selection resumed, the government kept the marine, knowing that if he were stricken with the last challenge, it would have to seat the "Guns & Ammo" guy.

In fact, we accurately predicted all 11 of the seated jurors, all nine of the government's strikes, and the government's dilemma for the 12th seat. Our pretrial work was over. Now it was on to testimony.³

Part 2: The Trial

Part of our trial strategy to show that the Communists were the aggressors would require us to go back four months in time to July 8, 1983, in China Grove, NC, where the seeds of the confrontation were planted and later nurtured by the CWP.

Joe Grady headed another version of the KKK known as the Federated Knights of the Ku Klux Klan. Grady was trying to fill his ranks by showing the 1917 D.W. Griffith's movie *Birth of a Nation* to the party faithful at a public community building in China Grove, NC. A China Grove resident, Paul Luckey, opposed his city allowing the out-of-towners to use the city property.

The media picked up on Luckey's opposition. The Southern Regional CWP leadership decided the best way to build their party and attract the working man, especially African-American workers, was to campaign against the KKK who were doing the dirty work for the capitalist class. The CWP July 1979 ten-page Southern Regional Bulletin described their plan:

Comrades...we have initiated a campaign against the Ku Klux Klan...we cannot win workers to the Party by words alone. To win...and break out of the bands of legality, our uncompromising propaganda *must be backed [by] militant force.* (emphasis added)

The Durham CWP had been trying to build its brand by infiltrating the trade unions at various textile mills where they could meet, educate, and bring textile work-

ers into their fold. They would now go to China Grove and organize the local African-American citizens who were already behind Luckey, take over, and lead them in a confrontation with the Klan.

Paul Luckey would be interviewed by Jeff Farran and me. He said that Nelson Johnson and other CWP came to China Grove several times before July 8; however, Johnson's pitch was not "we are here to help you," it was "death to the Klan." Johnson "hijacked" what was going to be a demonstration by local citizens and turned it into something Luckey felt could become more violent. Luckey would testify for the defendants by affidavit.

On July 8, shortly before the 1 PM movie showing, the CWP led a group of 80-100 protestors to the community center. The China Grove police had parked a police car across the center's entrance, where three police officers tried in vain to stop the group from entering the premises. The Klan, hearing the crowd shouting anti-Klan slogans, ran to their cars to get their firearms. Their wives and children remained inside the building. The Klan stood on the front porch surrounded and vastly outnumbered by the CWP and locals. While each side shouted insults and threats against the other, one CWP burned a Confederate flag and another beat on a porch column with an iron pipe. Grady would later have to pay to repair the porch damage. The three police officers stood between the two groups, trying to keep them apart. One officer, Captain Garmon, told us that he "...felt like his life was going to end." An officer asked Grady to direct his members to go back inside. He did and they obeyed. Now, the CWP had their victory in front of a crowd of media and television cameras. Before they marched back to the African-American community, Paul Luckey was shown a CWP pickup truck which was filled with ten to 15 long guns. The CWP then marched back to the African-American community where more guns appeared.

The defense was able to show that many of the CWP who were present in Greensboro on November 3 were also present in China Grove on July 8.

The government filed a motion to limit the defendants' introduction of the China Grove incident except where it was "...necessary to establish a motivational background" for the Greensboro violence, i.e.

revenge. The government also indicated that it was going to introduce specific uncharged acts of misconduct unrelated to November 3.

Judge Flannery ruled against most of the government's China Grove motion, citing "...such stringent limitation on defendants' presentation of China Grove would prevent defendants from putting forth several likely defenses." He found some of the government's 404(b) evidence "highly prejudicial" and not connected to November 3, allegations such as shooting into a house, plans to murder a Klan opponent, preparation for a bombing, plans to murder defendant Smith, and plans to disrupt a 1975 US Labor Party rally. The order was filed January 3, 1984, under seal.

While both sides were ordered not to go into the general philosophies of the Klan, Nazis, or Communism, the defendants could go into the CWP's desire to use arms against the Klan. Fortunately for the defense, the CWP used their opposition to nonviolence as a recruiting tool.

Some of the CWP propaganda went beyond their usual mantra of, "Take a stand. Smash the Klan." One poster referred to the Klan as "...some of the most *vicious cut-throats and bloodsuckers* the world has ever known" and, "We are no longer turning the other cheek only to get that slapped too..." (emphasis added)

On July 31, the CWP held a follow-up rally in China Grove. Their party bragged, "We took their [Confederate] flag and burned it and they did nothing but looked scared...they tucked tail and run...They are wounded dogs...We displayed no guns."

Another post-China Grove CWP memorandum extolled weapons as opposed to the teachings of Martin Luther King as a method to create social change: "We want to promote...*armed self-defense*...It openly challenges...*the ridiculous stand of nonviolence* promoted by the reformists and misleaders." (emphasis added)

Fred Harwell, representing Virgil Griffin, used a sentence from a CWP memorandum about their November 3 rally on his cross-examination of a CWP member. It summed up why the CWP taunted the Klan to come to Greensboro and why violence was more than a mere possibility: "A confrontation with the Klan would be the best if we can get it."

And to make sure the CWP got a confrontation, they issued a challenge to the Klan, in the form of an open letter, to come

to Greensboro November 3:

OPEN LETTER to: Joe Grady, Gorrell Pierce, and all KKK members. The KKK is one of the *most treacherous scum elements* produced by the dying system of capitalism...you are nothing but a *bunch of racist cowards...the Klan is a bunch of cowards...* We challenged you to attend our November 3 rally in Greensboro...the KKK are a *bunch of two-bit cowards...where are you holding your scum rallies...the Klan will be smashed physically.* DEATH TO THE KLAN. WORKERS VIEWPOINT ORGANIZATION (WVO). (emphasis added)

And just in case the Klan missed that well-publicized three-coward challenge, the CWP issued another broadside on November 1, 1979, at a televised press conference on the steps of the Greensboro Police Department:

There is only one correct stand on the Klan...*beat them* and drive them out of town. [At China Grove] we *burned their flag* in front of their eyes...they have been *afraid to announce* publicly where they hold their *scum rallies...* We say to the police, '*Stay out of our way.* We'll defend ourselves.' (emphasis added)

The CWP leaders were highly educated people. Nathan, Waller, and Beranzohn were all physicians; Sampson had attended medical school; and, Cesar Cauce graduated from Duke. While only a few CWP leaders were from the South, most had lived and worked side-by-side in the textile mills long enough to understand the southern white working class concept of manliness and the Klan's attachment to firearms. The Communists baited the Klan to come to Greensboro. The Klan took the bait and came to oppose Communism.

Some of the CWP and associates brought firearms to Greensboro. They brought them "just in case," but in violation of the terms of their parade permit. Five were fired at the Klan/Nazis.

The government's proposed stipulations to the defense of September 30, 1983, *et seq.* laid out the list of firearms of the CWP or their associates. Dale Sampson, wife of Jim Sampson, purchased a .38-caliber pistol (K-19) on April 8, 1979.⁴ It was the gun tossed to Rand Manzella by Jim Sampson after Sampson was mortally wounded. Manzella was filmed trying to hide the pistol (K-19) on the body of his fallen comrade, Cesar

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Suspects at Guilford County Jail (left to right) Michael Eugene Clinton, Rayford Milano Caudle, Lee Joseph McClain, David Wayne Matthews, and Roland Wayne Wood on November 3, 1979.

Cauce, on November 3. All six shells had been fired. On my cross-examination of Manzella, in spite of the video to the contrary, he denied ever holding a firearm.

Paul Bermanzohn purchased a .38-cal Charter Arms revolver on July 8, 1979, the day of China Grove. He also purchased a .223-cal Sturm Ruger rifle on September 29, 1978. He was unarmed when seriously wounded on November 3.

Cesar Cauce purchased a 12-gauge Remington Model 48 shotgun on September 28, 1979. He was armed only with a stick when shot and killed.

Allen Blitz purchased a .22-cal rifle on October 27, 1979, and a .38-cal Smith & Wesson revolver on November 2, 1979.

Frankie Powell brought her .38-cal Derringer (K-6) to the CWP event. One bullet had been fired. In her purse was an unfired .38-cal bullet, eight .380 unfired bullets, and a 30.06 rifle bullet (Q 420).⁵ Allen Blitz fired her Derringer on November 3.

Claire Butler brought her .357 revolver that she fired from the safety of the corner of the community building on Carver Street. When Sandra Smith, who was with her, stuck her head out around the corner to see what Butler shot at, she was struck and killed by a single lead projectile. She was the only African-American person killed that day.

Tom Clark purchased a .357 Magnum Sturm Ruger revolver and a 12-gauge Smith & Wesson pump shotgun (K-7) on October

19, 1979. He was holding a stick when he was shot and wounded.

After the Klan's first shot up in the air, Jim Waller ran towards Tom Clark's pickup and retrieved Clark's 12-gauge pump shotgun that Klansman Roy Toney wrestled away from Waller after a fierce struggle. A piece of Waller's skin was caught in

the gun's mechanism. Waller later died on the scene from a gunshot wound. His nightstick was beside him (GPD 176).

On Michael Nathan's mortally wounded body, the police found six .22-cal bullets (Q-133), a metal poker, and a tear gas canister, but no firearm.

Dori Blitz fired all the rounds from a .38-cal revolver that Jim Waller gave her.

Jim Carthen testified for the defense. Paul Bermanzohn befriended him in Durham. Carthen was not a CWP member, but was at the CWP meeting on November 2 at the Break the Chains bookstore in Durham when he saw several pistols on CWP members, including a .357 and a .45-cal pistol. Carthen rode from Durham with Paul and Sally Bermanzohn on November 2 and saw a small .25 or .35-cal pistol in their car.

The Klan came to heckle the Communists and to throw seven dozen eggs at the CWP. The defendants also brought guns, but there was no evidence of any prior intent to use them. However, the Klan caravan never got to a safe space where they could heckle the Communists because Dawson did not take them to the end of the parade where he told them the police would be "wall-to-wall." Instead, he took them to Morningside Homes, the beginning of the route where 100 fired-up African-American residents with sticks yelling "Death to the Klan" began beating on the Klan cars. It was a white racist's worst nightmare. There wasn't

a cop in sight. You could see the fear in the faces of the people in the ten-vehicle Klan caravan. Winston Cavin, *Greensboro Daily News* reporter covering the event, said that they looked "petrified."

Frazier Glenn Miller Jr., in the second car, was scared, but he told Bost, Hall, and me at his Smithfield home he "tried not to show it." He was a 20-year army veteran, including time as a Green Beret in the Special Forces.⁶

Mark Sherer, in the fourth car, leaned out of the vehicle's window and fired a shot up in the air from a hand-loaded cap-and-ball black powder .44-cal pistol to frighten the CWP away. Shot #1. But it only awakened the marchers, and two or three of them pulled out their Derringer-sized pistols, according to Winston Cavin, while the residents fled.

Brent Fletcher was in the third car. He fired his shotgun up in the air to scare the demonstrators away. Shot #2.

The three women in the fifth car were all frightened.

Virgil Griffin can be seen trying to lay down and hide in the back seat of the sixth car.

The main thrust of the government's case was to try and determine who fired the next three shots: #3, 4, and 5. If they could prove they were fired by the Klan, those would be the first offensive shots and arguably would significantly affect their claim of self defense.

An FBI agent, Bruce Koenig, would testify as an expert in acoustic analysis. The government's post-state trial investigation had turned up new testimony which they now contended would show shots #3, 4, and 5 were all fired in an area containing the Klan/Nazis. This was not where Koenig placed the shots in the state trial.

Hal Greeson cross-examined Koenig about his change in opinion. In the most dramatic moment of the trial, Hal, using the exhibit Koenig used in the state trial, asked Koenig if the area on Carver Street where he determined the crucial three shots were fired for the state trial wasn't where the CWP were. Koenig's answer was, "Yes." But before Koenig could explain why he had now moved the three shots closer to where the Klan were, he had lost the jury's confidence in his testimony. One older man turned his juror chair around 180 degrees so that his back was to Koenig for the rest of his testimony.

In order to comprehend Koenig's novel theory, the court gave us ample funds to

secure our own sound expert. Harry Hollien, Ph.D., was an internationally recognized professor at the University of Florida and an expert on acoustic analyses. His *curriculum vitae* ran 29 single-spaced pages. He consulted for the army, navy, and the Department of Defense, among others. His opinion on Koenig's shot placement work was, "Not even I (Harry Hollien) could do that." In addition, Hollien testified that from his analysis, there could have been as many as 42 shots, not 39 as Koenig argued.

A second FBI agent, Don Havekost, would testify as a research chemist that he could discern which shotgun shot which person. Comparative Bullet Lead Analysis (CBLA) was another novel FBI theory. Havekost would analyze the lead pellet taken from a wound, and by "neutron activation analysis" would determine the "elemental composition" of the lead. He would examine the antimony, tin, and copper elements in the lead taken from a wound and try to match them to the same elements in the lead of the unfired shells found in a particular shotgun used by a defendant. He would then use a mathematical formula to determine the odds that the lead pellet from the wound was "consistent with" the lead in the unfired shells. His calculations would never match 100%. They ranged from a 2% chance to a 69% chance.

The court also allowed us to retain our own expert metallurgist, who refuted Havekost's novel theory. Charles Manning, Ph.D., had been a professor of material sci-

ence and engineering at NC State before forming his own company that performed failure analysis and accident reconstruction. Dr. Manning had been the head of the Materials Engineering Group in NASA's Langley Advance Material Research Program from 1955 to 1967. Answering Jim Cooley's question, he testified that even if the lead from one 00 buck pellet matched the lead in an unfired shotgun shell, it would mean "nothing." There was no way of knowing where each piece of lead came from since there was too much lead coming from so many different sources at different times in the manufacturing and packaging process to draw any conclusions. In fact, after a highly critical report by the National Academy of Science in 2004, the FBI abandoned CBLA for the same reason.⁷

After a four-month-long trial,⁸ the defense rebutted the prosecution theories on all substantive counts and also refuted claims that the defendants had conspired to obstruct justice and to violate the civil rights of the CWP members and others on November 3, 1979. The jury deliberated three full days.

The end of the trial did not end the controversy, however. Protests over the shootings continue to this day in Greensboro, and disputes persist about the outcomes in court, although not much is ever said about the evidence presented to the jury.

Rumors and accusations still abound, and the whole truth about what happened that day, and why, may never be known.

What is known is that a jury in Winston-Salem considered the best case the prosecution could make and the best defense available to those charged, and on all counts found all of the defendants not guilty. ■

Tom Keith is a 50 year State Bar member and Wake Forest Law graduate. He was in private practice for 20 years in Winston-Salem, and served as DA of Forsyth County for five terms. He retired to his farm in 2010 with four bird dogs and several fishing boats, but took a year off to be emergency DA for Rockingham County in 2017.

Endnotes

1. Killed: Michael Nathan, James Waller, William Sampson, Cesar Cauce, and Sandra Smith. Wounded: Frankie Powell, Donald Pelles, Rand Manzella, Tom Clark, Paul Bernanzohn, and James Wrenn.
2. Griffin and Dawson were also charged with conspiracy to obstruct justice.
3. My pretrial vouchers claimed 39.08 hours in court and 670.7 hours out of court. I imagine the attorneys for the other defendants eclipsed my time significantly.
4. "K" was a government designation for a firearm.
5. "Q" was a government designation for ammunition.
6. Miller, an avowed racist and white supremacist, received the death penalty on November 10, 2015, for his murder of three people outside of a Jewish community center in Overland Park, Kansas. An anti-Semite, he admitted that he went there to kill Jews. None of those he murdered was Jewish, including a 14-year-old boy.
7. See Giannelli, Paul C., "Comparative Bullet Lead Analysis: A Retrospective" (2010), *Faculty Publications*, 97. bit.ly/Spring2021-14.
8. My trial vouchers totaled 445.55 hours in court and 539.50 hours out of court in addition to my pretrial vouchers.

President's Message (cont.)

supporters of the Communist Workers Party on one side and a group of Klansmen and neo-Nazis on the other. It is hard not to draw parallels to the deep divisions in our country at this present time where those with opposing views are often clashing violently. This too is part of the history that makes us and in this, as in so many other significant historical events, lawyers played an important role.

Filmmaker and author Michael Crichton said, "If you don't know history, then you don't know anything. You are a leaf that doesn't know it is part of a tree." If we are all leaves on a tree, then it must be an aspen tree. Aspen

trees look like separate trees, but often share the same root system. In fact, the Pando, or Trembling Giant, is a massive grove of aspens in Utah that consists of about 47,000 trees that share a single root system. Inez Milholland, Judge Allegra Collins, and Vice-President Kamala Harris are part of that tree. Republicans, Democrats, supporters of our past-president and supporters of our new president are part of that tree. As lawyers, we are reminded that as members of the legal profession we are public citizens having special responsibility for the quality of justice. We need to study our history, learn from it, and move forward.

Young poet laureate Amanda Gorman

said it more eloquently than I ever could in the poem she wrote and recited during today's inauguration. It is worth reading in its entirety, but I will leave you to muse on these excerpts: "Because being American is more than a pride we inherit; it's the past we step into and how we repair it;" "We will not march back to what was, but move to what shall be: a country that is bruised, but whole; benevolent, but bold; fierce and free." ■

Barbara R. Christy is a member of Schell Bray PLLC in Greensboro. She is also a North Carolina Board Certified Specialist in real property law—business, commercial, and industrial transactions.

