THE NORTH CAROLINA STATE BAR

JOURNAL

FALL
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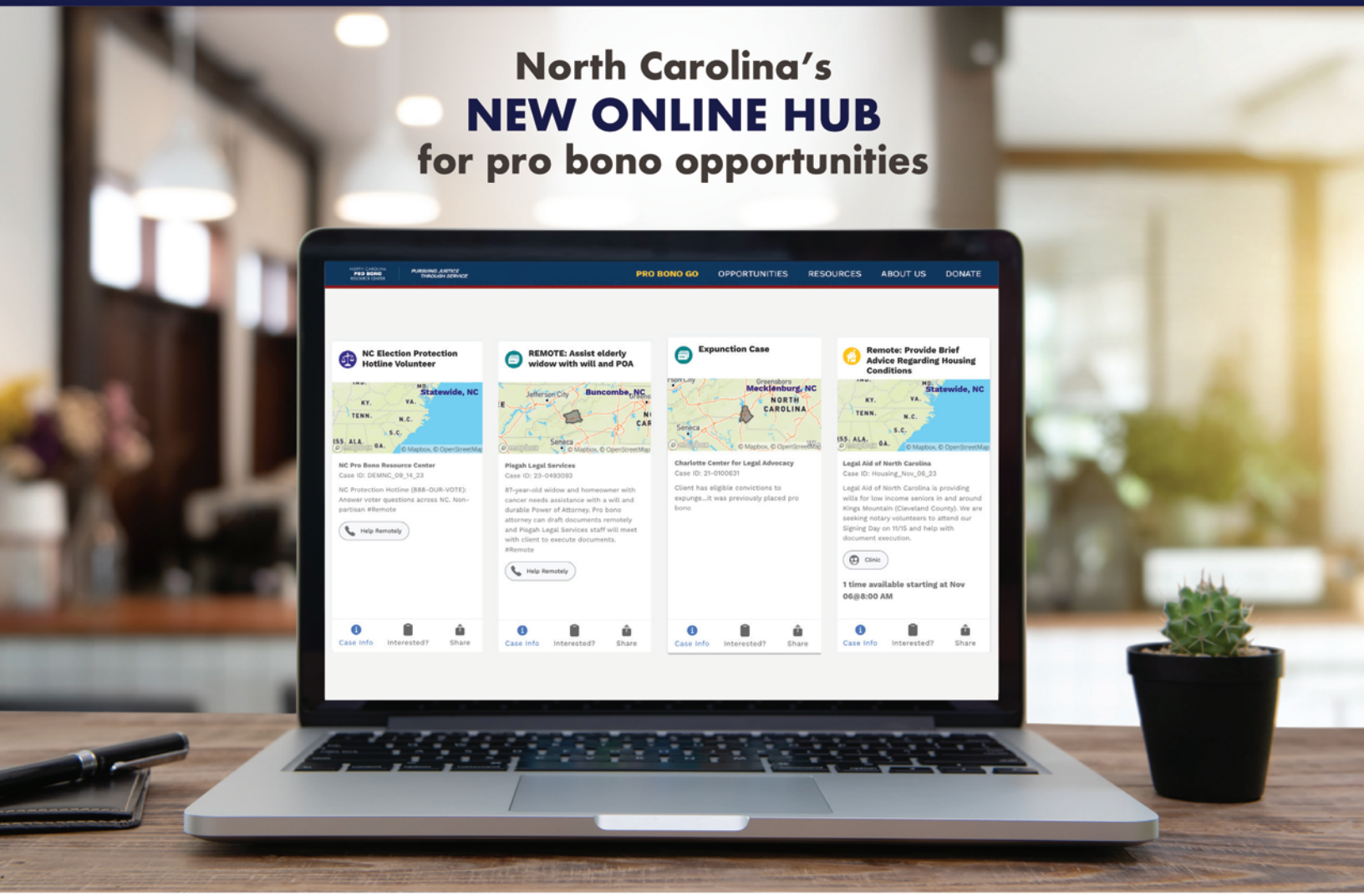

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Publication of an article in the Journal *is not an endorsement by the North Carolina State Bar of the views expressed therein.*

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Silver Linings of Challenges and Transitions

By A. Todd Brown

My year-long tenure as North Carolina State Bar president is quickly drawing to a close. Each passing day fills me with a profound sense of humility and pride for what we have accomplished together and the State Bar's bright future. Serving as State Bar president has been one of the greatest honors of my professional career. I deeply appreciate the support and kindness so many of you have shown me during this journey. I remain humbled and awed by the opportunity to hold this esteemed office.

At my swearing-in ceremony on October 26, 2023, I stated that my time in office would focus on a simple goal: "Leave the North Carolina State Bar better than I found it." I envisioned a term characterized by measurable progress driven by a steadfast commitment to the principles that guide our noble profession. I anticipated a term interspersed with periods of relative calm. I hoped for actions and deeds that supported the State Bar's mission to protect the public and preserve the integrity of the legal profession, including:

- enhancing State Bar governance, programs, and initiatives;
- increasing transparency in our actions and deeds;
- supporting the implementation of a broad-based modernization of the State Bar's staff compensation system;
- demonstrating good stewardship of the State Bar's resources;
- promoting greater collaboration and broader participation in our State Bar by cultivating and enhancing key internal and external relationships;
- assisting lawyers in practicing law in a fast-paced, technologically evolving, and economically challenging environment;
- expanding opportunities for lawyer networking, professional development, education, training, mentoring, and CLE options;
- advocating for strengthening the rule of law and maintaining an independent judiciary and self-regulated profession;
- championing professionalism and ethical behavior; and
- broadening access to justice and equality for citizens.

Thanks to the collective efforts of the council and State Bar professional staff, I am confident that we have made significant strides toward achieving these objectives.

However, upon starting and throughout my tenure, we also encountered potential obstacles to progress. We faced both external challenges and internal transitions that proved pivotal for improving State Bar governance and operations and for transforming the State Bar into an institution prepared for the future. Forward-thinking Bar leaders understand that managing expected or unexpected external and internal developments is a part of their role. They also recognize that these matters can present prime opportunities for timely and innovative change. A few examples illustrate the point.

External Challenges

Legislative—By December 10, 2023, the State Bar had "welcomed" and commenced an evaluation of its lawyer discipline apparatus by the General Assembly's newly established seven-member State Bar Review Committee. The committee's task was to review and examine the State Bar's grievance rules, procedures, and policies to address concerns related to due process for lawyers accused of misconduct, including the catchall role of examining "[a]ny other area the committee deems concerning or needing improvement." The committee was required to complete its work and submit its recommendations in a report submitted to the General Assembly by April 1, 2024.

The establishment of the State Bar Review Committee turned out to be a watershed moment for relationship building. The comprehensive examination of our grievance process by external stakeholders provided an opportunity for principled engagement and active collaboration with our Office of Counsel. This collaboration resulted in a heightened understanding of perspectives and needs, and led to measured improvement in the efficiency, fairness, and accountability of our process. The committee's final report included five recommendations intended to enhance the lawyer discipline process, improving the regulation of our

legal profession, and maintaining the protection of the public. Importantly, this collaborative stakeholder effort allowed us to publicly showcase the outstanding leadership and talent within our Office of Counsel and State Bar leadership.

Litigation—By January 4, 2024, the case of *Polaski, et al. v. Lee et al.* had been filed in federal district court, challenging the constitutionality of our unauthorized practice of law (UPL) statutes, initially naming only Attorney General Josh Stein as the defendant. By March 18, 2024, the plaintiffs had amended their complaint, dismissing the attorney general and substituting five North Carolina district attorneys and me as defendants. The plaintiffs—two North Carolina certified paralegals and an unincorporated nonprofit association—alleged that the State Bar was violating their federal First Amendment rights by asserting that their desired acts (i.e., to give legal advice to North Carolinians about how to complete court-created legal forms) constituted the unauthorized practice of law. They sought court-sanctioned approval to provide legal advice to the public for free and for a fee, as well as without lawyer supervision.