Turn Your Dreams of a Sabbatical into Reality

BY MARK P. HENRIQUES AND BRUCE L. KAPLAN

As we enter 2021 with, at the time of going to press, two vaccines in distribution in the US, perhaps you are starting to see a little glimmer of hope, that glistening light at the end of what has been a very long, dark tunnel. And as such, maybe you're dreaming of getting away. Not just a long weekend getaway, but really taking some time off—finally taking that sabbatical about which you've been dreaming. Whether your work situation allows for a significant break, or your time away needs to be scaled back a bit, we offer the following two articles to help you plan.

How to Take a Sabbatical

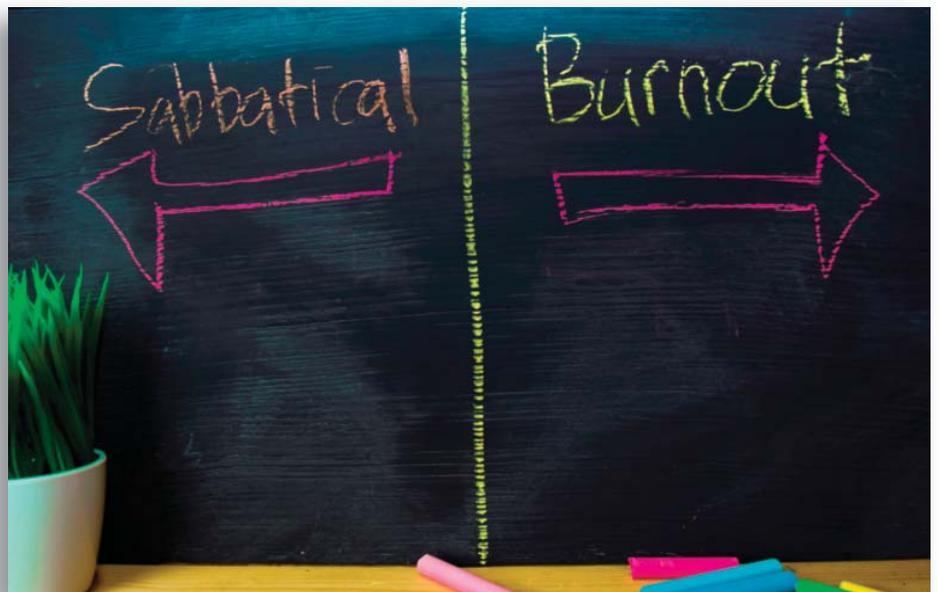
By Mark P. Henriques

I am sitting on a mat in Zuiganzan Enkouji—a Zen Buddhist temple in Kyoto, Japan, with a fantastic garden. There is silence. The wind rustles the leaves of the Japanese Maples and ripples the quiet pond. I feel the wind, see the wind, become the wind. Halfway around the world, with my wife and four children, I begin to understand Japan's love of order and simplicity. My mind is clear and bright.

How did I get here from a busy litigation practice with a large law firm? I took a sabbatical.

What is a Sabbatical?

The term “sabbatical” comes from Mosaic law, which decrees that every seventh, or sabbatical, year Israelites should let their land lie fallow, forgive debts, and free slaves. While fairly common in academic circles, law firms have started offering sabbaticals as well. Many large firms have established policies and guidelines. My firm,



Womble Bond Dickinson, offers partners a three-month paid sabbatical every ten years. This summer in Asia was my second three-month sabbatical. For my first sabbatical in the summer of 2009, my wife and I spent ten weeks in Europe with our young children. The firm has an application form and a detailed checklist to help with the transition.

Not all firms offer formal programs. Lawyers at smaller firms may need to approach management with a sabbatical proposal. Even at firms with sabbatical programs, many lawyers do not take advantage of them. Instead, lawyers think they are “too busy” or “too essential” to leave clients for an extended period. Ironically, it is often these “indispensable” lawyers who benefit the most from breaking away from the grind of a busy practice.

Planning with Clients and Colleagues

The keys to a smooth sabbatical are planning and communication. For a two-week vacation, the primary goal is to schedule all critical activities before or after the vacation. There is a scramble to wrap up matters before the vacation starts, then checking in every couple of days to make sure no fires have broken out, and then a crunch to catch up on a backlog of work when you return. A three-month sabbatical is different. Cases and clients cannot be put on hold for that long. Instead, the goal is to transition management of your clients and cases to attorneys in your firm so that clients' needs can be met and their matters can proceed.

Since my sabbatical was scheduled for the summer, I began telling clients about my planned time away starting early in 2019. I

also let new clients know my sabbatical plans during the initial engagement. Happily, my clients were interested and supportive about the opportunity I had been given. Of course, they also wanted reassurance that their matters would be appropriately handled while I was out.

Most of my cases were staffed with associates who would remain on those cases during my absence, providing knowledge and continuity while I was out. I assigned each of my cases to several partners in my office who would be responsible for certain cases during my absence. One month before my sabbatical, I created my “Active Case Sheet.” This 20-page Active Case List contained the 37 active or potentially active matters for which I was currently responsible, or that might come up over the summer. For each matter, I listed the newly assigned supervising partner and any associate(s), and, if different, the temporary billing attorney who would review and send client bills in my absence. Each matter included a brief description of the representation and information about the key client contacts. For more involved matters (several were large class actions), I included a detailed timeline, schedule of upcoming deadlines and events, along with attorney assignments (court filing deadlines, discovery deadlines, depositions, briefing, etc.).

In my final week before departing, I contacted all clients to remind them I would be out. I also scheduled transition meetings with those partners who would be taking over my cases and had meetings with the associates working on my matters. I prepared a final update to my Active Case Sheet, updated any new deadlines, and provided a copy to each partner supervising my cases, as well as firm management.

I provided my assistant with my itinerary and emergency contact information. I did not plan to check emails or voicemails during the sabbatical, so I set up my email and voicemail office auto-responses which: 1) advised that I was out and would not be checking in; 2) provided my assistant’s contact information; and 3) provided contact information for a “lead” coverage partner who could handle any new matters or unexpected developments.

Personal Planning

Sabbaticals can be used for a wide range of purposes. Some are taken to provide for

child or elder care. Others use sabbaticals to volunteer, learn, research, or write. I chose to use the time for international travel with my family. Because of the amount of travel involved, I formed a travel agency, Wondrous Vacations, LLC, so I could research and book my own travel. We visited ten countries and took two cruises. Whatever you decide to do, it is important to decide how you will spend your time and what level of contact you want to have with the office. Since the purpose is to have a break and “reset,” I encourage you to limit contact with the office as much as possible.

Benefits Upon Return

The sense of peace in Kyoto was good preparation for the next day, when we visited Hiroshima and the site of the world’s first atomic bomb attack. I expected anti-American sentiment, but both the museum and the Peace Park, with children singing songs and delivering cranes, was devoted to the horrors of civilian casualty, rather than blame for the attack. In Japan, South Korea, China, and Vietnam I found people who wanted to engage and share cultures, not discuss military history or political division. The trip reinforced my belief that people from all across the globe have the desire and ability to work together.

The break from the day-to-day press of business provided an opportunity to see the “bigger picture.” Family is one of my core values (along with integrity and competence), and the sabbatical let me fully engage with my children. We compared religious thought, cultural norms, gender roles, and a host of other topics that are not frequently discussed in our daily lives. The break renewed my commitment to *pro bono* work, and I couldn’t wait to return and record more In-House Roundhouse podcasts.

My experience was not unique. There have been many articles about the benefits enjoyed by lawyers taking sabbaticals. While a few lawyers decide not to return to practice, virtually no one regrets going on sabbatical. Living with purpose is critical, and a sabbatical is the perfect time to find, or reaffirm, that purpose.

Few articles have focused on the benefits that the law firms gain from an attorney’s sabbatical. After my sabbatical, my primary associate had new and deeper relationships with key clients. My partners had a better understanding of my practice. Perhaps most

importantly, my clients learned that Womble Bond Dickinson is more than Mark Henriques. Many clients found that the firm has a team of excellent lawyers who handle complex litigation, and other avenues of law. Creating deeper more connected relationships between clients and multiple firm lawyers adds real value to those firms who support sabbaticals for their attorneys. In this competitive market, few investments offer greater return.

Sabbatical Checklist

Clients

1. Assign attorneys who will handle client matters in your absence, particularly matters on which you are the only attorney working. Provide a list of assignments to firm management and the billing department.
2. Determine and list who will handle bills on matters where you are the billing attorney.
3. Determine and suggest who will handle new clients generated from existing clients that list you as the billing timekeeper.
4. Call or write clients, expert witnesses, and others with whom you deal frequently and advise them of your sabbatical and who will be in charge in your absence.
5. Have someone in mind as the “catch all coordinator” who will handle unforeseen matters; someone your assistant can consult if the need arises.

Administrative

1. Decide if you will review email while away.
2. Give instructions to your assistant regarding mail and filing.
3. Set auto-response for email.
4. Record sabbatical voicemail message.
5. Evaluate if someone can use your parking space.

Staff

1. If possible, designate one person as the contact person while you are on sabbatical, preferably your assistant.
2. Leave travel schedule, telephone numbers, and addresses where you may be reached with your assistant or another responsible person. Inform your assistant as to whether you do not wish to be disturbed for any reason, whether this information should be used only for “extreme emergencies,” or whether you wish to be consulted on a non-emergency basis.
3. Inform your assistant as to what should be done with correspondence and other doc-

uments in your absence. Consider instructions for:

- a. What mail should be passed on to other attorneys.
 - b. What mail may be discarded.
 - c. What to do with personal/confidential mail.
 - d. What mail should be kept for review upon your return.
 - e. What mail should be forwarded to attorney's home or other location.
 - f. Consider providing your assistant with access to your emails, so that your emails can be reviewed and, if needed, forwarded to the assigned supervising partner.
 - g. If you decide to give your assistant access to your emails, consider having your assistant create electronic folders to organize and store your emails so that when you return you are not sifting through three months of unorganized emails.
4. Instruct your assistant, message center, and receptionist personnel how to handle telephone calls in your absence.

Computer

1. Do a full data backup of all information on your PC.
2. Write down all computer IDs and passwords. Leave them in an envelope with your assistant to be used only in emergencies.
3. Determine if you wish to maintain access to the computer network from your home computer.

Financial

Make arrangements for:

1. Instructions concerning pay/distributions during your absence.
2. Making estimated quarterly Federal and Resident State tax payments, if necessary.

Miscellaneous

Look ahead to see if there are any responsibilities in professional organizations, officer responsibilities, etc., which need to be taken care of during your absence.

Give some preliminary thought and reflection to your return.

Consider leaving copies of your identification (i.e., driver's license, birth certificate, and passports) with your HR director in the event of an emergency. ■

Mark is a partner with Womble Bond Dickinson, where he has practiced for almost 30 years. He serves as co-chair of the firm's COVID-19 Task Force, chairs the firm's Editorial Board, and is the host of the firm's

podcast, the In-house Roundhouse. Mark handles complex commercial and construction litigation, with a focus on class actions. He has served on the State Bar Council for nine years.

Walden Pond Sabbatical

By Bruce L. Kaplan

*Dreams are the touchstones of our character
Simplify simplify simplify
Live deliberately,
—Henry David Thoreau*

Why

I have used secured leave and good timing to take the entire month of January away from my office for the past four years and have stayed in Seabrook Island, South Carolina. I am a sole practitioner, who has practiced in Boone, North Carolina, since 1981, and have one office staff person who has been with me for 15 years.

My love for Walden Pond, oceans, Lake Michigan, and now Seabrook Island's marsh brings me at 71 and having practiced for more than 40 years (NC Bar No 9900) to days of being at peace with, and in balance with, my life. I cannot describe the sunsets over the marsh or how it is the perfect ending to a day away from work. Henry David Thoreau writings and visiting Walden Pond have been touchstones for my balancing work, socialization, family, and quiet time. My legal assistant prepares my going to Seabrook Island box as my office away from the office, and I head out on December 28th each year to my sabbatical adventure.

I rent a three bedroom villa, and 60-65% of the time I am by myself, and the other time is spent with friends and family. I wake up early to read on the deck and then decide whether I want to walk, read some more, bicycle, go to the beach, or play tennis (and occasionally play pickle ball). When I am at my retreat I am mostly a tennis player and not an attorney.

I googled "sabbatical" and found that the concept is based on the Biblical practice of *shmita*, which is related to agriculture. According to Leviticus 25, Jews in the Land of Israel must take a year-long break from working the fields every seven years. A sabbatical has come to mean an extended absence in the career of an individual. For me, I feel I am restored to health as I embrace the time away from the courthouse and not

wearing a suit and tie.

Yes, I questioned whether I "deserve" to take a month off from the office and thus being absent from my image and identity as an attorney. I have made it a priority, and because it occurs every January, all the local attorneys, the clerk's office, and the judges recognize and support my month of January sabbatical. Yes, they actually support my sabbatical.

I continue to seek balance in my work and personal life, while gifting to myself this time away and embracing being at my Walden Pond. I believe that, because of my sabbaticals, at the age of 71 I still want to practice law because I enjoy the challenge and I want to continue to assist clients, including some that have been with me for 35 or more years.

How

As a sole practitioner for more than 30 years, I have created a legal environment that respects my sabbatical and works with me with scheduling and planning.

My assistant gets files, folders, and checks ready, as well as other necessary items such FedEx envelopes and labels in banker boxes. She is a very loyal and competent administrative support person who "covers for me" when I am away and helps me plan my sabbatical.

I have a strong relationship with a backup attorney. This for me is an attorney for whom I am also her backup when she is out of town.

I have built strong relationships with judges, other attorneys, clerks, and trial court administrators. I have formed these strong relationships in the 39 years I have been practicing in Boone.

I plan in advance, including deadlines for cases and sending out secured leave notices early. I create an outline of what needs to be accomplished in December to be able to leave the office on December 28th. I work to not have anything that cannot be continued or easily handled by my backup attorney. In the four years I have taken a month-long sabbatical I have had to return for one hearing and it was scheduled on a Friday.

I attempt to make some financial plans so I will not be stressed about money. The lessons from COVID-19 on how to survive with less revenue will carry over to my future financial planning. I pay some bills early so I

CONTINUED ON PAGE 22

The Mysterious and Unbelievable Case of the Batboy and the Hot Dogs

BY CAMILLE STELL, AN INTERVIEW WITH JOSH DURHAM

During the summer of 1990, Josh Durham and best friend Ashley Pace were working for the rookie league baseball team, the Burlington Indians. Estimates show that only one minor-leaguer out of ten will make it to the majors. But in that magical summer of 1990, seven



©Stockphoto.com/DaisyPixel

members of the Burlington Indians made it to the big league and Josh and Ashley had a front row seat to dreams come true.

Josh sat with us to discuss summer, baseball, hot dogs, and podcasts.

CS: What inspired you to pull this story from the summer of 1990 and tell it now?

JD: I had just graduated high school back then, and Ashley was a rising senior. It was such a great summer. Ashley and I are still very close, and we frequently talk about those good old days. I suppose that's what you do when you get older. Plus, we needed to find out once and for all whether Ashley cost one

player in particular his professional career. With 2020 being the 30th anniversary of that summer, it seemed like a perfect time.

CS: Why did you decide to use a podcast format?

JD: We were having lunch a few years ago, laughing about that summer, and we just had the idea to do it. I suppose that comes from listening to true-crime, investigative podcasts like *Serial*, *S-Town*, *Big Savage*, and others. Answering the decades-old mystery, together

with some fun memories of that summer, seemed like it would make for a great project. It took us a year or so to finally get serious about it, and here we are!

CS: Was this your first attempt at producing a podcast?

JD: It was indeed.

CS: What was the process for creating the podcast?

JD: Ashley did a fantastic job tracking down players and staff from the 1990 team, as

did my older brother, Trip, who also worked for the team that summer. We did a lot of phone interviews, a lot of internet research, and a lot (I mean a lot) of writing, revising, recording, and re-recording. Then came the editing process where we put it all together.

CS: Can you tell us a production “behind the scenes” moment that we wouldn’t know from just listening to the podcast?

JD: COVID-19 definitely threw a wrinkle into our plans, so we had to scrap the plan of recording together in a podcast studio. Ashley was able to find a great service that allowed us to record together while still staying apart. But, above all, I don’t think listeners can possibly imagine just how many smiles this project brought us. It was a lot of work, but we loved every minute of it.

CS: Would you recommend that lawyers use the storytelling format of a podcast to connect with their clients? Do you have any tips for them?

JD: Lawyers are becoming much wiser to the benefits of podcasting, thanks in part to folks like attorney-turned-podcast-guru Rob Ingalls at Lawpods. He does a great job working with lawyers, and was kind enough to pass along some pointers to us. I would definitely recommend that lawyers consider podcasting. The trick is creating that engaging story or hook that makes listeners want to keep coming back.

CS: How does storytelling make you a better lawyer?

JD: So much of what I do as a litigator is storytelling. Whether it’s in a brief, arguing a motion in court, or giving a closing argument, it’s what helps me keep the reader or listener interested and guide them from Point A to Point B.

CS: Is baseball still a passion of yours? Who do you cheer for?

JD: It is. It’s in my blood. And it’s such a beautiful game. I adopted the Houston Astros in the spring of 1980 and have been a fanatic ever since.

CS: I know that you enjoy writing as well, especially screenplays. Do you have any news on that front you would like to share?

JD: No news. I’ve got a few finished projects of which I am very proud, even if nothing comes from them. But, like any writer, I have a thousand more starts and finishes with little in between. There’s a great poem by Fred Chappell called “First Novel” that speaks to that point. It’s composed entirely of great lines that have no connection to each other. They’re all just ideas for a first novel, whether it’s a start, finish, or something in between. It’s painted on a mural in downtown Charlotte, and it makes me smile every time I pass by.