As of my submission of this message, the paralegals' suit awaits the federal district court's ruling on the defendants' motions to dismiss for failure to state a claim. Controlling precedent of the Fourth Circuit Court of Appeals on the arguments and claims advanced in *Polaski* indicates that the plaintiffs are not likely to prevail. The State Bar's vigorous defense of lawsuits challenging our actions and decisions allows us to affirm the propriety of our policies, procedures, and rules, which are designed to protect the public and preserve the integrity of the legal profession.[1]

By effectively addressing and skillfully navigating unexpected external challenges, organizations like ours can emerge more robust, adaptive, and mission-focused with refined strategies, improved practices, and a stronger foundation for continued growth and success. Successfully overcoming external challenges fosters innovative thinking and problem-solving skills within the organization, reinforcing a culture of collaboration and perseverance, and boosting employee morale and cohesion.

Internal Transitions

Opportunities abound for organizations that intentionally and effectively manage and leverage the benefits arising from changes in senior leadership. Fresh perspectives, strategic realignment, organizational agility, streamlined operations, knowledge transfer, culture rejuvenation, empowered teams, enhanced employee morale, stakeholder engagement, and leadership development programs are just a few of these benefits. This past year, the State Bar has experienced two significant, unexpected internal transitions.

New Counsel—After 18 years of excellent service and leadership in the Office of Counsel, Katherine Jean transitioned from the role of State Bar counsel to an "of counsel" position effective November 1, 2023. In her new role, Katherine assisted with the transition to the new counsel and continues to handle complex grievances. Then-President Marci Armstrong promptly appointed Deputy Counsel Carmen Bannon as "interim counsel" of the Office of Counsel. Following a national search, on December 19, 2023, the officers recommended Carmen be appointed permanent counsel of the State Bar's Office of Counsel, a recommendation that the State Bar Council unanimously accepted and approved that day.

The seamless transition to a new counsel for the Office of Counsel was a significant milestone. This senior leadership change was instrumental in restructuring, reimagining, and redefining our lawyer discipline process, ensuring it remains principled, fair, transparent, respected, and effective. Carmen's leadership, litigation experience, organizational insight, management ability, people skills, innovation, collaboration, teamwork, and problem solving are already making a noticeable impact as the State Bar continues to pursue its mission to protect the public and regulate the legal profession.

New Executive Director—Perhaps the most seismic, unexpected transition this past year is Alice Mine's well-earned decision to retire after over 30 years of dedicated and excellent service to our State Bar, first as chief ethics counsel and later as our esteemed executive director/secretary. Alice officially announced her retirement on July 18, 2024, effective December 31, 2024. Alice's service as executive director/secretary for the past five and a half years has exemplified the epitome of honor, integrity, excellence, leadership, and professionalism. Her vast contributions to the State Bar and our profession are invaluable and immeasurable. Alice is indeed irreplaceable; there is only one of her.

To facilitate a timely transition, I have appointed members of both an Executive Director Search Committee and a Screening Subcommittee of the Search Committee. These committees are actively working through a national search process to identify a new executive director. The expectation is that the process will result in the hiring and announcement of the new executive director/secretary during the State Bar's Annual Banquet & Installation of Officers in late October 2024. Following this, Alice will remain a vital part of our State Bar family to help mentor and assist the new executive director with a seamless transition.

Alice's retirement marks the end of an era. We are immensely and eternally grateful for her unwavering and outstanding service and leadership. Yet, this internal transition also presents an opportunity for the State Bar to benefit from the advantages of a change in senior leadership and to embark on a new era of positive change and future success.

Finally, I want to reiterate in this last President's Message what I proudly proclaimed upon taking office:

> The men and women who work at the State Bar are dedicated and talented, some of the best and brightest in our legal profession. They do the heavy lifting and keep the trains running, ensuring that we officers and councilors stay within our mandated lanes of self-regulation and public protection. They are true assets to the State Bar.

This past year, your State Bar professional staff's excellent work and strong leadership have justified these remarks. I am confident they will continue to be highly valued assets for many years to come.

From this and prior presidencies, I know that a Bar president's window of opportunity to effect positive change is brief—less than a year. I also understand that unforeseen developments can derail even the best laid plans. Reflecting on my time in office, I am tremendously proud of my administration's dedication, intentionality, support, and accomplishments, which have allowed me to pursue my earnest goal to leave this place better than I found it. I hope and trust that our collective actions

and good deeds will leave a lasting, positive impact on the public we serve, the legal profession we regulate, and the State Bar we cherish. Whether we succeeded, I leave for others to judge.

So, like the 88 State Bar presidents before me, I now move seamlessly and without fanfare toward the cherished role of "past-president," always at the ready to support our council and next president. As I hand over the reins to our most capable President-Elect Matt Smith, and offer my commendations to Past-President Marci Armstrong, I am at peace, believing that the good work achieved this year has strengthened the already solid foundation laid by those who came before me.

I look forward to supporting our State Bar's transformative evolution and continued pursuit of excellence. Thank you for the honor and privilege of serving as your 89th president. ■

Mr. Brown is a partner with Hunton Andrews Kurth in Charlotte.

Endnote

1. January was an active month. By January 26, 2024, in *Polidi v. Boente, et al.*, along with eight other federal and state lawyers, I also had been sued in federal court by a disbarred North Carolina lawyer who claimed that I and others allegedly violated his rights by withholding exculpatory evidence and ignoring a conflict of interest during his disbarment proceedings, among other things. Fortunately, on July 26, 2024, the federal district court dismissed the *Polidi* suit with prejudice for failure to state a claim for relief, subject to standard appeal rights.

IMPORTANT NOTICE REGARDING STATE BAR EMAILS

As a member of the North Carolina State Bar, you are routinely sent critical emails regarding dues notices, CLE report forms, etc. To increase efficiency and reduce waste, many reports and forms that were previously sent by US mail will now only be emailed. To receive these emails, make sure you have a current email address on file with the State Bar. You can check membership information by logging into your account at portal.ncbar.gov.

If you have unsubscribed or fear your email has been cleaned from our email list, you can resubscribe by going to bit.ly/NCBarSubscribe.

Thank you for your attention to this important matter.

The Corporate Transparency Act: Case Law Update and Determining Beneficial Owners

By Heyward Armstrong, Benji Jones, and Dawson Kirkland

Effective as of January 1, 2024, the Corporate Transparency Act and rules issued thereunder by the Financial Crimes Enforcement Network (FinCEN) (collectively, the CTA) require most US entities and foreign entities registered to do business in the United States to file reports with FinCEN disclosing information about the entity and its beneficial owners (BOI Reports). This article provides an update on a recent case involving the CTA, a reminder on reporting deadlines, and information regarding the determination of a company's beneficial owners.

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Federal District Court Case Rules the CTA Unconstitutional – But Most Companies Still Must Comply

On March 1, 2024, the US District Court for the Northern District of Alabama ruled that the CTA is unconstitutional in response to a lawsuit brought by the National Small Business Association (NSBA) and one of its individual members, Isaac Winkles. The lawsuit challenged the constitutionality of the CTA on various grounds, including allegations that the CTA's reporting requirements exceed Congressional authority under Article I of the US Constitution, and violates the First, Fourth, Fifth, Ninth, and Tenth Amendments. The court held that the CTA is unconstitutional because it exceeds Congress's enumerated powers, rejecting the government's arguments that the CTA is authorized under the foreign affairs powers, the Commerce Clause, and the taxing powers. How-

ever, the court remained silent regarding the plaintiffs' allegations that the CTA violates the specified amendments. In connection with the ruling, the court also enjoined the federal government from enforcing the CTA as to the plaintiffs in the case. However, this injunction does not extend beyond those plaintiffs.