CS: What haven’t we covered that you would like the readers to know?

JD: I’d love to give away the ending for our podcast series, but listeners will just have to tune in!

You can find the podcast online at [Stitcher.com](https://www.stitcher.com), on Spotify, or in any popular podcast app, including iTunes and Overcast. You can also Google “The Batboy and The Hot Dogs.” ■

Camille Stell is the president of Lawyers Mutual Consulting & Services and works with lawyers and firms on strategic planning, succession planning, and building modern law firms. Continue this conversation by contacting Camille at camille@lawyersmutualconsulting.com or 800.662.8843.

*Josh Durham, a partner with Bell Davis & Pitt, has launched a podcast, *The Mysterious and Unbelievable Case of the Batboy and the Hot Dogs*.*

Walden Pond Sabbatical (cont.)

am not worrying about having money in my professional account to cover expenses. I try to plan so that there is some income coming in during the month of January. I aim to be flexible and have reasonable work boundaries and expectations

It has not been difficult to schedule around my month away as all attorneys and judges compliment me on taking a month off and going to Seabrook—we actually joke about it.

My administrative staff person, who knows me well from working together for 15 years, is able to make decisions if and when I need to be notified. She also discusses issues with the attorney who covers for me when I am not available. I continue to talk with those who support me in my decision to take this time off away from the office and court.

I have also learned from COVID how to work remotely and how to create attorney-client relationships via Zoom. This year will hopefully be an easy time to be away from the office as many attorneys are working remotely from their home and I will be working remotely from my vacation home.

I don’t know when I will be retiring, but I believe taking this time off and detaching from my identity as an attorney will help me to transition to retirement. ■

Bruce has been practicing law in Boone since 1981. He is a past-chair of Hospitality House, past-chair of the Children’s Council, and past-president of the Watauga County Bar Association.

“Nay” To History (cont.)

of determined suffragist on the march over the protests of buffoonish men. The reality was a lot more interesting than that.” *The Wilson Quarterly*, Woodrow Wilson International Center for Scholars, Vol. 29, Issue 3, Summer 2005.

18. Megan Sadler, “A War of Roses,” WLVT, Aug. 18, 2020. [bit.ly/Spring2021-5](https://www.wlvt.com/story/2020/08/18/a-war-of-roses/); and Jennie Cohen, “The Mother Who Saved Suffrage: Passing the 19th Amendment,” *History*, August 16, 2010, and May 8, 2020. [bit.ly/Spring2021-10](https://www.history.com/story/2021-05/08/the-mother-who-saved-suffrage).

19. Akhil Reed Amar, “How women won the vote: in the

pleasant haze of half-remembered history, the ratification of the Nineteenth Amendment is surrounded by images of determined suffragist on the march over the protests of buffoonish men. The reality was a lot more interesting than that.” *The Wilson Quarterly*, Woodrow Wilson International Center for Scholars, Vol. 29, Issue 3, Summer 2005.

20. Alice R. Cotton. “Stafford, Lillian Exum Clement,” *Dictionary of North Carolina Biography*, 6 volumes, edited by William S. Powell (The University of North Carolina Press, 1979-1996), and NCPedia.

21. Jaime Huaman, “Gertrude Weil.” NCPedia.

Eviction Crisis (cont.)

American City, pp 98 (2016).

10. ACLU analysis released in January 2020 showing eviction filings against Black women at almost twice the rate of white renters in 17 out of 36 states between 2012 and 2016.

11. Desmond, pp 296-99 (2016).

12. Name has been changed to protect confidentiality.

13. Desmond at 300.

14. nccourts.gov/documents/publications/civil-issue-filing-order-results.

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We Don't Shake Hands Anymore

BY DAVID BRANNON

In 2020 the Editorial Board of the North Carolina State Bar sponsored what we hope will be the first and last COVID pandemic writing competition. Four submissions were received and judged by a panel of 11 board members. The submission that earned top prize is published in this edition of the Journal.

Entering the courthouse I notice a seldom-actually-seen-in-the-flesh colleague exiting. We both touch our right temples with two fingers of our right hand. Then we hold out those fingers in greeting. The new custom. No one shakes hands anymore. I don't think people remember that physical contact was common among attorneys, back before 2020 when the virus showed up.

In a few days, weeks, months—the next time the area's viral status turns “hot”—those two fingers will be holding a scanner that will read and display our body temperature. As we approach one another we will each present our scanner face. It is not rude to consider someone a bit “too warm” for personal contact. If social distancing and your personal mask don't make you comfortable, you always have your phone.

When it's “hot” you know to avoid contact. When it's “cool” or “warm” things are weird. How close do you get? Is physical closeness required? You weigh the odds, especially when “warm”—is this contact I'm considering having with you worth my life? And we are only talking about lunch, for heaven's sake.

What we have learned about the virus is disturbing. The “Spanish Flu” dined on humans in three waves of viral outbreak over about 18 months. There were a few small pop ups after that, but herd immunity had taken over and the virus, finding nothing left to eat, vanished.

This specific 2019 coronavirus is still active after all this time. It does not eat everyone it can during any specific outbreak. It leaves a seedbed of new infectible crops and gives them time to repopulate before the next outbreak. That makes it sound like the virus is conscious, aware, malevolent. Or just alive and planning its next meal. Since that might be me, I pay attention.

Not everyone who gets the virus dies, but enough people do that, if it's you or someone you know, it's not news you wish to hear. Get it and survive and you have about six months of immunity. If the viral wave has not run its course you may get infected again. Lots more hospital space is devoted to, or has been built because of, this virus.

Rounds of “hot” have passed in a few weeks to taking almost seven months. The longest “cool” was 18 months. No one has an explanation for the varying times. Today's parting salute is “Stay Cool.”

There still is no vaccine. If ever there is one it means the mystery of the coronavirus is solved. That could mean getting a shot so we won't get a head cold, another coronavirus. Until that long touted and not yet delivered vaccine, or until herd immunity arrives, the apex predator is just a feeder fish when things get “hot.”

But life goes on.

When it's “cool” everything looks just like it does right now. It's a period of “old school” courthouse procedure. You can speak face-to-face with an assistant clerk, but the clerk is wearing a mask and wishes, since you aren't, that you'd take a step back and turn to the side.

“Now, how can I help you?”

When it's “warm” or “hot” the courthouse turns into a warren of little booths, all negative air pressure, that people enter, sign in, and then, while audio and video runs and records automatically, conduct the business

they could not handle outside of a courtroom. It's considered bad form not to settle most things out-of-court. One “hot” season in any courthouse and that lawyer is an advocate for settling everything.

More every day gets done in alternative dispute resolution. In a variety of forms and forums this is where and how most criminal—and virtually all civil matters—get handled. Because so many of these new forums do not need physical presence, they run all the time, “cool through hot.”

The biggest change is that fewer things are against the law. The end of the long-failed “war on drugs” and adoption of a harm-reduction strategy towards drugs cleared a lot of court time. A general legalizing of all drugs stole the market (read money) from the drug cartels and they fell apart.

North Carolina even has a Cannabis Commission, headed by a guy who hates being called the state's “pot czar.” He says czars are un-American and his title is “cannabis commissioner.”

You see some, not many, masks when it's “cool,” but lots at “warm,” and they are mandatory at “hot.” Why would anyone not protect themselves and everyone else? People. Masks, once paper and disposable, are now fashion and an indispensable part of any new suit. Simple black is always appropriate, but there is a lot of personal expression in masks.

Most dwellings—certainly all built in the last few years—have a work/study room. Good, fast Wi-Fi connection; good sound; good video. With current authentication software you can be sure to whom you are speaking. When it's “hot” that's where work and school happens. We have discovered that “schooled from home” can be a totally different thing from “home schooled.”

When it's “cool” the kids get together a lot and their lives are like a good, outdoor camp regardless of in which season the “cool”

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happens. Education at that time focuses on social learning. When things turn “warm” or “hot” we work on getting the kids’ minds to wake up. Learn to think, question, and discuss. With an internet connection this can be done from anywhere. Access to the net is tax supported these days.

Old educational buildings are being converted to housing for the homeless. We don’t house thousands of kids daily like we once did. Those buildings still have utility.

Restaurants are mostly just kitchens—large and busy. Paying for dining room square footage you can’t use “warm through hot” is expensive. With secure drone delivery most surviving kitchens are busier than they ever were when serving a sit-down crowd. There are new restaurants opening all the time. They come and go. The virus did not change that part of that industry.

Drone delivery is complete when your order is placed promptly in the safe, secure, and heated or cooled as needed “portal” at your dwelling (or wherever your phone is). Kitchen - drone - portal - eat dinner. Life is okay.

The virus also changed policing in our

communities. We stopped asking police officers to act as social workers. We admitted that it was a good idea to spend tax money on both of those professionals. You do commonly see a small army of social workers these days, along with the support services they use.

But the police have a different function. We can put armed officers on the street, but why would we want to? To our credit you seldom see them about, and when you do they receive the support of the community.

Our policing practices invest in constables again, a lot of them. If you go out you’ll probably get a friendly wave from Constable Murphy. You’ll wave back. You know her, you like her, you trust her. You’d not hesitate to call her if you needed help. She’s easy to get hold of when needed and knows who to bring in to help. That’s good policing.

A lot of the “not really a police officer’s job” stuff is done by the local “Civil Patrol,” young muscle and brains that most anyone can approach for help with just about anything. This group supports the local army of community social workers.

Many of these Civil Patrol kids are doing

a two-year stint in the Community Corps, which then completely pays for their first two years of college at any state supported school. Some Community Corps volunteers stay close to home working in the local police and EMT auxiliary, while others fight forest fires or serve in the military or the Peace Corps. Lots of kids take a closer look at what they are considering as their first job this way.

There is a rebirth of the idea of society as a social contract. We owe some things to one another, some things that we almost never speak about.

The virus got us talking. ■

David earned his BS in secondary education. He turned out not to be tough enough to teach school, so he graduated from NCCU Law School in 1990. He’s spent 26 years in court, the last 15 years working the capital list. He has always worked defense; never as a prosecutor, and has always worked in juvenile court. He is now serving as a Wake County magistrate. David is the author of Clients & Cases: Crafting a Credible Theory of the Case; Indecent Liberties, a crime drama, and An Alien Satellite is Scanning the Earth.

Book Review—*A Warren Court of Our Own: The Exum Court and the Expansion of Individual Rights in North Carolina*

A BOOK BY JUSTICE MARK ALLEN DAVIS

The following is a conversation between Ed Bleyнат and David Hood.

Ed: David, I from time to time read with interest some of the book reviews you post on Facebook. One in particular caught my eye, which is a review of Justice Davis's book on the Exum court. What piqued your interest in reviewing this book?

David: I'd been meaning to read this one for a while because history is very much my thing. The chance to take in a book on North Carolina legal history was too good to pass up. Former NC Supreme Court Justice Mark Davis has written a history of the Court covering the period of time it was led by Chief Justice Jim Exum of Greensboro.

Ed: Greensboro, you say? What about Snow Hill, home of the famous Happy Jack brand of dog care products?

David: Bleyнат, are you going to pay attention to the substance of this, or just make your typically snide comments? Exum was born in Happy-Dog-Land, sure, but his non-judicial professional career mostly took place in Greensboro.

Ed: So, you concede the Snow Hill point, counselor! Carry on.

David: Anyway, for folk like me who enjoy political history, who love the law, and who review North Carolina appellate court decisions pretty closely every day that new opinions hit the interwebs, this book really scratches that kind of itch. For those without a connection to this state or to the legal pro-

fession though, I get it. But if you're reading the *State Bar Journal* you may be at least a little bit like me.

Ed: Your introductory comments on the Facebook review should be preserved for posterity. That way, some curator of early 21st century legal and political social media discourse can learn a thing or two. You good with including that?

David: Sure, why not? Here it is:

Not interested [in the Davis book]? Then maybe go find a reasonable, rational, and cordial debate on the issues of the day between folk of different political persuasions who nonetheless exercise mutual respect for each other, and who don't shut down the conversation with personal attack and nefarious motive attribution the minute a word is uttered or concept advanced which does not fit one's own world view.

No? Can't find such a thing? Well just stay here then, I guess.

Ed: Thanks! Posterity hath been preserved.

Some of your review was based upon personal experience, I take it?

David: Yes. I am a law school classmate and friend of Justice Davis. He was during school, and is now, a thoughtful and conscientious fellow for whom I have much warm feelings and respect. The fact that he and I do not come to the topic of the Exum Court from exactly the same perspective does not diminish in any way my appreciation for his

book.

Ed: Where might the two of you differ?

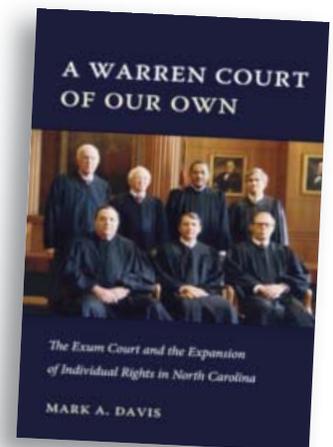
David: I read his book as suggesting that the Exum Court's liberal/progressive legacy is mostly a positive thing for the state's jurisprudence. I believe that legacy is mostly unfortunate from a strictly legal-reasoning point of view.

Ed: I suppose here is where I come in, since I clerked for Chief Justice Exum from 1989 through 1991, the heyday of some of those decisions. So, what cases do you have in mind?

David: Well, the Court stretched statutory language beyond recognition in many cases in order to achieve desired ends.

Ed: What are some examples that?

David: Well I suppose a good place to start would be *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). For those readers who do not know, this was the case where the Court decided to take an axe to the wall of exclusivity which prevented an injured employee from suing the employer given that the workers' compensation sys-



tem was intended to supplant tort remedies that employees had prior to that. Let's just say that I find the reasoning in the opinion to be, ahem, creative. I suspect the facts were just so egregious that the Court was led astray by the natural desire to craft some kind of remedy. I understand that reasonable folk can differ on this one, but I would point out that, from 1991 on, the courts have been so perturbed by the potential undermining of the workers' comp system that *Woodson* claims have almost uniformly been rejected. My old joke about this is that one can only pose a *Woodson* claim if one's last name is, in fact, Woodson.

Ed: There's another way to come at that, though, David. Do you think the legislature intended to let people buy some workers' compensation insurance in exchange for putting a man in a death trap so he could rush a job along? The trench was 20' deep and had vertical walls. A man dying in that little hell hole of a workspace might not fit the whole idea of "accident" too well, that being an "unexpected and untoward event"?

David: As I said above, the conduct was egregious. As we all learned in law school, though, bad facts can make bad law. If the conduct was truly intentional, i.e. some form of homicide, then prosecute it that way. If it's just really, really terrible workplace practice, then yes, I believe that should be handled within the workers' compensation system because that is the statutory place for such a thing.

Ed: Also, has it occurred to you that *Woodson* was crafted as, and has properly been interpreted as, a narrow decision, with the beneficial effect of offering a bit of deterrence? If that is the case, then might it just be that *Woodson* was correctly decided?

David: If you're saying it was a one-off, then congratulations! That is exactly what happened.

Ed: Alright, how about some other cases?

David: Another example would be *Coman v. Thomas Manufacturing*, 325 N.C. 172, 381 S.E.2d 445 (1989). The Court basically created out of thin air a "public policy" exception to the employment at-will doctrine, in a situation where a truck driver was being directed to violate federal regulations regarding driving time. Again, the perfectly reasonable desire to prevent such terrible employer behavior led the justices to step way outside their lane, establishing a tort

claim for fired employees with no clear delineation of what would constitute the "public policy" in question. That kind of clarification would, ahem, best be done by legislators drafting statutory exceptions to the at-will doctrine. This did eventually happen, after all, with the passage of REDA in 1992. Again, I would point out that the reason we did not see a complete floodgate of *Coman* claims (although I did litigate several, on both sides of the "versus") was that the courts realized the Pandora's box potential with *Coman* and reined it in to some degree.

Ed: Hmmm. But isn't the common law itself about applying existing principles to new facts, then recognizing new principles when circumstances warrant, such as to avoid absurd results? Employment at will was already a created legal saying, reflecting other legal sayings like "freedom of contract." But when an employee is forced either to violate the law, or to disregard his employer's directions and so lose his livelihood, doesn't that become a reasonable point for the common law to follow its long course and say, "there are limits on employment at will?"

David: I understand the argument that employment at will is solely a judge-created doctrine, but honestly I disagree. It is simply inherent in the concept of human freedom for the presumption to be that folk can do what they want, when they want. Employment at will simply recognizes the fact that, prior to governmental intervention, citizens are entitled to come and go, or hire and fire, in employment as they please. I'm not saying there cannot be good policy reasons to tamper with that "state of nature," only suggesting that said tampering is best left to the legislative power.

Ed: Here's where we have a couple philosophical disagreements, I suppose. The freedom to do what you want, when you want, is basically anarchy. The need for limitations on the freedom to expose others to harm form both community norms and legal norms. Given that Anglo-American criminal justice itself is a creature of judges finding or declaring the law (even if based on what they ate for breakfast), whether we are talking about common law robbery or malicious murder, some of the most important legal restrictions have long been creatures of judicial power, sometimes modified or codified by statute. In the *Coman* case, the Court looked at conflicting principles—the common law employment at will doctrine and

the regulatory requirements implemented to keep the road safe—and said, "the common law is ours. We will apply it, or even modify it, in a way that doesn't harm those who observe binding regulatory requirements."

What are some of your other thoughts?