In response to the court's ruling, FinCEN issued a statement declaring that while the litigation is ongoing, FinCEN will continue to implement the CTA with reporting companies, but will comply with the court's injunction as to Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial owner or company applicant, the National Small Business Association, and members of the National Small Business Association as of March 1, 2024. FinCEN's statement acknowledges that those individuals are not required to report beneficial ownership information to FinCEN at this time; however, any other reporting companies are still required to comply with the CTA.

Companies should continue to monitor further proceedings in this case, which the government has appealed to the United States Court of Appeals for the Eleventh Circuit, as well as any similar lawsuits filed in other courts regarding the constitutionality of the CTA.

Deadlines For BOI Reports

In the meantime, the CTA filing deadlines remain in effect for most companies, and we recommend that companies prepare to meet these upcoming deadlines. Specifically, for entities formed on or after January 1, 2024, and before January 1, 2025, BOI Reports must be filed with FinCEN within 90 days of formation, unless one of the CTA's 23 exemptions applies. For entities formed on or after January 1, 2025, if required, BOI Reports must be filed with FinCEN within 30 days of formation. We recommend that any newly formed entities consider these short deadlines in connection with entity formation, and prepare in advance so they are able to meet the applicable deadlines.

With respect to entities formed before January 1, 2024, if required, BOI Reports must be filed with FinCEN by January 1, 2025. We recommend that companies subject to the January 1, 2025, deadline prepare in advance to allow sufficient time to analyze beneficial ownership, coordinate with beneficial owners, and prepare the required filings, particularly entities with complex capital structures, multiple entities, and/or large numbers of beneficial owners.

Assessing and Disclosing Beneficial Ownership Information

Unless a reporting exemption applies, the CTA requires each reporting entity to disclose specific personal information about all natural persons who, directly or indirectly:

- exercise substantial control over the entity; or
- own or control 25% or more of the ownership interests in the entity.

Note, however, that if a beneficial owner owns or controls their ownership interests in a reporting company exclusively through multiple exempt entities, then the names of all of those exempt entities may be reported to FinCEN instead of the individual beneficial owner's information.

Determining Substantial Control

An individual has "substantial control" over a reporting company if the individual:

- serves as a senior officer;
- has authority over appointment or removal of any senior officer or a majority of the board of directors (e.g., as a director);
- directs, determines, or has substantial influence over important decisions of the company (such as decisions regarding the nature and scope of the company's business, the company's structure, major financial decisions, compensation of senior officers, significant contracts, governance documents, etc.); or
- has any other form of substantial control.

An individual may exercise substantial control over a reporting company directly or indirectly through board representation, ownership, or control of a majority of the voting power or voting rights of the reporting company; rights associated with a financing arrangement with the reporting company; control over one or more intermediary entities that individually or collectively exercise substantial control; arrangements or relationships (formal or informal) with other individuals or entities acting as nominees; or other contracts, arrangements, or understandings.

Determining 25% Ownership Interest

Beneficial ownership information is also required from any natural person who, directly or indirectly, owns or controls 25% or more of the ownership interests in the entity. "Ownership interests" are not limited to traditional shares of stock, membership interests, or partnership interests and may include:

- equity, stock, or similar instruments;
- capital or profits interests;
- instruments convertible into any share or instrument described above, futures on any such instrument, or warrants or rights to purchase, sell, or subscribe to any such instrument;
- puts, calls, straddles, or other options to buy or sell any of the items described above; and
- other instruments, contracts, arrangements, understandings, relationships, or other mechanisms used to establish ownership.

"Ownership or control" may be direct or indirect, including control through any contract, arrangement, or understanding including:

- joint ownership;
- ownership through another individual acting as a nominee, custodian, or agent;
- ownership or control of one or more intermediaries that individually or collectively own or control ownership interests of the reporting company; and
- for trusts holding ownership in a reporting company: a trustee, beneficiary, or grantor.

Ownership is calculated on a fully-diluted basis, as if all options, warrants, and similar instruments are fully exercised, and calculations are performed on the ownership interests as they stand at the time of the calculation. For entities treated as partnerships for federal income tax purposes and any other entities that issue capital or profit interests, an individual's percentage ownership is calculated as a percentage of the total outstanding capital and profit interests of the entity (the "Capital Rule"). For corporations, entities taxed as corporations, and those that issue stock, an individual's percentage ownership is calculated by taking the greater of (i) the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote (the "Voting Rule") or (ii) the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests (the "Value Rule").

If any of these calculations cannot be performed with reasonable certainty, then the individual is deemed to hold 25% or more of the total ownership interests in the reporting company if the individual owns or controls

25% or more of any class or type of ownership interests (the "Catch-All Rule").

Reporting companies with a complex capital structure (i.e., one utilizing SAFEs, convertible debt instruments, waterfall provisions, liquidation preferences attached to preferred stock, profits interests, etc.) will likely need to rely on the Catch-All Rule because they will not be able to calculate beneficial ownership "with reasonable certainty" under either the Capital Rule (for entities taxes as partnerships for federal income tax purposes), or the Voting Rule or the Value Rule (for entities taxed as corporations and those that issue stock) because, for example, (i) the conversion ratio into the underlying security of certain convertible interests—such as SAFEs and/or convertible notes—is not determinable at the time the calculation is performed or (ii) the entity's ownership interests—such as preferred stock, membership interests, or profits interests—may have multi-tiered distribution arrangements or liquidation preferences and no reliable aggregate valuation is available to be used to calculate ultimate percentage ownership.

To apply the Catch-All Rule, a reporting company must identify each "class or type of ownership interests" that exists within a reporting company's capital structure. FinCEN has not yet provided detailed guidance on identifying and segregating each "class or type of ownership interest." Aggregating or over-generalizing "classes" or "types" of securities for purposes of this analysis may reduce the number of beneficial owners required to be reported (thus resulting in a less-burdensome disclosure), but may also subject reporting companies to the risk of noncompliance and penalties due to under-inclusive reporting. We recommend that reporting companies work with their advisors to conduct this analysis and continue to monitor CTA guidance and market practice as it evolves.

For individuals who have an indirect interest in a reporting company through an ownership interest in a holding company that has an ownership interest in the reporting company, the individual's ownership percentage in the reporting company is calculated by multiplying the individual's ownership percentage in the holding company by the holding company's ownership percentage in the reporting company.

Use of FinCEN Identifiers to Streamline Reporting Obligations

A reporting company may provide a FinCEN identifier ("FinCEN ID") in lieu of a company applicant's and/or beneficial owner's personal information at the time of filing. The use of FinCEN IDs allows the reporting company to reduce its handling of potentially sensitive personal information. In addition, providing a FinCEN ID in lieu of the individual's personal information eliminates the need for a reporting company to file an updated BOI Report when the personal information of a beneficial owner changes (for example, a change in the beneficial owner's name, address, driver's license number, etc.), as the individual is obligated to keep such information updated directly with FinCEN.

The information in this article is based on the CTA and FinCEN guidance in effect as of the date hereof, and updates may be necessary as FinCEN provides additional information and market practice regarding CTA filings and requirements becomes more settled. ■

This article was originally published on SmithLaw.com on April 23, 2024, and has been republished here with permission by Smith Anderson.

Heyward Armstrong joined Smith Anderson in July 2006, where his practice focuses on corporate and securities law, including advising companies and their officers and directors on public company securities compliance, public and private offerings, mergers and acquisitions, divestitures, and corporate governance matters. Heyward leads Smith Anderson's Public Companies practice group.

Benji Jones has practiced law as a corporate attorney for more than 20 years, and her experience includes representing public and private companies on a broad spectrum of legal issues. She regularly represents businesses in public equity and debt offerings, domestic private placements, crowdfunding, other non-traditional private offerings and repurchase programs, public company securities compliance, corporate formation and governance, early-stage financing for start-up and growth companies, mergers and acquisitions, and strategic contracting.