David: I am not really qualified to opine much about the workers' compensation and criminal cases referenced in Justice Davis's work. After all, folk should go read the bloody book and not rely on this review anyway. I will say, for the record, that some of the Exum Court decisions make perfect sense to me—even when Justice Meyer was in dissent, notwithstanding my general agreement with Meyer's thinking in many other cases.

However, whichever side one finds oneself on in any particular case, Justice Davis has done a masterful job researching and telling the story. It is chock-full of anecdotes from former members of the Court, and interviews with prominent NC lawyers of the past and present.

Ed: Okay, before getting to the really interesting things, like the personal anecdotes, let's talk about those cases a little bit.

David: Sure. [Waiting and hoping that Bleyнат adds value to this discussion in some fashion.]

Ed: [Continuing to add fashionable value.] The death penalty cases occupied a lot of the Exum Court's time. Justice Frye, joined by Chief Justice Exum, saw a problem with the capital sentencing statute in *State v. McKoy*. It basically allowed jurors who wanted to impose the death penalty to keep others from considering some evidence in mitigation before rendering a final verdict. They dissented from an opinion affirming a sentence of death, and the United States Supreme Court reversed, basically adopting the Frye/Exum view. Now, a jury instruction generally is the type of thing that some members of the public might have seen as the infamous "technicality." But when the Court digs into a case and explains itself fully, acting as elected officials doing their job in an unpopular way, it seems to me to elevate the integrity of the Court and the honor of the profession. What is your thought on that topic?

David: Actually, I agree with this wholeheartedly. Stop the presses. Hood/Bleyнат on the same page. Shocking.

Ed: You indicated that you think some Exum Court opinions are quite sensible.

Does that include cases on the State Constitution? For instance, in *Corum v. University of North Carolina*, the Court decided that there was a direct right to claim damages under the State Constitution. What are your thoughts on that decision?

David: *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) held that a claimant has an implied state law remedy for violation of North Carolina Constitutional rights absent some other already-recognized or enacted claim. The reasoning makes perfect sense to me, is an honest extension of prior case law, and proceeds from the reasonable assumption that if rights are enunciated in the Constitution, protection of said rights cannot depend on the vagaries of any specific session of the General Assembly

Ed: Having tried to help your thinking on a variety of topics, I am sure our audience still wants to know a few more things.

David: “Tried” being the operative word.

Ed: Anyway, let’s discuss the backstory of the Court a little.

David: Justice Davis begins the book by describing the political backdrop of the 1980s in North Carolina, explaining how these particular folks ended up on the Court in the first place. This was still the age of an almost exclusively Democratic judiciary in a state that had voted for Reagan twice and elected the GOP’s Jim Martin to two terms as governor in 1984 and 1988. The Supreme Court itself was an elected body that almost never experienced consequential elections—virtually everyone had seats there as long as they wanted. Jim Martin was able to appoint some Republicans here and there, but that never much lasted past the next election cycle. As the book points out, this only began to change substantially in 1994, after the Exum Court was basically over as an entity.

Ed: [STEALING DAVID’S RHETORICAL QUESTION] Why is the political history important?

David: The Exum Court was famous for issuing opinions which expanded the rights of criminal defendants, extended tort law and workers’ compensation rights in ways that would make appellate judges in California blush, and enacted several whole new legal causes of action by the stroke of the judicial pen. Reading this book as a student of NC legal history, one is struck by just how many famous decisions were handed down during this period.

Ed: Weren’t most of those cases extensions of existing precedents; the common law continuing to develop?

David: If you’re arguing that the writers of the opinions did, in fact, cite previous Court decisions to stand for some proposition, then ten points to House Bleynat. If you’re suggesting that the Court fairly and carefully crafted these common law “extensions” in a way that traditional, incremental, and deferential jurisprudence would have allowed, ten points from House Bleynat and a buncha points to House Hood.

Ed: Now let’s hold on before Slytherin—I mean, Hood—House claims any points. In *Coman*, the employee was being ordered to violate federal law. One either says that firing him is okay, or says that it is not. That the phrase “against public policy” is used shouldn’t trouble us too much, since that is a nod in the direction of a legislative or regulatory body having already said “don’t drive any more hours than this, because it is not safe.” So, the Court either articulates an exception to the employment at will doctrine, or says that it is okay for an employer to rely on that judicially-created doctrine when firing someone for not breaking federal law. In short, it is the end of the line on where incrementalism might take you. Either the employer can be held liable when firing someone for not violating the law, or it can’t. Am I missing a third way?

David: As I said before, I disagree with the premise that employment at will should just be altered, ahem, at will under the theory that what a past judge giveth, a current judge may taketh away. One can agree that the employer acted shabbily and then posit that the remedy should be statutory rather than judicially created.

Ed: Well thinking that we might agree on more than one thing is probably a little bit too much to ask, isn’t it?

Let’s talk a little more about context.

David: It’s interesting to point out that the Exum Court took place in a state that was still dominated by conservative or moderate thinking in BOTH political parties. This did eventually change in 1994, when the Democrats ejected Louis Meyer from the Court in a primary because he was too conservative for their evolving tastes, but still.

Ed: A matter of taste or matter of political philosophy? And I say that as a person with tremendous affection and respect for Justice Meyer, who I surely did not want to

lose his seat.

David: Well, then some of both, if you wish. 1994 was a pivotal year in politics both nationally and in North Carolina, for sure. Meyer lost in the primary to Jim Fuller, a then-recent president of the plaintiffs’ bar, so there was no question whatsoever what was going on there. The Democrats were taking out someone seen as pro-business to hopefully replace him with someone as anti-business as one could imagine. My point is that the Democratic Party had traditionally been a bigger tent, with a large section of the party being identified as pro-business in a lot of ways, but Meyer was no longer seen as Democrat enough. Of course, Fuller was defeated by the GOP candidate in that election anyway because 1994 was very much a Republican year.

Ed: Hmm. Not sure I agree with the pro-business versus anti-business split. One could simultaneously support, say, the creation of Business Court to make the answers to commercial law questions more predictable, thereby advancing business interests in predictability itself, and still support, say, arguing that the legislature or the courts should adopt comparative negligence standards, a movement that would result in broader cost-bearing in the form of insurance rather than just falling on the business community.

David: One could, but I don’t believe the pro-business Democrats of the day looked at it that way. There is good reason for contributory negligence to have survived for decades of Democratic rule in Raleigh. Hint—it’s not because the plaintiff’s lawyers were not heavily Democratic. They were and are. It’s because there were a bunch of pro-business Democrats who believed in the status quo.

Ed: You were hesitant in your Facebook review to talk in detail about the Court’s opinions, but what about here?

David: I didn’t think it would make very good book review copy for me to recount any of the legal opinions themselves on Facebook, and we don’t want to bore our readership here...

Ed: Why not bore our readership?

David: Because Mark’s book does a great job of exploring the opinions without being boring. So folks, just get the bloody thing and read it. I will simply reiterate that this exercise is worth doing whether or not one would agree with any individual Exum Court decision. As I said earlier, there were some decisions I thought quite sensible,

like *Corum*.

Ed: How do we want to leave it with our readers?

David: I do want to end where the book ends though—a discussion about the extent to which political considerations did or did not influence decisions reached by the Exum Court’s liberal justices (essentially six of seven, although Webb and Mitchell were sort of swing voters depending on the issue). Exum and several of his living colleagues told Justice Davis directly that such considerations did not influence them at all, at least not consciously. I’m not sure I agree with that, but I guess the question is really what one means by “political considerations.”

In my view, because these guys could not practically be voted out by the Republicans in any real fashion, there was no political check on them. That meant that, should they be tempted to stray from basic legal interpretation and reasoning into the minefield of policy enactment based on their own concepts of what the law should be (you can tell I think that did happen here in some cases), there was absolutely no meaningful way for anyone to raise his or her hand to object to what might be a judicial usurpation of the legislative power.

Ed: You and I went around a couple times about that on Facebook, didn’t we David?

David: Yes, we did!

Ed: Having been employed as a law clerk during the 1990 election, there was not one of the three justices up for reelection (Exum, Webb, and Whichard) who didn’t think he had a fight on his hands. Each of them knew that some of the decisions, especially around things like the death penalty, could result in electoral backlash. I think this is what the interviewees meant when they said political considerations didn’t enter into the question. They knew they were vulnerable politically on a hot button issue if the electorate were persuaded they were out of bounds in these rulings, and that there was a price to be paid for them. Yet, they followed the law as they understood it and were willing to accept the risk of defeat, which was a real threat given some of the eventual vote margins. In my case, I had a job at stake!

David: Yes, we discussed that a good bit and I think timing is a factor. In the later years of the Exum Court there was more political vulnerability. Also, I’m not suggesting that judicial thinking be overtly swayed by election strategy, I’m just saying that the

temptation to enact one’s own policy preferences is more difficult to resist when one’s seat is relatively safe. It’s one of the reasons I think lifetime federal judicial appointments are a pretty terrible idea, but I reckon we don’t need to jump in that briar patch right now.

Ed: I think both of our lives would be improved by adopting policies of Briar Patch Avoidance.

Any further thoughts about the legacy of the Exum court?

David: I’m no majoritarian, believe me, but deciding how a case should turn out and then afterwards trying to figure out how to bend the law to make that happen invites cynicism and chaos.

Ed: Can you really separate the two that way? I mean, divorce the outcome you want from how to get there? For instance, the whole question of discerning the intent of the legislature is a pretty big one. Who’s to say that an area where circumstances fall close to the legislation, but not exactly under its more technical or precise language, calls for a restrictive rather than an expansive interpretation of the law in a manner that goes against, say, an overall remedial intent? And shouldn’t a just outcome in those areas also be the proper outcome?

David: Well, in my view, this business about divining legislative intent is goofy. When a statute passes, there are all sorts of considerations in the heads of all sorts of politicians voting “aye.” If an intent section is included, that is somewhat helpful, but even that can be a political compromise which does not truly reflect the thoughts of even a majority of those voting in favor. I believe in using the language itself as one’s guide, although I freely admit that this has its own pitfalls. A recent example of my approach is Gorsuch writing the opinion in the US Supremes which green-lighted discrimination claims for gender identity and sexual preference bias because, by God, the language of the statute required that result. Was that the original legislative intent? Clearly not. Indeed, the original intent of adding sex to the discrimination list was, cynically, to kill the whole thing because civil rights opponents of that day thought that members who wanted to stamp out racial discrimination would (surely) not want to enact the same protection for women!

Ed: Perish the thought! Aren’t the canons of statutory construction important to deter-

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mining an outcome in the close calls, though? If we don’t try to discern a purpose, absurdity might follow. Yet, these canons can at times conflict. If the statute is remedial, it is to be liberally construed. If the statute is in derogation of the common law, it is to be strictly construed. What is remedial? What is in derogation rather than, say, clarification? And don’t we typically have to go there when the statutory wording is less than precise?

David: Only if one absolutely has no other choice, I would argue. The primary judicial touchstone should be interpreting the language as written, in conjunction with other language in related statutes as needed. I’m not suggesting that other canons may not need to be applied, but goodness gracious let’s not stretch things beyond the breaking point just because one thinks the statute is “remedial.”

Ed: And this, I suppose, is why courts decide cases and controversies, not theoretical disputes. You might not know which canon of construction, or which line of cases even, applies until you know the facts.

Anyway, David, I want to thank you for the review and leave it with your closing paragraph from the Facebook post:

David: “These are interesting issues for lawyers to ponder, discuss, and debate. Justice Davis’s book helps us do just that. He has done North Carolina lawyers a great service here, so I’ll just end by saying, great job Justice Davis, and give this one an eight out of ten on my review scale.”

Ed: Pretty high praise coming from you, my friend. ■

Edward L. Blyemat Jr. graduated from UNC Law School. He began his legal career as

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Grievance Committee and DHC Actions

NOTE: More than 30,500 people are licensed to practice law in North Carolina. Some share the same or similar names. All discipline reports may be checked on the State Bar's website at ncbar.gov/dhcoders.

Disbarments

Judith Birchfield of Chapel Hill did not ensure that a client's estate planning documents

were properly executed and properly amended to effectuate the client's wishes, notarized a false acknowledgment, knowingly assisted in probating an invalid will, and made false statements to third parties and to the Grievance Committee. Birchfield surrendered her law license and was disbarred by the DHC.

Matthew Coxe of Jacksonville misappropriated entrusted funds, did not reconcile his trust accounts, acted as attorney-in-fact for an elderly client while he was enjoined by the court from acting as a trustee or attorney-in-fact, used the client's funds to pay his personal expenses, and otherwise mismanaged the client's funds. He was disbarred by the DHC.

Nicole A. Crawford of Durham neglected a client's case; made multiple false statements to her client, opposing counsel, and the court; and fabricated documents. Crawford did not participate in the DHC proceeding. She was disbarred.

underlying criminal case. The DHC suspended his license for three years. The suspension is stayed for three years upon enumerated conditions.

Completed Motions to Show Cause

In February 2019 the DHC suspended Meredith P. Ezzell of Wilmington for three years. The DHC concluded that Ezzell neglected and did not adequately communicate with her client, collected excessive fees, did not refund unearned fees, did not protect her client's interests upon termination of the representation, misrepresented her services, did not supervise her nonlawyer assistant, and violated multiple trust accounting rules. The suspension was stayed for three years upon enumerated conditions. The DHC entered a consent order finding that Ezzell did not comply with the conditions and extended the stay for an additional 18 months.

In April 2020 the Wake County Superior Court enjoined Sean Thomas Dillenbeck of Gastonia from handling entrusted funds and ordered him to provide trust account and client records to the State Bar. The court granted the State Bar's motion for an order requiring Dillenbeck to show cause why he should not be held in contempt for failing to produce the required documents. After multiple hearings necessitated by last-minute document production and requests for more time to produce additional documents, the court determined that Dillenbeck was not in contempt.

Censures

Julian Hall of Durham was censured by the Grievance Committee. While representing a client who was acting as a confidential informant, Hall cued the client to stop talking to law enforcement authorities about Hall's other clients or acquaintances by standing up and leaving the debriefing. The committee concluded that Hall did not act with diligence and competence, that Hall did not adequately explain or obtain informed consent for the conflict of interest inherent in the

Suspensions & Stayed Suspensions

Kenneth Davies of Charlotte had his client execute a promissory note for the benefit of his law office without advising the client in writing to seek independent legal counsel. Knowing that his client disputed his legal fee, he disbursed the disputed fee to his law office from his client's entrusted funds without the client's consent or authorization. Davies was suspended by the DHC for one year. The suspension is stayed for two years upon enumerated conditions.

Gina E. Essey of Oak Island did not conduct quarterly and monthly trust account reconciliations, did not maintain accurate client ledgers, did not promptly disburse earned fees, and did not perform quarterly trust account reviews. The DHC suspended her license for two years. The suspension is stayed for two years upon enumerated conditions.

Gregory A. Newman, district attorney for Prosecutorial District 42, falsely represented to the court that the victim of an alleged sexual assault had been notified of a plea agreement and made false representations to the Grievance Committee about the

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situation, and that Hall's conduct was prejudicial to the administration of justice.

Reprimands

William Lassiter of Rocky Mount represented his client in the closing of a loan. He collected funds to pay for property insurance. When the check was returned to him by the insurance company, Lassiter did not inform his client, did not issue a replacement check, and did not refund the premium to his client, leaving the client without insurance coverage on her home. Lassiter did not respond to his client when she contacted him after her home was damaged by fire. He was reprimanded by the Grievance Committee. The committee considered the harm suffered by Lassiter's client, Lassiter's lack of remorse, Lassiter's absence from the office during some of the relevant time, and the fact that this appeared to be an isolated incident.

James R. Levinson of Benson collected nearly \$15,000 from a court-appointed, indigent client. He did not adequately explain to the client that Levinson could continue as appointed counsel free of charge to the client, did not promptly notify the court that the client had sufficient funds to pay for private counsel in violation of N.C. Gen. Stat. § 7A-450(d), and knowingly disobeyed an obligation under the rules of a tribunal. He was reprimanded by the Grievance Committee.

Valerie Queen of Raleigh cashed a check made payable jointly to Queen and her client and delivered the client's portion of the funds in cash, did not give the client a written accounting of the receipt and disbursement of entrusted funds, did not maintain an IOLTA trust account, did not respond to the Grievance Committee's question whether she maintained an IOLTA trust account, and did not comply with a federal court order to attend training, be admitted to the bar of the federal court, file a notice of appearance, and

Upcoming Appointments to Commissions and Boards

The following appointments must be made at the April 2021 meeting.

Disciplinary Hearing Commission (three-year term)—There are three appointments to be made by the State Bar Council. Maya Madura Engle and Shannon R. Joseph are eligible for reappointment. Richard V. Bennett is not eligible for reappointment.

The Disciplinary Hearing Commission (DHC) is an independent court that hears all contested disciplinary cases. It is composed of 12 lawyers appointed by the State Bar Council and eight public members appointed by the governor and the General Assembly.

Inmate Grievance Resolution Board (four-year term)—There is one appointment to be made. Gerald Beaver is eligible for reappointment. The State Bar assists the governor with his selection by providing the names of ten lawyers as potential can-

didates. The Inmate Grievance Resolution Board investigates inmate complaints and seeks to resolve those complaints pursuant to the procedures established by its Administrative Remedy Procedure.

North Carolina Courts Commission (four-year term)—There is one appointment to be made. Fred Parker is eligible for reappointment. The Courts Commission studies the structure, organization, jurisdiction, procedures, and personnel of the Judicial Department and of the General Court of Justice, and makes recommendations to the General Assembly for changes that will facilitate the administration of justice.

Legal Aid of North Carolina (three-year term)—There is one appointment to be made. Chris Clifton is eligible for reappointment. Legal Aid of North Carolina is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people to ensure equal access to justice and to remove legal barriers to economic opportunity.

obtain competent co-counsel. She was reprimanded by the Grievance Committee.

Heather Ziemba of Wilmington was disciplined for her handling of immigration cases for three separate clients. Ziemba undertook each representation before she changed law firms. Ziemba did not notify all clients that she changed law firms. Ziemba did not respond to her clients' requests for information and did not perform the legal services she undertook to perform. In one case, because of her neglect and failure to communicate, Ziemba had to file a second I-601A applica-

tion, for which she charged her client an additional fee, and it ultimately took six years for her client to receive a Lawful Permanent Resident card. In that case, Ziemba also made a false representation to the Grievance Committee. In another case, Ziemba made multiple false representations to her client. She was reprimanded by the Grievance Committee. The committee took into consideration Ziemba's lack of prior discipline, significant personal issues and stress Ziemba experienced, and Ziemba's refund of the fee for legal services necessitated by her neglect. ■

A Warren Court of Our Own (cont.)

clerk to the Honorable James G. Exum Jr., then chief justice of the Supreme Court of North Carolina. After associating with a major Greensboro business and litigation firm, Ed moved to Asheville to continue his

law practice. He has been practicing at Ferikes & Blynat, PLLC, since its founding in 2001. He is the author of two volumes on the Synoptic Gospels and is actively involved in a variety of church, civic, and community activities as a director, a trustee, or a volunteer. He is the immediate past-president of the Harry C. Martin Chapter of the American Inns of Court.

David Hood is the partnership chair of the Hickory law firm Patrick Harper Dixon LLP, where he practices civil litigation in many diverse forms. Mediation also forms a large part of his practice. When not litigating or mediating, he performs in community theater musicals, serves on the local Board of Elections, and plays boardgames competitively in tournaments throughout the country.

Tara Cho, Board Certified Specialist in Privacy and Information Security Law

BY SHEILA SAUCIER, CERTIFICATION COORDINATOR, BOARD OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Tara Cho, a board certified specialist in privacy and information security law. Tara chairs Womble Bond Dickinson (US) LLP's Privacy and Cybersecurity Team. Her practice is dedicated to counseling clients on privacy and data security issues across industries such as technology, retail, e-commerce, and life sciences, with an emphasis on compliance risks and regulatory requirements affecting the healthcare and healthtech sector. Tara became certified as a legal specialist in Privacy and Information Security Law by the North Carolina State Bar Board of Legal Specialization in 2018 as a member of the inaugural class of specialists in this field. She is also recognized by the International Association of Privacy Professionals (IAPP) as a certified information privacy professional for both the US (CIPP/US) and Europe (CIPP/E).

Q: Please tell me where you attended college and law school and a little about your path to your current position.

I went to Rhodes College for undergrad—it's a small liberal arts college in Memphis, TN—and attended New England Law in Boston, MA. When I started law school, I knew that I wanted to pursue a career in healthcare law, ideally working in-house for a hospital or health system. At the start of my 1L summer, I began clerking for a firm that represented an extensive healthcare system, its physician/provider groups, and related entities. In that role, I gained valuable insight into the many regulatory and privacy issues stemming from the Health Insurance Portability and Accountability Act (HIPAA) and found that I enjoyed working

in the compliance and data privacy space.

After graduation, I moved to North Carolina and began my first in-house role at IQVIA (then Quintiles). One of my mentors (Dr. Judith Beach) was the global privacy officer and regulatory counsel, and a long-standing leader in this space. Seeing into the future, she encouraged me to expand my expertise in the ever-growing requirements for data protection. I eventually transitioned to



private practice and have spent the last ten years building a practice focused on privacy and data security law. Because the regulatory landscape is so new and not established in longstanding case law, we have the opportunity to develop creative compliance strategies that evolve alongside technology and data-driven innovations, which is an aspect I really enjoy.

Q: Why did you pursue board certification?

Thanks to the leadership of Matt Cordell and Elizabeth Johnson (chair and vice-chair, respectively, of the committee for this specialty) and the work of many others, North Carolina was the first state to recognize this specialty. It was an honor to sit for the exam with the inaugural class of specialists and shine the light on a substantive practice area that may not have been fully understood until recent years. With the enactment of new legislation, a hyper-focus on mega data breaches, and high-profile cases questioning the risk-benefit and potential invasion of privacy associated with new technologies, many consumers and professionals are now keenly aware of the need for expertise in this space. This certification also allows experienced attorneys to differentiate themselves from others who may be less experienced or

not fully immersed in these issues on a full-time basis.

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

We have seen tremendous activity in this practice area in the last few years. Consumers are more aware of the risk associated with their data, and businesses are very much aware of the business potential for data intelligence and large data sets. This awareness has given rise to a flurry of new legislation worldwide and even state-by-state here in the United States. Domestically, there is a sectoral approach to privacy and security regulation, applying set standards to specific industries, including healthcare and financial institutions (both of which have longer-standing regulations). However, states like California have implemented legislation intended to protect the personal data of state residents. The result is differing requirements state-to-state and overlapping or conflicting requirements between state and federal regulation, which creates compliance challenges, particularly for businesses that operate online (across many jurisdictions).

Q: How does specialization benefit the public? The profession?

Board certification is not a one-time exam, but rather an ongoing commitment to devote a defined number of hours to the practice of privacy and information security law, meet standards set forth by the Bar and the Board of Legal Specialization, and maintain continued education. This specialization is regulated by a trusted and unbiased source, and it enables the general public to identify and utilize a pool of qualified practitioners who have a demonstrated expertise in a narrow specialty.

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Back to Basics

BY ROBYNN MORAITES

And COVID! Continues. Really? Aren't we in the home stretch yet? Apparently not. Breaking news (that surprises no one): vaccine rollout not happening as quickly as planned/predicted... B117 COVID mutation bomber now looms...blah blah blah.



There is an adage in long-term recovery. “If you stick with the basics, you never have to get back to them.” So, what are the mental and emotional well-being basics in this prolonged, semi-pseudo-quarantine-lock-down-but-not-really-just-enough-to-destroy-the-global-economy-but-not-enough-to-slow-transmission situation?

The basics are:

- 1) Stay as grounded in the present moment as you are able.
 - 2) Slow down. Breathe. Deeply. Repeat.
 - 3) Feel and honor your feelings. Do not deny them. Don't take them out on others. Feel them, then let them go. (Call LAP if you need help understanding how to effectively navigate this terrain.)
 - 4) Do what you can to address your circumstances. Do your best, then let go of the rest.
 - 5) Find ways to laugh.
 - 6) Be kind. To yourself. To others. We may disagree about every single thing, but we can still be kind to one another. Can't swing kind? Then be civil. We are all doing our dead-level best. And, while we may be in different boats, we are all in the same storm.
 - 7) Go back and read or reread the State Bar *Journal* Summer 2020 LAP Column on Coping with Uncertainty bit.ly/Summer2020Journal (page 30).
 - 8) Stay off social media because prolonged exposure prevents and impedes numbers 1-6 above. Not kidding.
- Hemingway wrote in *Farewell to Arms*,

“The world breaks everyone, and then some become strong in the broken places.” This succinctly describes the process of recovery. As soon as LAP participants begin using recovery tools, they start actively practicing numbers 1-6 above, daily, out of survival-level necessity. Early recovery, for most people, usually involves situations steeped in uncertainty (economic, personal, professional, social, familial)—situations where there is a sense of a loss of control, not only to shape outcomes, but even loss of control over the process. People in long-term recovery have had years of practice implementing these tools day in and day out. Recovery is mostly about day-to-day emotional well-being as we navigate the vagaries of life.

It is not that people in long-term recovery somehow do not feel scared, anxious, frustrated, angry, impatient, or overwhelmed. They do; we do. It is that we have learned ways to be more present in the unfolding moment, more emotionally balanced and not make it (i.e., life, a difficult situation like a pandemic, etc.) worse than it actually is. Sometimes it (i.e., life, a difficult situation like a pandemic, etc.) can be quite bad. So we must find ways to navigate it with some sense of equanimity to maintain a bit of balance. This is where recovery tools come into play. In good news, these recovery tools are available to everyone. Slogans are one tool of recovery.

Last April I reached out to a few LAP volunteers and asked each to send me a short

paragraph on their favorite recovery slogan and to apply it to the pandemic. I have shared a few here. Each entry is written by a different volunteer, and yet, you will see lots of overlapping themes that somehow all circle back to 1-6 above. I received more content from our volunteers than I can possibly use in one *Sidebar* (LAP's e-newsletter) or LAP column. So, I created a mental and emotional well-being toolkit on our website. Visit nclap.org. The toolkit is listed under the resources tab. You can click on a slogan and read multiple lawyers' perspectives on a topic. There are relevant articles at the bottom of the page...things like “On Lockdown? Look for Meaning, Not Happiness” or “How Will We Make It Through April (of 2020)...” Hint: the same way we will make it through April (of 2021).

If you are dealing with the death of one or more friends or family members, if you are ill, if you have had to shutter your law practice, or experienced any other serious life events, you may need extra emotional or therapeutic resources. I encourage you to email LAP. People in long-term recovery have faced serious hardship (the same hardships we all face, eventually, one way or the other), and these slogans have served as channel markers, helping them navigate the worst of times. But standing alone, out of context, these slogans may seem trite given your cur-

rent circumstances. If this is your first exposure to some of these concepts and you are facing serious hardship, you may need to put these in the context of a greater support system or therapeutic plan. So please shoot us an email.

FEAR – False Evidence Appearing Real: Taming Fear

Fear is an instinct hardwired in us from birth. It serves an indispensable purpose to alert us to danger—like an approaching hurricane or encountering a snake. Fear makes us aware of possible peril, so we can defend ourselves or evade harm.

Most of us experience another form of fear, though. In recovery, we refer to when False Evidence Appears Real, or when we Forget Everything is Alright. It's a "self-centered fear" that takes root when we don't have control, but internally we demand we gain it. It becomes a disabling emotion when we demand to keep what we have or obtain what we don't. And we become suspicious of threats to what we think we want or need.

Business was good. That settlement was within grasp. Then, COVID-19. Now, gripped by FEAR, we've just got to get back in the game and make something happen. But as we grow and mature in recovery, we see that everything is just as it should be. Not for us to manipulate, but for us to explore and find blessings within.

We lose the fear of not getting what we want. We trust we'll be given what we need.

We are not fearful of losing what we have, but grateful for having ever received it.

Self-centered fear is a virus of its own. Faith and gratitude are the vaccine.

Wear Life Like a Loose Garment

"Wear the world like a loose garment, which touches us in a few places and there lightly," St Francis of Assisi.

This recovery saying is the only one that conjures up a physical release, a change in sensation of the body and mind. It allows us to create a peaceful space for ourselves, separated from the incessant incoming arrows of uncertainty, fear, anger, unmet needs, and other painful perceptions. For these are what are painful—perceptions. To wear the world as a loose garment is to perceive things as something the world and life will always press at us and around us, but do not have to touch us but "lightly." Most things are either outside our control or ultimately unimpor-

tant. We do not need to grasp, manage, dwell on, or react to everything that happens to us, but can choose to keep the "world" at an emotional distance as we do the next right thing. It is an attitude that can relax the body and relieve the mind of poisonous emotions when confronted with people, places, or things that beset us.

To be in the world but not of it, to live and move through life without being emotionally attached to everything that happens, is to wear the world lightly and be at peace.

One Day at a Time

Right now, the slogan "One Day at a Time" is my lifeline. In the midst of this coronavirus crisis, so much of it can feel overwhelming—the fear, unmanageability, uncertainty. Early in my Al Anon recovery, with my son at the bottom of addiction, I felt all of those things, overwhelmed by it all. I found "One Day at a Time" so helpful in dealing with the fear, the lack of control, the uncertainty of outcome. It has been a powerful tool ever since, and it is really helping me in this crisis. If I break the whole overwhelming situation down into one day at a time and focus on living in peace in just that day, instead of projecting outcomes and worrying about what's out of my control anyway, I keep my serenity. It really does work. As our literature says, "Just for today, I will try to live through this day only, and not tackle all my problems at once. I can do something for 12 hours that would appall me if I felt that I had to keep it up for a lifetime."

Another lawyer writes:

Living life "one day at a time" is a concept that is literally forced on us by the reality of the sun rising and setting each day. Life as we know it comes in 24-hour installments. There is no way to change this fact. However, human beings are prone to worrying about the future and regretting the past. These tendencies can lead to fear-riddled paralysis, which renders us less useful to those around us in the here and now. In these trying times, the future is uncertain and unsettling. We can easily spend hours of our day contemplating fearful possibilities regarding our future. In the alternative, we can paralyze ourselves with regret-filled analysis of our past actions. Attorneys are especially prone to this. We are asked by our clients to predict case outcomes. We are constantly concerned about deadlines and billable goals. These days we may be worried

about mortgage payments and meeting payroll. Committing to live our days one day at a time does not render these responsibilities meaningless or unimportant. Living our lives one day at a time merely right-sizes our life's responsibilities into manageable increments. We can focus each day on accomplishing attainable goals. This allows us to live in the moment, meet our responsibilities with a clear mind, and be useful and present to the people we care about.

Do the Next Right Thing

This coronavirus crisis and the constantly changing "new normal" for all of us is a whole new experience in powerlessness on a global scale that we could not have imagined, but thankfully recovery has taught me to recognize and accept my powerlessness, surrender to the reality of the situation, and then focus on the next right thing to do. When every aspect of our normal routine is disrupted, I have a choice whether to resist and wallow in fear or focus on the few things I do have control over: my attitude and my actions. Like many lawyers, my upbringing and my training taught me that I was supposed to figure it all out and solve the whole problem, preferably without asking for help. That mindset produces a lonely, fearful state of mind that I cannot afford if I want to stay sober and sane. Instead I have been taught to focus on the next right thing that I can do, which is sometimes just NOT doing what I know is the wrong thing.

Feelings Aren't Facts

I hadn't yet been to many recovery meetings when I heard a gruff old guy bark, "Feelings ain't facts!" I didn't understand that then, but I think I do now. We all have feelings. They're not wrong or bad. I don't want to live a life without joy, compassion, love. The problem is that I sometimes confuse feelings with fact and act on or live for a while with the feeling rather than the factual reality—to my detriment and maybe the detriment of others. I've learned that the better course is to acknowledge the feeling and analyze it—get the facts straight. Meditation or talking to a person I trust can be helpful. When I've got the facts straight, I can integrate them appropriately with my feelings and act or react effectively. And I don't wallow in emotion.

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Building Our Bar's Resilience with a Virtual "Om"

BY LAURA MAHR

As our world navigates each phase of the COVID-19 pandemic, lawyers are dealing with more unknowns than usual, both personally and professionally. The uncertainty surrounding the virus heightens our mental and emotional stress, making it challenging for us to be present in the here and now. In these unpredictable times, many of us lawyers find that we need additional support to stay resilient and support our health and well-being.

Last summer, Lisa-Gaye Hall, the Buncombe County Bar (BCB) administrator, identified that the BCB membership needed additional resources. Lisa-Gaye reached out to me asking if I would present a virtual mindfulness CLE series for the BCB. She expressed her concern for members' well-being. "As the pandemic wears on and we become accustomed to meeting virtually and feeling financial strain," Lisa-Gaye said, "several members of the BCB are asking me if the BCB leadership plans to sponsor any free online CLE. It is becoming apparent that people are not only hurting financially, but they are also hurting mentally and emotionally."

When Lisa-Gaye contacted me about creating a virtual mindfulness series in lieu of the in-person series I had presented annually for the BCB since 2017, I stepped in and got to work creating a pandemic-specific mindfulness course. I was enthused to create a program that was not only skill-building, but also a vehicle through which BCB members could connect virtually and meaningfully and support one another through pandemic-related challenges. In addition, I wanted the course to resonate with a variety of lawyers, including those new to mindfulness and neuroscience practices.

Lisa-Gaye presented my proposed curriculum for the course, "A Resilient Mind:



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Mindfulness Tools for Trying Times," to the BCB leadership so that the leadership committees could vote on whether to fund the program with BCB funds. "When I shared your proposal with BCB Bar leaders," Lisa-Gaye shared, "they were immediately excited about the idea of offering a virtual CLE series to help our members learn to use mindfulness techniques to adapt to the pandemic." President of the BCB and business lawyer Sonya Rikhye shared her thoughts behind providing the course for members. "Attorneys carry the responsibility of finding solutions to the business and personal challenges of our clients. Mindfulness is an effective tool to manage stress and anxiety and to generally bring a feeling of calm and control; the leadership of the BCB offered this course to assist our members in managing feelings of stress and anxiety that result from practicing law generally, which may have increased as a result of the pandemic." All three leadership committees of the BCB voted unanimously to approve the course, and shortly

thereafter the course launched.

The series was structured in a way that allowed maximum participation by BCB members: It was eight weeks long, held at lunchtime, free to all members of the BCB, available for "drop in" virtually by phone or Zoom, and approved for CLE credit by the NC State Bar. The classes were not recorded so that participants could share authentically without concern that their comments would be rebroadcast.

Of course, the real issue was whether attorneys would attend. Fortunately, the course was well-received and well-attended by BCB members. "As I watched the screen fill up each week with 50, 60, sometimes 70+ members all meditating together," Lisa-Gaye reflected to me later, "I was so impressed with your ability to use your training and knowledge to encourage attorneys to meditate and reap the benefits. It was a joy to receive so much positive feedback from participants at the end of the course."