Dawson Kirkland joined Smith Anderson in 2021, where her practice focuses on corporate and transactional law, advising public and private clients of all sizes on mergers and acquisitions, divestitures, equity investments, corporate governance, and other business law matters across a variety of industries.

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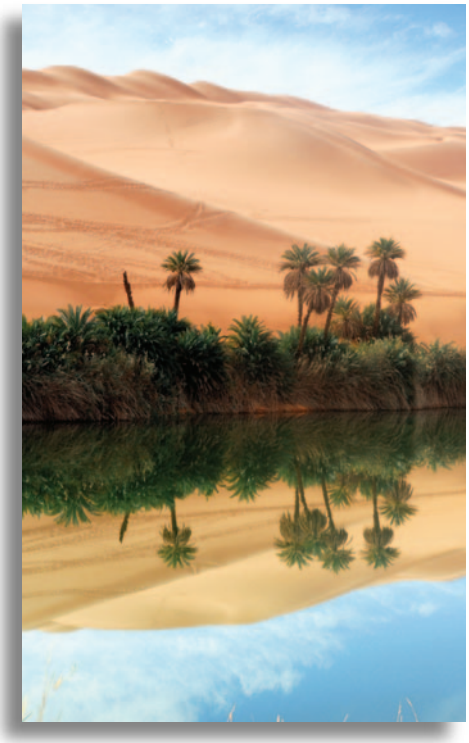
Opportunities to Practice in a Legal Oasis

By James "Jimbo" Perry

On August 31, 2023, a Legal Desert Summit occurred at the NC State Bar Building in Raleigh. The summit was called by Chief Justice Paul Newby and then-President Marcia Armstrong. Thirty presenters shared the status of legal deserts in North Carolina and proposed potential solutions to this crisis.



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First, Dan Alexander, a former Royal Navy marine, shared that his military training reminds us that the way to address a seemingly insurmountable problem is to take small, consistent steps in areas we can control. President Armstrong emphasized that all the solutions to the problem are worth pursuing.

This article is a summary of lessons learned at the summit. Furthermore, I will update the progress being made across the state to meet this need.

Redefining Legal Desert

Technically, a legal desert is an area that has less than 1 lawyer per 1,000 people. In North Carolina, almost half of our counties (48/100) meet this definition. One county has zero lawyers, with more counties having only one lawyer. In contrast, from the public's perspective, a legal desert arises whenever an individual either cannot find or afford an attorney to meet a legal need. This can occur anywhere. We learned that a staggering 86% of civil legal needs go unmet. An even higher percentage (91%) of the public find cost to be a barrier to obtaining an attorney. Legal Aid of NC is part of the solution; however, there is only one Legal Aid lawyer per 8,000 people who qualify. Legal Aid simply does not have the resources to meet this demand. A menu of solutions from full representation to self-represented litigant assistance is needed. Additionally, 73% of people charged with crimes need public defense. Public Defenders and IDS attorneys handle caseloads nearing 400. So, when considering a legal desert, please remember that any location not having attorneys to provide needed services should be considered a legal desert.

Relabeling Legal Desert to Legal Oasis

The first time I participated on a law school panel encouraging students to live and work in underserved areas, the panel was promoted as Exploring Opportunities to Work in a Legal Desert. No one showed. Who wants to work in a desert? However, when we relabeled the presentation to Exploring Opportunities to Work in a Legal Oasis (and served pizza) we had over 70 law students attend.

Our panel shared about the challenging work and life benefits of living in a small, underserved community. Relationships, work-life balance, control over schedules, and cost of living were compelling reasons why one might

consider living in a legal oasis community. Over two-thirds of lawyers experience high anxiety, and almost one-third battle substance abuse or mental health issues. Therefore, it is not a stretch to state that a community without enough lawyers, that offers a simpler lifestyle, should be called an oasis rather than a desert.

Addressing the Acute Issues

The acute need for lawyers in these oasis areas is now at a critical level for both civil and criminal cases. How do we fulfill the basic responsibility of each lawyer to provide access to the legal system? As our NC State Bar's Preambles states we "should be mindful of the deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal services." The following are some ideas that attorneys have shared and are presently executing in North Carolina to address the acute needs.

Ten-Client Challenge: Attorneys, who do not take appointed cases with IDS are challenging each other to represent ten indigent clients during the year in criminal or parent defender cases. Although ten clients will not fix the system, if 20 attorneys in the district each take ten clients, then some relief will be provided. One district joined the challenge last December. Many families were together for Christmas, who otherwise would have remained in jail over the holidays if not for these gracious attorneys.

Legal Incubator: The NC State Bar heard from the Texas Bar about their legal incubator program, which placed cohorts of attorneys in underserved areas to serve their needs. Over the last ten years, approximately 200 attorneys have moved to and are now practicing law in these areas. From our perspective, the issue was that the Texas Bar gave $500,000 to begin the program. The cost of the program is being partially offset by each participating lawyer contributing $350 per month. In North Carolina, the money to start the program was not available, but Mark Atkinson was. Mark went to law school as a second career. He had a "call" to help lawyers establish financially sustainable practices in underserved areas. During the last four years, he has worked with 29 graduates. Mark has joined North Carolina Central University School of Law as an adjunct faculty member, and prepares students in opening their practices in legal oasis communities. He only charges $79 a month. He has relationships with vendors who provide trust accounting software and legal research at no cost. Monthly meetings are held among the participating graduates to address new practice concerns. A volunteer panel of experienced lawyers is available to mentor them. The program also provides access to free CLEs through the Practicing Law Institute (PLI).

Law Practice Exchange: Tom Lenfesty assists lawyers who are retiring or transitioning out of the practice of law by connecting them with new lawyers or lawyers desiring to relocate in smaller communities. He assists lawyers in "handing off" their practices to the next generation of lawyers.

Retired Lawyers: Some communities that are retirement destinations are encouraging lawyers who are not actively practicing to assist in filling in the need gaps.

NC State Bar Considerations: First, allowing successful applicants to be sworn in once receiving their notification letters, which would eliminate the four-to-six-week delay due to the current requirement of possessing the physical license to be sworn into the bar; and second, unbundling legal services to allow limited scope representations.

Coordinate with Law Schools: District attorneys, public defenders, IDS, and other stakeholders are making efforts to identify newly-minted lawyers who do not have jobs, and help them find a legal oasis to live and work.

Addressing the Chronic Issue

Ideas addressing the chronic issues of a lack of lawyers were shared at the summit. A status report of progress being made is as follows:

Education: Historically, law schools in North Carolina strive to educate lawyers for Main Street and Wall Street. However, only one school—North Carolina Central University School of Law—offers a class specifically designed to help new lawyers live in and move to smaller underserved areas. In the past, some of the other schools have had similar classes. Hopefully, the other North Carolina law schools, both public and private, will follow NCCU's lead and offer these types of classes in the future.

Recruitment by Firms: In the same spirit as the constantly campaigning politicians, larger law firms are continuously involved in the recruiting process. The career placement offices help these firms recruit. Unfortunately, smaller firms in the rural areas do not recruit until the last minute and are usually too late, as most third-year students have already accepted job offers. I recall one student, who was born and raised in a small community. He wished to return home to live and work, but no local firms were hiring interns. Instead, he accepted an internship in a large city as a 1L and again as a 2L. Eventually, he accepted their job offer and is now working at the firm. Although he wanted to come home, he had no options in the small community. In the spring I attended a job fair at one of the schools. There was no firm at the job fair that employed less than 100 lawyers. The large firms have the budget and time to recruit. The small firms do not make it a priority to recruit until the need is great. This mindset needs to change.

Strategies for the Small Law Firm

Change Recruiting Mindset: Arrive on day one, make introductions, and follow up with students regularly. Big firms start recruiting before day one. They execute their plan and show up early and often. Smaller community firms do not have the time or resources to compete with a large firm, but there are options. Some schools offer a lunch and learn or mingling days, in which lawyers are at a gathering hall to meet and greet students in an informal setting. Smaller community lawyers must change their way of recruiting and invest resources and time to allow students an opportunity to experience the work-life balance in a legal oasis.

Small-Town Listserv: Campbell, through the leadership of Will Sparks, last year's president of the Law School's Student Government, established a small-town listserv. Seventy students were identified as people who would consider living in a legal oasis. Small firms should coordinate with Campbell's career placement office and communicate with these students. I encourage other law schools to follow suit.

Panels: Law Schools are very receptive to panel discussions about the advantages of living in a small community. Effective small-town panelists include district attorneys, public defenders, Legal Aid, and small local firms. Having a private firm sponsor a pizza lunch is a great way to attract several interested students. Personal follow-up with each of those students is extremely important. Sharing names of those students who express an interest in a particular community with other lawyers in those communities will provide potential connections.

Clinics: Each of the law schools' clinics would welcome lawyers into their classes to share their experiences. This is a great way to connect with students who have a particular

practice-area interest. Establishing relationships with the clinical professors and sharing a firm's needs will greatly assist you in identifying potential employees.

Internships: Summer experience is vital in a student's decision-making process on where to work and live. When smaller community firms are asked to describe their preferred candidate, the normal response is a 3L who "wants to live here." If a firm finds a new attorney with no exposure to a smaller community, it is very unlikely that the attorney will be there or with that firm for long. Small firms must recruit, not only to their firm, but also to their community.

District attorneys, public defenders, and Legal Aid have established summer internships in underserved areas. IOLTA offers $50,000 to each in state law school for a three-year period to fund public interest internships in underserved areas. Through the leadership of Marcia Armstrong and Todd Brown, a Legal Oasis Internship pilot program has been established for the summer of 2024. This ten-week internship will be in an oasis area, consisting of eight weeks with a private firm, one week with a nonprofit, and one week in the courthouse. The goal of these internships is to provide an opportunity for students to get to know the legal community and the community at large with hopes the student will live there after graduation. Students are placed in towns from the mountains to the coast. Data will be gathered to determine if these internships result in new lawyers moving to these communities. I speak regularly to some of these interns. They are being embraced by their community and have told me that they are interested in working and living there or a similar area.

Providing Access to Legal Services

For-Profit Law Firms: Some firms are identifying attorneys wanting to live in a particular location, and providing them the business support so the attorney can focus on practicing law. The firm provides staff, a fully-equipped office, and mentoring for the new lawyers. One firm, King Law, now has 17 North Carolina locations.

Nonprofit Law Firms: Nonprofit law firms are also starting up across the state. An example of a nonprofit firm is Inner Banks Legal Services in Washington, NC. Sarah Beth Withers developed the vision for this firm while clerking for the Honorable Randy Doub, a federal bankruptcy judge. Her firm practices bankruptcy, domestic, immigration, and parent defender work. They charge based on a sliding fee scale. The largest nonprofit firm in North Carolina—other than Legal Aid of North Carolina, which assisted 65,000 individuals in 2023—is Pisgah Legal Services NC. They provided services for 23,000 people across western North Carolina last year. Pisgah and Legal Aid handle civil cases only. In Greensboro, Triad Legal Services does IDS-appointed, domestic, and immigration cases. As a benefit, a nonprofit firm qualifies its employees for many debt forgiveness programs. Working for a nonprofit or in a public interest position allows for full-loan forgiveness after ten years of service. Mark Atkinson has written a manual entitled, *How to Start a Non Profit Law Firm: A Step by Step Guide*. The manual can be purchased for $10 at store.bookbaby.com.

Legal Support Centers: The Wake County Legal Support Center was established by the NC Equal Access to Justice Commission under the leadership of Judge Ashleigh Parker and serves as a resource hub for self-represented litigants. The center can provide information to visitors about how court works, forms to assist their case, lawyer referral information, and other agencies and resources information. The center has developed a website with online resources as well including eCourts Guide & File and legal information resource packets. In its first year of operations, it served over 5,600 visitors.

Long Term Concerns

Money, Money, Money

Student Debt: The average debt of a law student graduating from a state-supported school is over $100K, while the debt from a private school exceeds $200K. This amount does not even account for undergraduate debt. The total amount of debt could qualify for loan forgiveness if the student does public interest or nonprofit work for ten years and makes regular monthly payments during that ten-year period. Additionally, the North Carolina Legal Education Assistance Foundation (NC LEAF) helps provide monthly debt payments for lawyers doing public interest work. Because of this high debt, students often feel they have little option but to accept the highest paying job after graduation. As we talk to students, we encourage them to consider cost of living when choosing where to settle. A dollar goes much further in Lillington than it does in Charlotte. Although $200K in student debt is oppressive, a $2-million house, compared to an $150K house in a smaller community, may be even worse.

Campaign of Conversation: Most lawyers believe paying a higher hourly rate would attract more attorneys to take appointed cases. More money would help, but we need to enter a campaign of conversation with our legislators for more resources to be allocated to IDS. Mary Pollard, executive director of IDS, labors tirelessly on our behalf, but the funding is beyond her control. We attorneys all need to have conversations with our respective state representatives to inform them about this issue and resolve this need. Everyone's contribution is required for this long-term campaign to succeed.

However, money alone will not fix the problem. I have spoken to lawyers across the state who have told me that the money is not the primary cause of them declining court-appointed cases. Many are willing to do their fair share of this noble work if they would be treated with respect by other court actors. When a lawyer is handling cases for no more than a quarter of their normal billing rate, their time must be respected. Operating a law office is expensive. The chief justice has placed banners in all county courthouses, each with the following question: "Are you treating others the way you would like to be treated?" Is this mindset being reflected in our courtrooms among the private bar, the district attorneys, the public defenders, and the bench? In some judicial districts, just a change of attitude will greatly increase the chances of attorneys returning to the court-appointed list.

Marketing and Recruiting

Community Recruiting: Todd Edwards from NC East Alliance spoke at last year's summit. He shared how they have established recruiting clusters in high schools via teachers. They share with students the tremendous opportunities for employment in their area of the state. For example, Spirit AeroSystems in Lenoir County has a workforce that draws from seven counties. They make fuselages for Aerobus jets. They also employ many highly-educated individuals. When a teacher finds a student interested in aeronautics, job opportunities in these underserved areas are shared with them. The student does not need to move to Kansas or Washington to be involved in this industry. Seeds are planted early and often. NC East Alliance is considering establishing a leadership cluster that will focus on marketing

to professionals like lawyers, doctors, dentists, and accountants. If we want to keep our talent pool in underserved parts of the state, we must be intentional and promote the great aspects of living in these areas.

Mock Trial: Since the 1990s, Rebecca Britton has been coaching high school students for the Mock Trial Competition. Last year, out of the 106 participating teams, only four came from east of I95 and only six from the western part of the state. The Mock Trial Board of Directors is trying to increase representation from underserved communities by threefold. Rebecca has stated, "While there are urgent and immediate needs in our underserved counties in North Carolina, we must also look at the long game. How do we implement long-term solutions?" Lawyers, partnering now with rural high schools, identify and mentor promising students through the Mock Trial Program. Such participation allows the lawyers to maintain those mentoring relationships beyond high school. This rapport may not only inspire and develop future leaders, but also future lawyers who may navigate their way back home to lead in their communities.