Numerous participants expressed to Lisa-Gaye and BCB leaders that they found the course and tools useful for both personal and professional stress management. Elizabeth Teira, managing member of TEIRA LLC, shared her appreciation for the course in an email to Lisa-Gaye. “This course was exceptionally helpful and I religiously attended every session, re-coordinating multiple family member schedules in order to do so,” she wrote. “The substance of this course and its superb teacher were healing forces in our 2020 world of stress. All attendees benefited both in their professional and personal lives by implementing just a few of the pearls of wisdom imparted through the course.”

Brad Searson, partner with Barbour, Searson, Jones & Cash, PLLC, shared that he also found a crossover in the skills from professional to personal life. He shared with Lisa-Gaye, “This program is one of the most useful CLE experiences I’ve attended over the years, with many tangible benefits, including: increasing calm, reducing anxiety, and improving concentration; practicing mindfulness meditation with so many members of our local bar, especially in the midst of a pandemic; learning and practicing new skills that are helpful in the practice of law and in life; enhancing capacity to be fully present, listen, and enjoy the time spent with clients; learning to work with the grief and frustration of personal injury clients without allowing their burdens to take over my own emotional state; and increasing optimism and satisfaction in work and life.”

Like other courses I teach, this series was designed to help lawyers better understand the neurobiology of stress and how mindfulness and meditation help to regulate a dysregulated nervous system. It centered around understanding cutting edge resilience theory, and practicing mindfulness and neuroscience-based tools that “neuro-hack” our nervous system’s dysregulated stress response to promote calm and clarity, especially during a crisis.

Susan Ciaravella, founder of Susan Ciaravella Law, PC, shared how the “neuro-hacks” in the series helped her to better cope with the stress of litigation. “This CLE series has been the most invaluable to date in my 17 years as a trial lawyer,” she shared. “Not only do trial lawyers endure immense stress (inherent to our profession), we also accumulate vicarious trauma from repeated

exposure to our clients’ difficult and often traumatic experiences. Trials, by nature, are adversarial, and we are physiologically programmed as humans to react to adversarial situations; whether by fighting back, fleeing, or freezing. This course helps identify signs of nervous system dysregulation and offers healthy tools to promote balance. I’d love to see this course regularly offered, as it takes practice and repetition to master new habits.”

Attorney Amy Bircher expressed appreciation to the BCB for offering the course, along with her satisfaction in learning how mindfulness and neurobiology overlap. “Sincere gratitude to you for your work putting together this CLE,” she wrote. “It was definitely time well spent for stressed out lawyers. Meditation has always helped me in court, but learning about polyvagal theory and having a rational explanation for why it works reinforces the need for the practice.”

Other BCB members also thanked Lisa-Gaye and the Bar for their leadership in bringing well-being training to its members. David English, shareholder at Roberts & Stevens, PA, emailed Lisa-Gaye a week after the course ended. “My apologies for not sending this sooner,” his email read, “but this is the first Tuesday in eight weeks that we are not having the lunchtime seminar, and it is missed. I truly do appreciate you and the Bar for organizing these classes. This was undoubtedly one of the best and most helpful CLE events I have attended in over 20 years of practice. Laura did an excellent job, and her time is very much appreciated.”

Kimberly C. Stevens, capital resource counsel and assistant federal public defender, also expressed her appreciation to the BCB, “Thank you so much for the chance to attend this valuable program. Please let the Bar know that this series helps give us tools to manage stress—a chronic problem within the profession and with the current state of societal affairs. A much needed series, and one that I hope will be repeated.”

While the course focused primarily on how we as individual attorneys can “neuro-hack” our own brains, it also included discussion about and suggestions for how the mindfulness and neuroscience tools can improve professionalism and collegiality. Elizabeth L. Oxley, attorney at law, shared her appreciation to the BCB for the course and noted the connection between the

course curriculum and professionalism. “Thanks again for an uplifting educational series that gave me invaluable tools to use during COVID and beyond,” her email expressed. “I learned a lot about how to let go of stress and stay serene, calm, and peaceful in the face of challenges,” she shared. “In my humble opinion, so much of effective law practice depends on demonstrating collegiality and courtesy—and keeping in mind the bigger picture. Laura’s sessions supported us in achieving those goals as individuals and as a legal community.”

D. Lynn Cox, attorney at law, echoed similar sentiments in her email to the BCB. “Thank you so much for this incredibly useful course! These sessions have provided me with tools I can use to better represent my clients and to work more efficiently and cooperatively with my colleagues.”

The benefits of practicing mindfulness meditation and neuroscience tools extend beyond mental mastery. They also provide avenues to improve our self perspective, and offer paths to find our way back to emotional stability when we feel emotionally triggered. Scott Lamb, Law Office of Scott W. Lamb, PA, reflected on this aspect of the course: “This was the best, most useful legal training that I’ve done. Learning how to be a better version of my whole self was, by far, the best tool I’ve learned as an attorney. Learning to spot my own triggers, emotional patterns, and nervous system responses was invaluable. They will not only help me be a better person, but also a better lawyer.”

During the course, many participating lawyers shared how comforting it was to know that they were not the only ones experiencing increased stress and challenges during the pandemic. In an email to Lisa-Gaye, Heather Newton, attorney at law, shared, “This was one of the most valuable benefits I have ever received from any bar association or professional organization. It reminded me that I am not alone in facing the challenges of the pandemic. It forced me to make space for mindfulness once a week, and gave me tools to make space at other times. Also, the gift of low-cost CLE was very welcome in a year when my revenues are down due to the economic downturn. Thank you!”

At the closure of the series, Lisa-Gaye and I exchanged emails, and she shared feedback from participants. “We found a way! We did it!” her email read. “This course has been a true blessing to our legal communi-

ty!” Her words and the feedback she shared brought a big smile to my face. As an instructor, it is meaningful to me to know that the resilience-building tools I teach land well for participants. As an attorney, it is gratifying to help fellow attorneys cultivate compassion for themselves during these trying times. I am deeply appreciative of the BCB for its commitment to its membership’s well-being, and grateful for the time, presence, and candidness of the participating lawyers. I treasure every positive comment the course receives; I am encouraged that mindfulness really works, even for lawyers!

One part of teaching the course that I particularly enjoyed was seeing participants’ faces—albeit virtually—each week. I found it moving and powerful to witness other lawyers in their homes and offices “Zooming in” and meditating in communi-

ty. Despite the physical distance between us, I felt connected to each participant as we shared in this novel experience. Despite the many hardships of the pandemic, it is encouraging to learn that we have the ability to come together as a community to learn, support one another, and connect through a “virtual om.” As I read Lisa-Gaye’s email, I was reminded of the iconic quote by Margaret Mead: “Never doubt that a small group of thoughtful, committed citizens can change the world: indeed, it is the only thing that ever has.” What I envision growing out of these changing times is the number of thoughtful lawyers who are committed to incorporating mindfulness into the practice of law. And that together we do, indeed, change the world. ■

Laura Mahr is a North Carolina and Oregon lawyer and the founder of Conscious

Legal Minds LLC, providing mindfulness based well-being coaching, training, and consulting for attorneys and law offices nationwide. Her work is informed by 13 years of practice as a civil sexual assault attorney, 25 years as a student and teacher of mindfulness and yoga, a love of neuroscience, and a passion for resilience. If you would like to learn more about bringing the “A Resilient Mindset: Mindfulness Tools for Trying Times” course to your Bar or firm, or to find out more about one-on-one resilience coaching, please email Laura through consciouslegalminds.com.

If you’d like to learn more about stress reduction and improved cognitive function using mindfulness, check out: “Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness, Meditation, and Neuroscience” (online, on demand mental health CLE approved by the NC State Bar): consciouslegalminds.com/register.

IOLTA Update

- Income received in 2020 through November from participating financial institutions totaled \$4.3 million, a decrease of 10% compared to the same time period last year. Given the economic conditions triggered by the pandemic, this decrease was initially anticipated to be much worse.

- IOLTA’s reserve fund has a current balance of \$2,473,932. The IOLTA Board established the reserve fund to provide for stabilizing year-to-year funds available for grantmaking when income declines.

- NC IOLTA continues to work with banks holding IOLTA accounts that seek to adjust their interest rates and policies as a result of economic conditions. IOLTA encourages banks to communicate with IOLTA prior to adjusting rates to ensure continued compliance with the State Bar rules regarding IOLTA.

- At the December 1 grantmaking meeting, the IOLTA trustees approved 2021 IOLTA grant awards. Regular 2020 IOLTA grants totaled nearly \$3,025,700: \$2,491,700 to providers of direct civil legal services, \$352,000 to volunteer lawyer programs, and \$182,000 to projects to improve the administration of justice.



7,088
CASES COMPLETED

FROM JULY 2019
THRU JUNE 2020,
Legal Aid of North Carolina
and Pisgah Legal Services

COMPLETED 7,088
cases for domestic
violence victims.

- An additional grant of \$454,090 was made with funds from the national Bank of America settlement to the Home Defense Project Collaborative to support foreclosure prevention legal services.

- NC IOLTA administers state funding on behalf of the NC State Bar under the Domestic Violence Victim Assistance Act. Funds generated by costs assessed in civil and criminal court actions are distributed to Legal Aid of North Carolina and Pisgah Legal Services

to support legal assistance for domestic violence victims. Since the start of the state’s fiscal year in July, NC IOLTA has administered \$321,864 in domestic violence state funds. Funds received under the act continue to be significantly less than pre-pandemic levels.

- Each year, NC IOLTA produces a report on the funding administered under the Domestic Violence Victim Assistance Act. The report for 2019-20 can be found at nciolta.org/publications.

Council Adopts Two New Opinions; Committee Publishes One Opinion and Sends Opinions on *Ex Parte* Communications and Confidential Nature of Public Information Back to Subcommittee

Council Actions

At its meeting on January 15, 2021, the State Bar Council adopted the ethics opinions summarized below:

2020 Formal Ethics Opinion 2

Advancing Client Portion of Settlement

Opinion rules that a lawyer may not advance a client's portion of settlement proceeds while a matter is pending or litigation is contemplated, but may advance a client's portion of settlement proceeds under other circumstances if the lawyer complies with Rule 1.8(a).

2020 Formal Ethics Opinion 5

A Lawyer's Responsibility in Avoiding Fraudulent Attempts to Obtain Entrusted Client Funds

Opinion discusses a lawyer's professional responsibility to inform clients about relevant, potential fraudulent attempts improperly to acquire client funds during a real property transaction.

Ethics Committee Actions

At its January 14, 2021, meeting, the Ethics Committee received reports from two subcommittees studying proposed amendments to the Rules of Professional Conduct. One subcommittee is studying the adoption of anti-discrimination language to the Preamble and the text of the Rules of Professional Conduct. The other subcommittee is studying the addition of language in the comment to Rule 1.1 (Competency) recognizing a lawyer's responsibility to be aware of how implicit bias and cultural differences can impact the representation of a client. Both proposals remain in subcommittee for continued study.

The Ethics Committee considered a total of 14 ethics inquiries, including the two opinions adopted by the council referenced above. Ten inquiries were sent or returned to subcommittee for further study, including inquiries addressing the following: a lawyer's professional responsibility when asked by a client to take possession of evidence constituting contraband; a lawyer's duty to recognize and avoid counterfeit check scams; and a lawyer's professional responsibility in utilizing machine learning/artificial intelligence in a law practice. The committee also reconsidered the following three proposed formal ethics opinions after receiving adverse comment: Proposed 2019 Formal Ethics Opinion 4, concerning a lawyer's professional responsibility when communicating with members of the judiciary; Proposed 2020 Formal Ethics Opinion 1, concerning a lawyer's professional responsibility in responding to negative online reviews; and Proposed 2020 Formal Ethics Opinion 6, concerning the confidentiality of information contained in the public record. The three opinions were returned to subcommittees for further study. The committee approved the publication of one proposed opinion, which appears below.

Proposed 2021 Formal Ethics Opinion 1 Contemporaneous Residential Real Estate Closings January 14, 2021

Proposed opinion addresses conflicts of interest, communication, funding issues, and accountings in contemporaneous closings for

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at the next quarterly meeting. Any comment or request should be directed to the Ethics Committee at ethicscomments@ncbar.gov no later than March 26, 2021.

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.

residential real property.

Facts:

Residential real property is owned by record owner A. The property is to be conveyed from record owner A to B and from B to end buyer C on the same day. The sales price for the A to B transaction is \$80,000. The sales price for the B to C transaction is \$100,000. The money provided by C would be utilized by B to make B's purchase from A; B would provide no independent funding. One lawyer, Lawyer, would close both the A to B and B to C transactions. Lawyer would represent B and C; Lawyer would not represent A. Lawyer would be the settlement agent for the closings.

Inquiry #1:

Can Lawyer represent B and C in these transactions?

Opinion #1:

This scenario presents a concurrent conflict of interest under Rule 1.7(a). Lawyer's representation of C may be materially limited by Lawyer's responsibilities to B, and vice versa. *See* Rule 1.7(a)(2); 2013 FEO 4; 97 FEO 8; RPC 210.

Rule 1.7(b) articulates the circumstances under which a lawyer may represent a client notwithstanding the existence of a concurrent conflict of interest. One requirement is that the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client. Rule 1.7(b)(1).

In assessing whether a representation burdened by a concurrent conflict of interest might be permissible, the lawyer "must consider 'whether there is any obstacle to the loyal representation of both parties.'" 97 FEO 8, quoting RPC 210. As discussed in 2013 FEO 4 in the context of joint representation of a buyer and a seller in a residential real estate transaction:

[T]he lawyer has a duty to ensure that he can comply with Rule 1.7 prior to accepting joint representation of the buyer and seller. When contemplating joint representation, a lawyer must consider whether the interests of the parties will be adequately protected if they are permitted to give their informed consent to the representation, and whether an independent lawyer would advise the parties to consent to the conflict of inter-

est. Representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation to all clients. *See* Rule 1.7, cmt. [15].

To provide competent and diligent representation to C, Lawyer would need to disclose to C all material facts known to Lawyer about the transactions and advise C with respect to all of the facts and circumstances concerning the transactions. *See* 97 FEO 8, Opinions #4 and #5.

Matters about which Lawyer would need to communicate with C include:

1. That B does not own the property and whether the contract entered into between B and C for the sale of the property is valid;
2. That C's money will be used by B to purchase the property from A, for which C's informed consent would need to be given (*see* Opinion #4 below); and
3. The price at which B is purchasing the property from A, which is a fact that may not otherwise be known by C and might bear upon the true market value of the property and/or whether C would consider it in C's best interest to proceed. *See, e.g.,* 97 FEO 8 and Opinion #4 below.

Certain of these facts will be confidential information known to Lawyer from his representation of B and protected from disclosure under Rule 1.6. Certain of these facts may be matters B does not want disclosed to C or may involve information the disclosure of which would harm B's interests, which Lawyer must consider in determining whether Lawyer can provide competent and diligent representation to both B and C.

Lawyer cannot represent C unless B consents to the disclosure to C of all facts regarding the A to B transaction and the conditions of Rule 1.7(b) are otherwise met. *See* 2013 FEO 4; 97 FEO 8, Opinions #4 and #5.

Another of the requirements under Rule 1.7(b) for a lawyer to represent a client notwithstanding a concurrent conflict of interest is that the lawyer obtain any affected client's informed consent to the representation and confirm that consent in writing. Informed consent is defined in Rule 1.0 as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances." Comment [6] to Rule 1.0 states

that, to obtain informed consent, a lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.

Lawyer would need to obtain informed consent from both B and C. To obtain informed consent from B and C, Lawyer must explain to B and C how the interests of B and C may be in conflict, including disclosure of all facts and circumstances giving rise to potential conflicts in their interests.

With respect to C, the facts and circumstances Lawyer would need to disclose to C to obtain informed consent from C include but are not limited to all of the matters discussed above for required communications to C. In order to obtain informed consent from C, Lawyer must also discuss with C the advantages and disadvantages of the proposed transactions for C and C's options and alternatives, including C retaining independent counsel. If Lawyer cannot discuss all of these matters with C for any reason—including but not limited to B not wanting certain information disclosed to C or disclosure to C being adverse to B's interests—then Lawyer cannot obtain C's informed consent and cannot represent C in these transactions.

Inquiry #2:

Is the answer to Inquiry #1 different if Lawyer clarifies that Lawyer only represents B in the A to B transaction and C in the B to C transaction?

Opinion #2:

No. A concurrent conflict of interest under Rule 1.7(a)(2) exists if a lawyer's representation of a client may be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or by a personal interest of the lawyer. The above-identified conflicts would still exist even if Lawyer only represented B with respect to the A to B transaction and C with

respect to the B to C transaction. *See* Opinion #1.

Inquiry #3:

If Lawyer concludes that Lawyer cannot represent C, can Lawyer proceed with the closings representing only B?

Opinion #3:

It depends. To the extent C consulted with Lawyer or provided Lawyer with information to close the B to C transaction but no attorney-client relationship was formed between Lawyer and C, C would be a prospective client under Rule 1.18(a). If an attorney-client relationship was formed between Lawyer and C but was terminated by Lawyer due to the conflict of interest, then C is a former client under Rule 1.9.

Under Rule 1.18(b) and Rule 1.9(c), as applicable, Lawyer would be prohibited from revealing any information learned from C and from using such information to the disadvantage of C. If this prohibition would materially limit Lawyer's representation of B, then Lawyer cannot represent B under Rule 1.7(a). This is a nonconsentable conflict of interest if Lawyer would not be able to provide competent and diligent representation to B as required under Rule 1.7(b) with the representation materially limited by the prohibition against revealing or using confidential information from C.