Personal Touch: We all want to be known and cared about. The best recruiting tool is to have a long-term view. Get to know your local high school or college students who are interested in becoming a lawyer. Take interest in what these students are doing. Let them know they are needed and wanted "back home." Check on them after exams and on birthdays. I am familiar with an attorney who mentored a high school junior. That student wanted to become a lawyer. The student volunteered and worked with the attorney through high school, college, and law school before coming home to be an attorney. Some years later, that attorney is now a local judge. A simple friendship and an offered opportunity helped provide that small community with a great citizen and judge. Take time to give a personal touch. Darrin Jordan, a past State Bar president from Salisbury, and District Court Judge Tom Langdon from Surry County are great examples of early recruiting. When they get a call from a student interested in becoming a lawyer, they take the student to lunch and show them the many great things about living in a legal oasis.

Please contact me if you are in an underserved area and want to hire a lawyer who is interested in living and working in your community. Also, if you are an attorney and interested in moving to a legal oasis, I would consider it a privilege to help you make some good connections. ■

Jimbo graduated from undergraduate and law school from UNC-Chapel Hill, was in private practice in Raleigh for two years, and then served as an AUSA for the Eastern District of North Carolina for five years. He then returned to his hometown of Kinston, NC, where he practiced with his family firm for almost 40 years. In January 2023 he began working with Mel Wright, who was executive director of the Chief Justice Commission for Professionalism for 24 years. Upon Mel Wright's retirement in 2023, Jimbo became executive director of the commission. He remains Of Counsel for the Perry, Perry & Perry firm in Kinston.

Compliance with the Written Decision Requirement for Quasi-Judicial Matters Heard by Local Government Boards

By Nicholas Herman

shironosov/istockphoto.com

In *PHG Asheville, LLC v. City of Asheville*,[1] the Honorable John M. Tyson wrote that "[i]t is incumbent upon city and county attorneys to advise and inform decision-making boards of their proper roles and procedures required in quasi-judicial proceedings." This admonition extends, among other procedures required in quasi-judicial proceedings, to the requirement in G.S. 160D-406(j) that "[e]ach quasi-judicial decision shall be reduced to writing, reflect the board's determination of contested facts and their application to the applicable standards, and be approved by the board and signed by the chair or other duly authorized member of the board."[2] Under G.S. 160D-406(a), this requirement applies to all quasi-judicial proceedings whether "in determining appeals of administrative decisions, special use permits, certificates of appropriateness, variances, or any other quasi-judicial decision.[3]

Notwithstanding this long-standing requirement, which mandates that the written decision "reflect the board's determination of contested facts and their application to the applicable standards," many local governments—by habit of practice—fail to adequately document quasi-judicial decisions in accordance with this requirement. For example, many jurisdictions document quasi-judicial decisions by merely "checking the boxes" on a form or worksheet that recites the bottom-line standards necessary for a favorable decision, including a few sentences about certain conditions that must be satisfied for the approval. This type of preprinted-form documentation has repeatedly been held to be insufficient.[4]

Many other jurisdictions are content to rely merely upon the minutes of the meeting at which the decision was made and assume, as some courts have held, that the minutes alone are sufficient to satisfy the written-decision requirement.[5] However, a number of courts have held that this assumption was erroneous, holding that the minutes or transcript of the meeting was inadequate to establish the requisite board's determination of the contested facts and their application to the applicable standards for purposes of appellate review.[6]

Thus, in accord with Judge Tyson's admonition, counsel for local governments should not hesitate to appropriately advise their quasi-judicial decision-making boards more fully about the written-decision requirement of G.S. 160D-406(j) and, if necessary, establish a more disciplined practice for satisfying that requirement in the face of old habits that may run afoul of that requirement. Similarly, understanding this requirement is important for effective representation by counsel for an applicant in a hearing on a quasi-judicial matter.

The Contents of a Valid Written Decision

As previously mentioned, G.S. 160D-406(j) requires a written decision that addresses the "*contested facts* and their application to the applicable standards" necessary for approving the matter that is the subject of the decision. The phrase "contested facts," which does not include uncontested ones, reflects the fundamental purpose of the written decision to establish for the superior court on appeal (or subsequent appeal) the reasoning of the board's decision when an appeal is brought, which frequently will be based upon a dispute about the facts essential to the board's decision.

Notwithstanding the "contested facts" language, it is desirable, as a matter of practice, that every written decision recite the facts upon which the decision is based, even if all the facts are uncontested. This is recommended because a person who did not present contrary evidence at the quasi-judicial hearing may, if he otherwise has standing under G.S. 160D-1402(c), appeal the board's decision on any one or more grounds specified in G.S. 160D-1402(j), such as a violation of constitutional provisions; lack of statutory authority; failure to follow applicable procedures; error of law; lack of competent, material, and substantial evidence to support the decision; or arbitrary or capricious decision-making.[7] That is, even as a decision based on uncontested facts is unlikely to be appealed, the entry of a written decision that recites the pertinent facts guards against the success of a rogue appeal by any person who, though not a disputant at the hearing, otherwise has standing to challenge the decision.[8]

In addition to stating in the written decision the essential facts on which it is based (even if the facts are uncontested as recommended above), the decision must show how the facts apply to the "applicable standards" for the decision. For example, the standards for granting a special use permit[9] typically require that the use (1) does not materially endanger the public health or safety, (2) meets all required conditions and specifications of the land-use ordinance, (3) will not substantially injure the value of adjoining property or be a public necessity, (4) will be in harmony with the area in which it is located, and (5) be in general conformity with the comprehensive plan.[10]

The standards for approving a variance[11] require that the board of adjustment conclude, as prescribed in G.S. 160D-705(d), that: (1) unnecessary hardship would result from the strict application of the regulation; (2) the hardship results from conditions that are peculiar to the property; (3) the hardship did not result from actions taken by the applicant or the property owner; and (4) the requested variance is consistent with the spirit, purpose, and intent of the regulation, such that the public safety is secured and substantial justice is achieved.

For a written decision to show how the facts apply to the applicable standards, the decision should contain separate sections for (1) "Findings of Fact" and (2) "Conclusions," where the content of each properly distinguishes between the "facts" as established by the evidence at the hearing (i.e., non-conclusory testimony or documentary evidence about things known or proven, as opposed to mere expressions of judgment or belief about something) and "conclusions" (which usually take the form of the applicable standards by which the ultimate decision is made). As stated in one decision:

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified as a finding of fact.[12]

For example, on a special use permit application, the written decision might contain the "Finding of Fact" that: "John Smith, a NC general certified appraiser, testified and submitted an Appraisal Report conducted under the USPAP standards; and, using a comparable-sales analysis, he concluded that the proposed use of the property would enhance the fair market value of adjoining properties by 25%."[13] The same decision might then contain the "Conclusion" that: "The proposed use will not substantially injure the value of adjoining property." As another example, in a variance application, the written decision might contain the "Finding of Fact" that: "The proposed one-foot extension of the applicant's new house encroaches into the stream buffer of an existing stream on the property by one foot." The board's decision might then contain the "Conclusion" that: "The hardship of the landowner to extend the footprint of his new home by one foot is a result of the stream on the property and not any action taken by the landowner."

The "Conclusions" in the written decision must track solely the applicable standards for making the decision, and each applicable standard must be explicitly addressed in the decision.[14] So too, there should be "Findings of Fact" supporting each applicable standard.

As a practical matter, it is usually not onerous or burdensome to show that there is "competent, material, and substantial evidence in the entire record," as required by G.S. 160D-402(j)(c), to support the requisite "Findings of Fact" in a written decision. Although not mandated, many jurisdictions record the proceedings of their quasi-judicial hearings so that a verbatim transcript can be provided on appeal, and this practice is strongly encouraged.[15] Written applications and supporting materials, along with Staff Reports (usually summarized at the hearing under oath by a staff member) are admissible into the record under G.S. 160D-406(c). Thus, the evidentiary record supporting many "Findings of Fact" and "Conclusions" can properly be established, when uncontested, based on these types of "administrative materials" alone.[16]

For example, in the absence of any evidence to the contrary, on a special use permit application the requirements that: (i) the application meets all required conditions and specifications of the land-use ordinance; (ii) the project will be in harmony with the area in which it is located by virtue of being zoned for that use subject to conditions;[17] and (iii) the proposed use will be in general conformity with the comprehensive land use plan might all be established by a Staff Report that can be referenced in the decision's "Findings of Fact." Similarly, the facts stated in a Staff Report may (if uncontested) establish most, if not all, of the facts necessary to support the standards applicable to

granting a variance. When this is the case, the written decision can briefly summarize these facts in the "Findings of Fact" with reference to the Staff Report to support the "Conclusions" in the decision that each applicable standard has been met.

Just as the written decision must, by its "Findings of Fact" and "Conclusions," reflect the board's determination about the key facts and their application to the applicable standards, any conditions imposed upon approval of the application must be supported by adequate "Findings of Fact." As provided by G.S. 160D-705(c) and 160D-705(d), a board may impose "reasonable" and "appropriate" conditions on special use permits and variances. Such conditions, however, must be reasonably related to the proposed use, not conflict with the zoning ordinance, and further a legitimate objective of the zoning ordinance.[18] This means that, when a board imposes certain conditions in connection with granting a particular application, the written decision must contain adequate "Findings of Fact," based on the evidence, to justify the conditions imposed.[19]

Procedure for Preparing and Adopting a Written Decision

Boards use different procedures for preparing and adopting a written decision. In relatively simple and uncontested cases, the staff (or the applicant party) might provide an advance draft of a written decision, with proposed "Findings of Fact," "Conclusions," and a "Decision," for adoption by the board (subject to any edits or substantive modifications by the board) at the conclusion of the quasi-judicial hearing. In more complex or contested cases, or when the full evidence in the case is not reasonably known in advance, the board might, at the conclusion of the hearing, adopt a motion that (i) the staff (and/or the applicant and the opposing party) submit alternative draft decisions on the application for final decision by the board at a later meeting, or (ii) the staff (and/or a party) submit a draft decision which, as directed by the board, either grants or denies the application for the board's consideration at a later meeting. The board's choice among these different methods for preparing a proposed decision will largely depend on the particular facts of the case in terms of its complexity and the extent to which the matter is controverted.

Any one of these procedures is permissible. However, particularly when the application under decision is contested, it is recommended that the board consider adopting a motion to request that the opposing parties (and the staff) prepare proposed decisions to grant or deny the application so that the board can fully consider these alternative draft decisions at a later meeting.

If the board adopts a motion directing that the staff (or parties) bring back to the board a proposed decision for board consideration at a subsequent meeting, board members at that meeting may vote on the final decision even if they were not present at the earlier quasi-judicial hearing if they had complete access to, and had reviewed, the minutes and records of the earlier hearing.[20] Thus, even as there will be a delay occasioned by a second board meeting to approve a final written decision, the legitimacy of the final vote on the matter will be unaffected when the final decision is rendered by board members not present at the initial hearing but who have fully reviewed the minutes and records of the earlier proceeding and this review by board members not present at the initial hearing is explicitly stated on the record.

As a practice matter, local government attorneys should, particularly in complex or contested quasi-judicial matters, be actively involved in writing or reviewing drafts of proposed decisions to ensure that their "Findings of Fact" and "Conclusions" (including any conditions of approval) comport with all the requirements and evidentiary standards set forth in G.S. 160D-1402(j) referred to in note 7 above. This is also true for counsel representing an applicant in a quasi-judicial proceeding who has the opportunity to draft a proposed decision.

For example, there may be situations in which the evidence submitted at the hearing consists of testimony or documentary evidence that is either irrelevant to the applicable standards for decision or is "conclusively incompetent" under G.S. 160D-1402(j)(3), such as purely lay-opinion testimony—as opposed to the required expert testimony—on whether "[t]he use of a property in a particular way affects the value of other property" or whether "[t]he increase in vehicular traffic resulting from a proposed development poses a danger to the public safety." In these situations, the drafting or review of a proposed written decision by the local government attorney or the attorney for the applicant will ensure that the decision includes in the "Findings of Fact" only those facts that are relevant, admissible, and supported "by competent, material, and substantial evidence in view of the entire record" as required by G.S. 160D-1402(j)(1)e. In this way, if there is an appeal of the decision, counsel's participation in the decision's preparation will likely foreclose any contention on appeal that the decision's "Findings of Fact" are based on irrelevant or incompetent evidence not supported by the entire record or that the "Conclusions" and ultimate "Decision" are not rationally based on the "Findings of Fact" and an ample evidentiary record to support those findings.

Conclusion

Even as Judge Tyson's admonition to local government attorneys to properly advise and inform decision-making boards of their proper roles and procedures required in quasi-judicial proceedings is *dicta* in the case in which he wrote the admonition, local government attorneys can quote these words to their boards to the extent it is necessary to revamp their boards' quasi-judicial procedures to ensure that written decisions in these proceedings fully comport with all legal requirements. So too, counsel for applicants in quasi-judicial proceedings should insist that these requirements are fully followed.

The members of quasi-judicial boards are typically not lawyers, and the statutory and case-law requirements for a valid quasi-judicial decision are complex. Thus, as necessary, board procedures for the entry of these decisions should be revamped to accord with the best standards of practice consistent with the legal requirements for making those decisions. ■

Nick Herman is a partner in The Brough Law Firm in Chapel Hill. His practice concentrates in local-government law, representing municipalities and counties as general counsel or as special litigation counsel. He is also an adjunct professor at Campbell Law School and NCCU Law School.

Endnotes

1. 262 N.C. App. 231, 240, 822 S.E.2d 79, 85 (2018).
2. This requirement previously existed in G.S. 160A-388(e)(2) before that statute was repealed by S.L.

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NC IOLTA Director to be President of the National Association of IOLTA Programs

By Claire Mills

As executive director of the North Carolina Interest on Lawyers' Trust Accounts (NC IOLTA) program, Mary Irvine is well known throughout the state for her work to advance NC IOLTA's mission to improve the lives of North Carolinians by strengthening the justice system as a leader, partner, and funder. She regularly engages with State Bar leadership, lawyers, grantees, and bankers to enhance access to justice in North Carolina. But Mary's advocacy for justice does not stop at the borders of our state.

Mary has worn many hats for the National Association of IOLTA Programs (NAIP) since 2018, and will become the organization's president in July 2024. NAIP is a nonprofit, nonpartisan membership organization for funders of civil legal aid throughout all United States jurisdictions, including the District of Columbia, Puerto Rico, and the Virgin Islands, as well as the Canadian provinces and territories. NAIP supports the growth and development of IOLTA programs and works to increase access to justice for all. NAIP's mission is to enhance legal services for the poor and the administration of justice through the growth and development of IOLTA programs as effective grant-making institutions that provide a major source of funding and support for legal services for the poor, administration of justice, and other law-related public interest programs.

Mary's first work with NAIP was on the working group created in 2018 to study and make recommendations for creating a new staffing structure for NAIP, which previously received limited administrative support from the ABA. Through the work of this group, a dues structure was implemented and the organization was able to contract with a management company for administrative services, allowing the organization to function at a much higher level.

Mary joined the NAIP Board of Directors in 2019 and has served on many committees since, including, most recently, as vice-president. Her involvement includes the Finance and Audit Committee, the Membership Working Group (serving as chair), and serving as the current liaison from NAIP to the ABA Commission on IOLTA.

When asked what drove her to serve on the board, Mary stated, "When I first started working with NC IOLTA in 2014, I had the chance to attend the twice-yearly workshops hosted jointly by NAIP and the ABA Commission on IOLTA. After each workshop, I returned to Raleigh with many ideas, questions, and follow-ups. In 2017 I was promoted to become NC IOLTA's executive director, and I continued to utilize the resources and support from NAIP members in my new role by seeking mentorship and support to navigate issues we were facing as a program and that I experienced as a new executive director. When I was asked to serve on the board, I still felt quite new in my role, but had already benefited from the generous support and

expertise of this community. I knew the positive impact it could have, and I hoped to, through my NAIP Board service, create new ways for our community to stay connected, find camaraderie, and draw on the collective expertise we bring."