Additionally, under Rule 1.18(c) and Rule 1.9(b), Lawyer would not be able to represent a client with interests materially adverse to C in the same or substantially related matter if Lawyer received information from C that could be either significantly harmful to C in that matter under Rule 1.18(c) (C as prospective client), or that is material to the matter under Rule 1.9(b) (C as former client). Exceptions are provided under Rule 1.9 and Rule 1.18, including if C gives informed consent confirmed in writing. However, certain disclosures need to be made to C to obtain informed consent, as discussed above and in the comments to Rule 1.0, and if Lawyer is not able to make those disclosures to obtain C's informed consent, Lawyer will not be able to represent B under Rule 1.9 (C as former client), and would not be able to represent B under Rule 1.18 (C as prospective client) unless another exception under Rule 1.18(d) applied.

Inquiry #4:

Can Lawyer use the funds provided by C for C's purchase from B to fund B's purchase from A?

Opinion #4:

No, not without C's knowledge and informed consent and some appropriate legal arrangement (e.g. promissory note). Without C's knowledge and informed consent and an appropriate arrangement, use of C's money for the benefit of B is misappropriation of C's funds violating Rule 1.15-2(n) and Rule 8.4(b) and (c), as detailed below.

Lawyer cannot disburse funds from a residential real estate transaction until the deed is recorded. *See Johnson v. Schultz*, 195 N.C. App 161, 166-7 (2009), *aff'd*, 364 N.C. 90 (2010), citing and quoting N.C. Gen. Stat. §§ 45A-2, -4. Accordingly, B is not entitled to possession or use of any of C's funds from the B to C transaction until the B to C deed is recorded. *Id.*; Rule 1.15-2(n).

The B to C deed cannot be recorded until after the A to B deed is recorded. However, the A to B deed from A—which is entrusted property as defined in Rule 1.15-1(f)—cannot be recorded by Lawyer unless and until Lawyer has possession of funds, the possession and use of which B is then currently entitled, to pay the sales price due to A under the A to B contract. *See* N.C. Gen. Stat. §§ 45A-3, -4; Rule 1.15-2(a), (d), (k), (n); 2009 FEO 7, Opinion #1; 99 FEO 9, Opinion #1.

Inquiry #5:

Can Lawyer represent B and C in developing an arrangement under which B would become entitled to the possession and use of C's funds prior to recordation of the B to C deed and can Lawyer draft the necessary documentation for such arrangement?

Opinion #5:

No. Such joint representation involves a nonconsentable conflict of interest under Rule 1.7.

The making of an appropriate arrangement between B and C under which B would gain entitlement to the possession and use of C's funds prior to the recording of the B to C deed, and the drafting of appropriate documentation of such

arrangement, presents another conflict of interest under Rule 1.7(a). Because the terms of this arrangement would need to be negotiated between B and C—similar to what transpires in a commercial real estate transaction—Lawyer cannot represent B and C in the making of this arrangement and cannot draft the documents for this arrangement. *See* 2013 FEO 14 (nonconsentable conflict of interest barring joint representation in commercial real estate transaction unless the conditions listed therein are satisfied, including that contract terms have been finally negotiated prior to commencement of the representation and that there are no material contingencies to be resolved). *See also* 2013 FEO 4 (joint representation may be permissible in a residential real estate transaction because the contract to purchase is entered into prior to commencement of the representation and the lawyer has no obligation to bargain for either party).

See Opinion #3 above with respect to whether Lawyer could represent only B or only C.

Inquiry #6:

If all conflicts, communication, and funding issues are properly resolved, can Lawyer proceed with closing these transactions?

Opinion #6:

It depends. There may be other issues Lawyer will have to consider before determining whether Lawyer can proceed.

Such issues may include, but are not limited to, the following:

1. Whether Lawyer would be assisting any other person in engaging in a criminal offense or would be engaging in conduct constituting a criminal offense, implicating Rules 1.2(d), 8.4(a), and 8.4(b). *See, e.g.,* N.C. Gen. Stat. §§ 14-118.12, -118.15; N.C. Gen. Stat. §§ 93A-1, -8; 18 U.S.C. §§ 1001, 1014, and 1344.

2. Whether Lawyer would be engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, implicating Rule 8.4(c), such as in the identification of the owner in the preliminary opinion of title for the B to C transaction or in any other aspect. All documentation prepared by Lawyer must be accurate, including identifying the record owner (A) in any preliminary opinion of title for a search period

during which A is the record owner.

Inquiry #7:

If all conflicts, communication, and funding issues are properly resolved, if the transactions are permitted by law, and if no other issues exist that would preclude Lawyer from proceeding with closing these transactions, what accountings must Lawyer do for these closings and to whom must they be provided under Rule 1.15-3(e) and Rule 1.15-3(f)?

Opinion #7:

Accountings are due to A, B, and C pursuant to Rule 1.15-3(e) and (f).

There must be a trust account client ledger and there must be a written accounting of receipts and disbursements (typically in the form of a settlement statement) for the funds provided by B or to which B becomes entitled to possess and use (e.g. under a promissory note) pursuant to Rule 1.15-3(b)(5) and Rule 1.15-3(e) and (f). The written accounting must be provided to B pursuant to Rule 1.15-3(e) and (f). The client ledger and the written accounting must show the receipt of the funds from or on behalf of B, including identification of funds provided for B's use by C, and the disbursements of those funds. *See* Rule 1.15-3(b)(5), (e) and (f). *See also* N.C. Gen. Stat. § 45A-8.

There must be a trust account client ledger and there must be a written accounting of receipts and disbursements (typically

in the form of a settlement statement) for the funds provided by C or on behalf of C. The written accounting must be provided to C pursuant to Rule 1.15-3(e) and (f). The ledger and written accounting must show the receipt of the funds from or on behalf of C and the disbursements of those funds, including any provision of some portion of C's funds to B for B's use in the A to B transaction. *See* Rule 1.15-3(b)(5), (e), and (f). *See also* N.C. Gen. Stat. § 45A-8.

There must be a written accounting of the sales proceeds to which the seller is the beneficial owner upon the recording of the applicable deed provided to each seller under Rule 1.15-3(f). This accounting must show all disbursements made from the seller's proceeds, including all costs and fees deducted from the sales price due to the seller under the applicable contract. *See* Rule 1.15-3(f). *See also* N.C. Gen. Stat. § 45A-8.

Opinion #7 is limited to applying Rule 1.15-3(b)(5), Rule 1.15-3(e), and Rule 1.15-3(f); other authorities and obligations may require documents to be provided to other parties.

Inquiry #8:

Instead of being structured as A to B and B to C transactions, B enters into a contract to purchase with A and assigns his rights under that contract to C. B made the initial contact with Lawyer for representation and expects that Lawyer will also represent C. B does not want A and/or C to know all infor-

mation about the transaction. The assignment documentation does not disclose all information about the transaction, such as the purchase price in the A to B purchase contract and/or the amount of the assignment fee going to B. B wants the settlement statements prepared in a manner that does not disclose all information to A and/or C. Can Lawyer represent B and C and close this transaction?

Opinion #8:

This scenario presents many of the same issues and considerations discussed above. Lawyer must be able to disclose all information about the transaction to client C and cannot close the transaction if he or she cannot do so. Lawyer must be able to be forthright with all parties and must be able to disclose to all parties any information required by law. All documents, closing statements, and deeds prepared by Lawyer must be accurate in all respects. Lawyer must be able to provide accurate accountings to A and C. *See* Opinions #1, #3, #6, and #7.

Inquiry #9:

Could Lawyer represent A, B, and C in these transactions?

Opinion #9:

The same issues and considerations discussed above would apply if Lawyer wished to engage in joint representation of A, B, and C. *See* Opinions #1 through #8. ■

Legal Specialization (cont.)

Q: Has your practice area been impacted substantially by the current pandemic situation?

The pandemic has impacted every industry, including the legal sector. In my practice, the abrupt migration to remote working arrangements, development and implementation of technologies that facilitate remote workforce, and new technologies affiliated with COVID-related initiatives such as contact tracing and other pandemic-specific issues have raised novel privacy questions and data security implica-

tions. All this while the first-of-its-kind omnibus privacy law—the California Consumer Privacy Act—took effect in January 2020, became enforceable in July, and was subsequently amended by a California ballot initiative that just passed in November. Simultaneously, there have been big waves related to European data protection requirements, proposed privacy bills across states and federal levels, and a rapid increase in cyberattacks and data breaches. These (and more) have substantially impacted my practice area and companies (and individuals) in every industry.

Q: What would you say to encourage

other lawyers to pursue certification?

It is a great way to boost your credibility in a competitive area—one that is more recently flooded with nonattorney professionals and even automated technology and packaged products that aim to address compliance and related issues. The rigorous requirements and ongoing commitment demonstrate an elevated level of expertise—well worth the investment. ■

For more information on board certification for lawyers, visit us online at nclawspecialists.gov. The application period for 2021 opened on March 1st.

Amendments Pending Supreme Court Approval

At its meetings on October 23, 2020, and January 15, 2021, the North Carolina State Bar Council voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for its approval. (For the complete text of the rule amendments, see the Fall and Winter 2020 editions of the *Journal* or visit the State Bar website.)

Amendments to the Student Practice Rules

27 N.C.A.C.1C, Section .0200, Rules Governing the Practical Training of Law Students

The rule amendments clarify the different forms of student practice placements outside the law school and the supervision requirements for those placements. In addition, throughout the rules, the term “student intern” is replaced with the term “certified law student” to avoid confusion between student practice in law school clinics and practice placements outside the law school.

Amendments to Rule 1.5, Fees, of the Rules of Professional Conduct

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

Amendments to Rule 1.5 add a specific prohibition on charging a client for responding to an inquiry by a disciplinary authority regarding allegations of professional miscon-

duct by the lawyer; for responding to a Client Security Fund claim alleging wrongful conduct by the lawyer; or for responding to and participating in the resolution of a petition for resolution of a disputed fee filed against the lawyer.

Amendments to the Advertising Rules in the Rules of Professional Conduct

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

Comprehensive amendments to the rules on legal advertising in Section 7 of the Rules of Professional Conduct accomplish the following: strengthen and prioritize the prohibition of false and misleading communications concerning a lawyer’s services; streamline the rules on advertising and eliminate unnecessary or unclear provisions; update the rules to reflect the current state of society and the profession, including the recognition of both technology’s pervasive presence and of the evolution of the consuming public; and enable lawyers effectively and truthfully to communicate the availability of legal services, including utilizing new technologies.

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

Section .0900, Examinations

To comply with social distancing requirements during the coronavirus pandemic,

Highlights

- Proposed amendments to the CLE Rules were published for comment last quarter. The proposed amendments would add a new category of CLE credit called “Diversity, Inclusion, and Elimination of Bias Training,” and would impose a one-hour mandatory requirement in this new category. The proposed amendments received many comments, both in support and opposed. At its meeting on January 14, 2021, the Executive Committee of the council voted to send the comments to the Board of Continuing Legal Education for study.
- A new legal specialty certification in child welfare law is proposed by the Board of Legal Specialization. The proposed new rules appear at the end of this article.

there is a need for additional venues at which to administer the February 2021 bar exam. The amendment to the Board of Law Examiner’s rules will permit the exam to be administered anywhere in North Carolina.

Proposed Amendments

At its meeting on January 15, 2021, the council voted to publish for comment the following proposed rule amendments:

Proposed Amendments to the Rules on

Organization of the North Carolina State Bar

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

The proposed amendments permit

notices for district bar elections for State Bar councilors to be sent via email.

.0802 Election – When Held; Notice; Nominations

(a) Every judicial district bar, in any calendar year at the end of which the term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof ~~directed to him or her. Notice may be sent by email or United States Mail to the at his or her email or mailing address on file with the North Carolina State Bar. Such, which~~ notice shall be placed in the ~~United States Mail, postage prepaid, sent~~ at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice of the election to the North Carolina State Bar, by regular mail or email, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, ~~mail~~ email these notices to the lawyers in the district bar holding the election using the lawyers' email address on record with the North Carolina State Bar. If a lawyer does not have an email address on record, the notice shall be sent by regular mail to the lawyer's mailing address on record with the North Carolina State Bar.

(e) ...

Proposed Amendments to the Rules for Legal Specialization

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

The proposed amendments eliminate a designated time of year for the Board of Legal Specialization's annual meeting, permit notice of meetings by email, and correct references to the Rules of Professional Conduct.

.1714 Meetings

~~The annual meeting of the board shall be held in the spring of each year.~~ The board by resolution may set ~~the annual meeting date~~ and regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, electronic mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business

In Memoriam

Randall David Avram
Raleigh NC

Laurel Otis Boyles
Winston-Salem, NC

John Gay Britt Jr.
Chapel Hill NC

Robert Michael Bruce
Danbury NC

Gilbert Henry Burnett
Wilmington NC

William Baird Cagle Sr.
Asheville NC

Boyd Cleveland Campbell Jr.
Charlotte NC

George R. Clary III
Winston-Salem NC

Richard Leo Crouse
Advance NC

Randy Dean Duncan
Hickory NC

Garth K. Dunklin
Charlotte NC

William Lewis Durham
Myrtle Beach SC

Larry Constantine Economos
Cary NC

John W. Ervin Jr.
Morganton NC

Robert L. Farmer
Raleigh NC

Steven Ira Goldstein
Asheville NC

Robert Louis Gunn
Pittsboro NC

Wilson Hayman
Raleigh NC

Richard Clarke Hendrix
Greensboro NC

Philip Fullerton Howerton Jr.
Charlotte NC

Michael P. Hugo
Raleigh NC

William D. Huskey
Charlotte NC

Steven Kropelnicki Jr.
Fairview NC

Durwood Swindell Laughinghouse
Raleigh NC

John Bonafice Maier
Greensboro NC

Marjorie R. Mann
Asheville NC

John Erle McDonald Jr.
Charlotte NC

Jackson Bruce Morton
Gainesville GA

Kenneth Allen Moser
Winston-Salem NC

Henry Ward Oxendine
Pembroke NC

Timothy Parker
Burlington NC

Mary McLaughlin Pope
Southern Pines NC

Channing Orr Richards
Southport NC

Thomas Sampson Royster Jr.
Oxford NC

Stephen Russell Simmons
Raleigh NC

Frank Walton York
Greensboro NC

shall be four or more of the members serving at the time of the meeting.

.1716 Powers and Duties of the Board

Subject to the general jurisdiction of the council and the North Carolina Supreme

Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty

(1) ...

(8) to cooperate with other boards or

agencies in enforcing standards of professional conduct and to report apparent violations of the ~~Revised~~ Rules of Professional Conduct to the appropriate disciplinary authority;

(9) ...

.1718 Privileges Conferred and Limitations Imposed

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers.

(1) No standard...shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to ~~Canon 6 of~~ the Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law.

(2) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to ~~Canon 6 of~~ the North Carolina Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his or her availability to practice in any field of law consistent with ~~Canon 2 of~~ the Rules of Professional Conduct, even though he or she is not certified as a specialist in that field.

(3) ...

Proposed Amendments to the Rules for Certain Specialty Certifications

27 N.C.A.C. 1D, Section .2700, Certification Standards for the Workers' Compensation Law Specialty; Section .2800, Certification Standards for the Social Security Disability Law Specialty; Section .2900, Certification Standards for the Elder Law Specialty; Section .3000, Certification Standards for the Appellate Practice Specialty; Section .3100, Certification Standards for the Trademark Law Specialty; Section .3200, Certification Standards for the Utilities Law Specialty; Section .3300, Certification Standards for the Privacy and Information Security Law Specialty

The rules for some of the specialty certifications require peer references to be mailed. The proposed amendments will make the rules for the various specialties consistent

with each other and enable the specialization program to send peer reference forms for all specialties by email.

.2705 Standards for Certification as a Specialist in Workers' Compensation Law

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

(a) ...

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in workers' compensation law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ **provided** by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) ...

.2805 Standards for Certification as a Specialist in Social Security Disability Law

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

(a) ...

(d) Peer Review. An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in a jurisdiction in the United States and have substantial practice or judicial experience in Social Security disability law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ **provided** by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) ...

.2905 Standards for Certification as a Specialist in Elder Law

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

(a) ...

(e) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in elder law

or in a related field as set forth in Rule .2905(d). An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ **provided** by the board to each reference. These forms shall be returned directly to the specialty committee.

(f) ...

.3005 Standards for Certification as a Specialist in Appellate Law

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

(a) ...

(d) Peer Review. An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of 10 lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in appellate practice. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

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

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

committee.

(e) ...

.3105 Standards for Certification as a Specialist in Trademark Law

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

(a) ...

(d) Peer Review. An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in trademark law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

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

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

(e) ...

.3205 Standards for Certification as a Specialist in Utilities Law

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

(a) ...

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges

who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in utilities law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

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

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

(e) ...

.3305 Standards for Certification as a Specialist in Privacy and Information Security Law

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

(a) ...

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field to serve as references for the applicant. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than five references may be licensed in another jurisdiction. References with legal or judicial experience in privacy and information security law are preferred. An applicant consents to confidential inquiry

by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application. A lawyer who is in-house counsel for an entity that is the applicant's client may serve as a reference.

(2) Peer review shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) ...

Proposed Amendments to the Plan of Legal Specialization

27 N.C.A.C. 1D, Section .3400, Certification Standards for the Child Welfare Law Specialty [NEW Section]

The proposed rules create a new specialty certification in child welfare law. The standards are comparable to the standards for the other specialty certifications. Bold underlined text is not used because the section is entirely new.

.3401 Establishment of Specialty Field

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

.3402 Definition of Specialty

Child welfare law is a unique area of law that requires knowledge of substantive and procedural rights provided for in the North Carolina General Statutes, Chapter 7B. The cases are complex and multi-faceted both in the issues they present and the number and types of court hearings required by federal and state law. The substantive area includes abuse, neglect, dependency, and termination of parental rights. Knowledge of additional substantive areas is also required such as child custody, the Uniform Child Custody Jurisdiction Enforcement Act, the Interstate Compact on the Placement of Children, the Indian

Child Welfare Act, adoptions, and education law. The cases revolve around children and families that are experiencing significant issues resulting in the government's intervention to protect children's safety while also protecting parents' constitutional rights to parent their children. Child welfare differs from family law/domestic relations in that different laws and procedures apply and the government through a county department of social services is involved.

.3403 Recognition as a Specialist in Child Welfare Law

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

.3404 Applicability of Provisions of the North Carolina Plan of Legal Specialization

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

.3405 Standards for Certification as a Specialist in Child Welfare Law

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

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

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

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of child welfare law but not less than 350 hours in any

one year.

(2) Practice shall mean substantive legal work in child welfare law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in child welfare law focuses on a combination of abuse, neglect, dependency, and termination of parental rights proceedings as governed by N.C.G.S. Chapter 7B ("the Juvenile Code"). Types of work involve staffing cases; advising clients; participating in department of social services' team meeting involving the juvenile and family; preparing for trial; researching, drafting, or editing written pleadings (petitions, motions, responses to motions, written argument to the district court, appellate briefs); representing clients in district court juvenile proceedings, and family law court proceedings with substantial child protective services involvement; participating in oral arguments before the North Carolina appellate courts; consultation on child welfare issues with other counsel and child welfare professionals; authoring scholarly work related to child welfare; and teaching child welfare

(1) at an ABA accredited North Carolina law school, (2) for approved CLE credit at both a North Carolina or national program, (3) for North Carolina professional continuing education requirements, and (4) for prospective and current Guardian ad Litem staff and volunteers.

(4) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of child welfare law for up to two years during the five years prior to application may be substituted for an equivalent number of years of experience necessary to meet the five-year requirement set forth in Rule .3405(b)(1);

(B) Service as a district court judge who has attained juvenile court certification through the AOC in North Carolina. Such certification may count for one year of experience in meeting the five-year requirement.

(c) Continuing Legal Education - To be certified as a specialist in child welfare law,

an applicant must have earned no less than 36 hours of accredited continuing legal education credits in child welfare law/juvenile law and related fields during the three years preceding application. The 36 hours must include at least 27 hours in child welfare/juvenile law; the remaining nine hours may be in related-field CLE. Related fields include family law, adoption law, juvenile delinquency law, immigration law, public benefits law, ethics, education law, trial advocacy, evidence, appellate practice, and trainings on topics including implicit bias, cultural humility, disproportionality, and substance use and mental health disorders. The applicant may request recognition of an additional field as related to child welfare practice for the purpose of meeting the CLE standard.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in child welfare law.

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

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of the law relating to abuse, neglect, dependency, and termination of parental rights, child custody, adoptions, and education law including, but not limited to, the following:

(A) state and federal sources of authority: laws, rules, and policy

(B) the constitutional rights of parents and children and requirements of state intervention

(C) jurisdiction, venue, overlapping proceedings

(D) procedures regarding the petition, summons, and service

(E) how a case enters the court system
(F) central registry and responsible individuals list

(G) parties, appointment of counsel, and guardians ad litem

(H) purpose and requirements of temporary and nonsecure custody

(I) aspects of adjudication and its consequences

(J) dispositional hearings and alternatives

(K) visitation

(L) permanency outcomes

(M) voluntary placements of juveniles and foster care (ages 18-21)

(N) termination of parental rights (TPR) procedure, grounds phase, best interests phase, and legal consequences

(O) post TPR/relinquishment, adoption, reinstatement of parental rights

(P) applicability of rules of evidence and evidentiary standards

(Q) appealable orders, notices of appeal, and expedited appeals

(R) relevant federal laws including, but not limited to, the Uniform Child Custody Jurisdiction Enforcement Act, the Interstate Compact on the Placement of Children, and the Indian Child Welfare Act

(S) confidentiality and information sharing

.3406 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3406(d) below. No

examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3405(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in child welfare law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 42 hours shall be in child welfare/juvenile law, and the balance of 18 hours may be in related field CLE. A list of the topics that qualify as related-field CLE and technical CLE shall be maintained by the board on its official website.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in North Carolina. References must be familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .3405(d) of this subchapter apply to this standard.

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

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3405 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, the application shall be treated as if it were for initial certification under Rule .3405 of this subchapter. ■

Client Security Fund Reimburses Victims

At its meeting on January 14, 2021, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$60,263.08 to ten applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$1,200 to a former client of Lisa D. Blalock of Laurinburg. The client retained Blalock for representation on criminal charges. Blalock failed to provide any meaningful legal services to the client before she was disbarred on February 24, 2020. The board previously reimbursed five other Blalock clients a total of \$4,190.

2. Awards of \$11,070 and \$523 to former clients of George L. Collins of Jacksonville. In the first instance, clients retained Collins to represent them in a will caveat proceeding and paid his \$12,000 flat fee plus \$500 for costs. Collins provided two hours of legal services and paid \$230 in costs prior to surrendering his license. Collins failed to inform his clients of his inability to continue representing them, to withdraw from the matter, and to return the unearned portion of his fee and costs. The second client retained Collins to handle a speeding ticket. Collins failed to provide any meaningful legal services to the client before he was disbarred on December 31, 2019. Collins died on April

16, 2020. The board previously reimbursed two other Collins

clients a total of \$35,000.

3. An award of \$1,221.30 to a former client of Matthew C. Coxe of Jacksonville. Coxe had an ongoing arrangement with a homeowners' association to attempt to collect unpaid dues from delinquent homeowners and file a lien if the dues remained unpaid. Coxe would collect his fee from the amount collected from the delinquent homeowner. Pursuant to that arrangement, Coxe collected unpaid dues from one delinquent homeowner and negotiated the check without paying anything to the HOA. Coxe's license was suspended on September 9, 2019. The board previously reimbursed one other Coxe client a total of \$2,500.

4. An award of \$2,500 to a former client of Bruce T. Cunningham Jr. of Southern Pines. The client retained Cunningham to file an MAR. Cunningham died on July 5, 2019, before he could provide any meaningful legal services to the client. The board previously reimbursed several other Cunningham clients a total of \$93,575.

5. An award of \$123.12 to former clients of John O. Lafferty Jr. of Lincoln. Lafferty was the closing attorney for the clients' sale of real property. Lafferty collected an escrow payment from the buyers and issued a check to his clients, but failed to deliver the check or otherwise tender payment to them before he was disbarred on May 5, 2019. The board previously reimbursed several other Lafferty clients a total of \$148,063.94.

6. An award of \$600 to former clients of Bradley S. Moree of Wrightsville Beach. Moree was the closing attorney for the clients' sale of real property. Moree collected funds from the sellers for the purchase of a home warranty, but failed to disburse those funds to the home warranty company. When the clients discovered they had no warranty coverage and complained, Moree sent a check for the actual cost of policy premium to the warranty company and a check for the balance of funds to the clients. Both checks were returned for insufficient funds. Moree was placed on disability inactive status on April 2, 2020.

7. An award of \$40,000 to an estate that suffered a loss due to the conduct of Richard C. Poole of Greenville. Poole represented the defendant in an action brought against her by the executors of an estate. Poole deposited settlement proceeds for the matter into his trust account and did not disburse the settlement proceeds to the estate before his trust account was frozen pursuant to an Order of Preliminary Injunction. Poole was suspended December 6, 2019.

8. An award of \$1,516.66 to a former client of Carlos D. Watson of Charlotte. Watson represented the client on a personal injury claim arising from an automobile accident. When Watson settled the matter, he had been enjoined from handling entrusted funds, and the settlement proceeds were deposited into his law partner's trust account. The law partner disbursed a portion of the settlement funds to the client and one of the medical providers, but failed to make all the appropriate disbursements. Watson was disbarred on December 18, 2017.

9. An award of \$1,509 to a former client of Patricia L. Wilson of Linville. The client retained Wilson to prepare estate planning documents for her and her husband. Wilson failed to provide any meaningful legal services to the client prior to her death on October 2, 2019. ■



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Law School Briefs

Campbell University School of Law

Campbell Law School Dean J. Rich Leonard is helping lead deans from more than 50 US law schools to examine and address legal issues in policing and public safety. The American Bar Association (ABA) has announced the formation of a Legal Education Police Practices Consortium to contribute to this national effort that will include conduct, oversight, and the evolving nature of police work. Leonard is one of only ten law school deans who will lead the consortium's advisory committee. Campbell Law is the only North Carolina law school to join the consortium at this time. "I was one of about six law school leaders who came up with the idea for the consortium," Leonard explained. "We were all trying to do our own thing and realized, when we started talking, that we could have a much more significant impact if the law schools would work together to address this systemic issue." Drawing on the geographic diversity of the ABA, the participating law schools, and their networks, the consortium will advance the widespread adoption of model police practices and initiate other projects designed to support effective policing, promote racial equity in the criminal justice system, and eliminate tactics that are racially motivated or have a disparate impact based on race.

Campbell Law School and William Peace University have partnered to create an accelerated dual degree option for students seeking to earn undergraduate and juris doctor degrees. Under the 3+3 accelerated dual degree program, WPU students can earn an undergraduate degree and a juris doctor from Campbell Law in six years rather than seven, saving both time and money. In addition to the William Peace partnership, Campbell Law also has a 3+3 program in place for undergraduates attending Meredith College and Salem College as well as Methodist and Campbell Universities.

Duke Law School

The Duke Law community and Wrongful Convictions Clinic celebrated the pardon of client Ronnie Long by North Carolina Governor Roy Cooper in December. The clinic secured Long's release and exoneration in August after he was convicted and incarcerated for 44 years for a 1976 rape he did not commit.

Robinson O. Everett Professor of Law Nita Farahany JD/MA '04, PhD '06 has been inducted as a fellow of the American Association for the Advancement of Science (AAAS), an honor that recognizes important contributions to STEM disciplines, including pioneering research, leadership within a given field, teaching and mentoring, fostering collaborations, and advancing public understanding of science. Farahany, who also is a professor of philosophy, director of the Duke Initiative for Science & Society, and chair of the Duke MA in Bioethics & Science Policy, is a leading scholar on the ethical, legal, and social implications of emerging technologies. She was elected as a fellow by her peers for "distinguished contributions to the field of neuroethics, enabling responsible and equitable development and implementation of new knowledge and technologies in neuroscience," according to the organization's announcement.

The *Oxford Handbook of Comparative Foreign Relations Law*, edited by William Van Alstyne Professor of Law Professor Curtis Bradley, is being honored by the American Society of International Law (ASIL) with its inaugural Robert E. Dalton Award for Outstanding Contribution in the Field of Foreign Relations Law. Published in 2019, the handbook includes scholarship resulting from a series of conferences Bradley organized with leading international experts to lay the groundwork for comparative foreign relations law as a new area of teaching and study. He was supported in doing so, in part, through his receipt in 2016 of an Andrew Carnegie Fellowship

and accompanying award from the Carnegie Corporation of New York.

Elon University School of Law

Former NC Supreme Court justice named visiting distinguished jurist in residence—The Honorable Mark Davis, who authored more than 500 judicial opinions on virtually every area of law while serving on the North Carolina Supreme Court and the North Carolina Court of Appeals, has joined the Elon Law faculty where he will lead courses on the judicial process, assist in teaching criminal law, and assist with the supervision of students completing Elon Law residencies-in-practice in judicial chambers. Davis also will convene and moderate panels on the law for the greater community.

Federal judge to law grads: "Always believe in justice"—Chief Judge Roger L. Gregory of the US Court of Appeals for the Fourth Circuit tasked Elon Law's Class of 2020 with making sure "the world knows that equal justice under law is not just for a few people, but for everyone" when he delivered the commencement address to 122 graduates in a December ceremony. "Always believe in justice. Work hard. Be creative. Be resilient," he said during a program moved online due to the COVID-19 pandemic. "Every person is important." Julianna Kober L'20 received the law school's 2020 David Gergen Award for Leadership & Professionalism, the school's highest honor, at the ceremony.

Class gift honors memory of former Elon Law dean—Graduates from the Class of 2020, with the generosity of faculty, staff, alumni, students, and families, raised more than \$7,300 in support of the law school's student emergency fund and to memorialize Dean Emeritus George R. Johnson Jr., who died in November following a lengthy illness. The gift was presented to Dean Luke Bierman at the conclusion of an annual awards program recognizing outstanding achievement in each graduating class.

Joining the presentation on December 11, 2020, was Dr. Linda Morris, Johnson's wife.

University of North Carolina School of Law

Faculty answer election questions for the community—In the days following the election, law and politics experts at UNC-Chapel Hill hosted a series of seven Q&A webinars to provide the community with an opportunity to discuss answers to their questions about a contentious election that happened in the midst of a global pandemic.

UNC School of Law releases higher education equity report—Together with UnidosUS and UNC Center for Community Capital, Professor Kate Elengold released the first report arising out

of a generous grant from Lumina Foundation to study the relationship between debt, achievement, and equity in higher education, with a specific focus on Latino students.

UNC establishes the country's first Critical Race Lawyering Civil Rights Clinic—Run by Professor Erika Wilson, the clinic teaches students how to merge the theoretical frameworks offered by critical race theory with lawyering practice. Wilson says other law schools have already inquired about how they might use critical race theory to inform their own clinic pedagogy.

Faculty books—Professor Kevin Bennardo's book *Thinking and Writing About Law* was published by Carolina Academic Press. Professor Michael Gerhardt's book *Lincoln's Mentors: The*

Education of a Leader was published by HarperCollins.

Recruiting rural law students—Carolina Law alumnus Douglas Freedle '65 donated \$1 million to support incoming law students from rural North Carolina. Freedle's gift counts toward the Carolina Edge, the campaign for Carolina's commitment to raise \$1 billion for scholarships for students at every level.

Faculty's scholarship cited by the US Supreme Court in 2020—Three Carolina Law faculty members were cited by the Supreme Court of the United States. Fourteen were cited 30 times in state and federal courts.

Earn CLE credit—Satisfy your annual CLE requirements with virtual programming through UNC. Visit law.unc.edu/cle. ■

Lawyer Assistance Program (cont.)

It's normal, rational, for me to be anxious, even fearful, about the coronavirus pandemic. But instead of living my days in that fear, when I analyze the facts, I can appropriately act upon them. I see what I can and should do (or not do), take any necessary action, and live my life—carefully.

HALT

In my early recovery I was told, repeatedly, "Don't get too Hungry, Angry, Lonely, or Tired." And it was amazing to discover how out of touch I was with myself in those seemingly simple arenas. In the early days I used this slogan as a touchstone to come back to internal balance. In an effort to keep it simple today in the time of the coronavirus, it helps to remember this simple slogan. If I remember to HALT, I am much less likely to spiral emotionally (inside my head) or become too reactive to the people in my life (family, co-workers, opposing counsel, the person in front of me at the grocery store who does not understand exactly how to properly use gloves or a mask).

Attitude of Gratitude

I can't tell you how many times in my recovery journey I've found myself accepting an invitation to a one-person pity party. And

without exception, my sponsor would tell me to make a gratitude list. I would do it—sometimes quickly and sometimes slowly—but I would do it. And without fail, my mental state would change. During this challenging time, I try to keep an attitude of gratitude even while acknowledging there really is something to be distressed about. Being grateful doesn't mean being in denial about what is going on. It means that once we face our feelings about the circumstances, we can choose to shift our focus. With my focus shifted, I find there is always something, no matter how small, I can be grateful for: the tulip that bloomed in my yard, food in my refrigerator, online shopping, FaceTime, a good book and time to read it. And if in any moment I can find nothing else to say thank you for, at least for today, I am grateful to be sober.

KISS

Years before I became a lawyer, I had KISS ("Keep It Simple Stupid") drilled into my head in the army. Back then it meant that I needed to forget everything else and learn how to be a soldier. Later, when life got more complicated, it meant that I had to get out of my own head and focus instead on those things that were most important, and let go of those things that were out of my control. So today, as life seems very complicated and sometimes even dangerous, I come back to KISS and concentrate on those things that really are important. Like

health. Without the gym to go to, I've been finding some innovative ways to exercise, like walking outside and communing with nature. Like connections. Even before coronavirus I knew that total isolation was a bad place. Now I wish I had had the prescience to buy Zoom stock because I am constantly using it to connect with extended family, co-workers, clients, and others. Like limiting my screen time. Thinking that I needed to stay informed about COVID-19, I spent a lot of time watching the news channels. Before long, I found that too much screen time really wasn't healthy. Now I catch up with about a half-hour broadcast at night that avoids politics like the plague. Like practicing kindness. With all the craziness in the world, it's time to treat everyone, even those who aren't particularly likable, with heart-felt kindness. If we can do that, we'll all get through this together. ■

Robynn Moraites is the director of the North Carolina Lawyer Assistance Program.

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. For more information, go to nclap.org or call: Cathy Killian (Charlotte/areas west) at 704-910-2310, or Nicole Ellington (Raleigh/down east) at 919-719-9267.



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