Christine Fecko, general counsel for the IOLTA Fund of New York and the outgoing NAIP president, had this to say about Mary: "I've worked closely with Mary Irvine for many years, both as a NAIP Board member and officer, and I can't think of a better person to step into the role as NAIP president. Mary combines broad strategic thinking with diligent attention to the details necessary to keep this membership association

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Lawful Lynching: A Book Review

By Tom Langan

The Violent World of Broadus Miller: A Story of Murder, Lynch Mobs, and Judicial Punishment in the Carolinas (University of North Carolina Press, 2024) explores the brutal murder of 15-year-old Gladys Kincaid and the manhunt for her suspected killer. Kevin W. Young, a lecturer at Appalachian State University, brings his considerable storytelling and research skills to bear as he renders the circumstances that brought Miller from his native South Carolina to Morganton, North Carolina, in the summer of 1927.

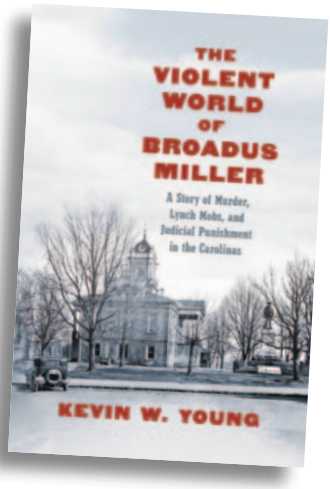
Broadus Miller is a real-life, small-town iteration of Ralph Ellison's "invisible man." Miller's only recorded writing is his misspelled signature on a marriage license, and the only photograph of Miller taken while he was alive is attached to a reward notice.[1] Young succeeds in sketching Miller's biography by profiling the violent society and institutions in which he lived.

Broadus Miller was a product of South Carolina's upcountry—Black, impoverished, and mentally ill. Convicted of manslaughter for the 1921 slaying of a Black woman in the town of Anderson, Miller was sentenced to three years in the South Carolina State Penitentiary. Young offers vivid and detailed descriptions of the inhumane conditions there. Early chapters explore the inadequate mental health and penal systems in both Carolinas, North and South. Young also exposes the convict leasing system that effectively perpetuated slavery and transformed criminal justice into a money-making enterprise. The disparate impact of all of this on African Americans is borne out by the statistics that Young has meticulously gathered and interpreted.

Upon his release from prison, Miller made his way to Morganton, where he found work as a laborer on a stately home under construction in town. Miller had not been in Morganton very long when Kinkaid was murdered. He was quickly identified as Kincaid's killer. Law enforcement, national guardsmen, and ordinary citizens numbered in the thousands as they scoured the countryside looking to kill or capture the outlaw. Young's narrative is sandwiched by a prologue detailing the murder of Kincaid and the book's final chapter, which recounts the manhunt. It is in these places that the pace quickens, reading more like a true crime thriller than the scholarly work that it is.

After a two-week manhunt, Miller was ultimately slain by Commodore Burleson, a Klansman, hunter, and Morganton police officer.[2] Burleson was one of many tracking Miller through the mountains and thickets of Western North Carolina, most of whom were seeking to cash in on a handsome bounty. The reward money became the subject of litigation in the years to follow, thus cheapening Burleson's deed even among those who wished for and celebrated Miller's death. Once Miller was killed, his body was paraded through Morganton and publicly displayed on the lawn of the Burke County courthouse. You might ask, was this not a lynching?

As commonplace as lynchings were in the South, state officials and many in law enforcement seemed earnestly committed to deterring the practice. It subverted the rule of law and reflected poorly on the region's image. But even when a lynching was averted and a Black defendant brought to trial, the proceedings were typically unfair, and the outcomes were often predetermined. For example, when a Black man was tried in Wayne County for the murder of a white woman, a lynch mob stormed the courthouse. After restoring order, but before the jury determined guilt or innocence, the presiding judge reassured the crowded courtroom that he was "morally certain that the verdict will be guilty and that I shall presently sentence this prisoner to death."



It was very easy for judges, law enforcement officials, and political leaders to discourage lynchings in North Carolina. The state had enacted an outlawry statute in 1866.[3] Modeled after the state's fugitive slave laws, the statute was a curious alternative to lynching. If lynching is defined as an extrajudicial killing by a group of persons, the outlaw statute merely conferred legal sanction upon the act. Upon a proclamation by two magistrates or one judge, an individual could be declared an outlaw. Acting upon the advice of Burke County attorney and future United States Senator Sam Ervin, Miller was "outlawed," and *any citizen* of the state had the legal right to shoot and kill the fleeing fugitive. Talk about a distinction without a difference! This logical fallacy is not lost on the author when he observes that, "[I]f Broadus Miller were quickly killed, the threat of a lynch mob would be averted, and the town spared a tumultuous trial."

Ervin is not the only household name to make a cameo in *The Violent World of Broadus Miller*. Contemporaneous writings by the novelist Thomas Wolfe furnish readers with evocative images of Black migrant life in Western North Carolina. We also meet the lesser-known Henry Grady and Beatrice Cobb.[4] Grady was a colorful judge

who underwent a conversion from grand dragon of the Ku Klux Klan to an advocate for Blacks to serve on juries by the end of his career, while Cobb was a pioneering female newspaper editor with an ambivalent record on civil rights. These welcomed digressions broaden the book's appeal to a more general audience.

The book runs 240 pages with nearly 80 pages dedicated to endnotes and a comprehensive bibliography. Of the remaining text, less than half of it is devoted to Miller and the "largest manhunt in Western North Carolina's history." Young details the abundance of lynchings, show trials, and manifest injustice elsewhere in North and South Carolina, resulting in a narrative that is sometimes labored.

Broadus Miller's Carolinas are lawless and savage places. Don't expect to read about landmark cases, righteous judges, or crusading lawyers. Perhaps that is the message lawyers can take away from Young's book. Aristotle observed that *nature abhors a vacuum*. In the absence of due process, a community's appetite for justice is sated by its worst passions. Between convict leasing and cash bounties for state-sanctioned vigilantes, the profit motive underpins the foundation of criminal justice in this era. In Burke County nearly 100 years ago, justice for Gladys Kincaid was undermined by racism, bloodthirst, and greed. Kevin Young provides the reader with many examples of the ways in which Miller's story is hauntingly replayed across the Carolinas with tragic regularity. Young never suggests that Miller was innocent of this vicious crime. That is not the point that the author is trying to make. Guilty or not, the result was always the same in Broadus Miller's world. ■

Tom Langan is a district court judge in Surry and Stokes Counties, and serves as State Bar councilor for the 23rd Judicial District.

Endnotes

1. Apparently, many photographs of Miller's corpse were taken by morbid spectators while it was on display in Morganton. None of these images were included in the book.
2. Commodore was Burleson's given name. It did not denote rank of any kind.
3. Despite being ruled unconstitutional by a federal district court judge in 1976, the outlaw statute was not repealed until 1997.
4. Grady is the same judge who predicted a guilty verdict in Wayne County and promised a death sentence.

Quasi-Judicial Matters (cont.)

2019-111, § 2.3, as amended by S.L. 2020-25, § 51(b), effective June 19, 2020.

3. For example, the requirement also applies to a quasi-judicial proceeding to determine whether a land-use regulation should be suspended or a variance be granted to provide a reasonable accommodation to an individual under the Federal Fair Housing Act and Americans with Disabilities Act under the standards of "reasonableness" and "necessity" governing such an accommodation. *See generally, Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597, 603-604 (4th Cir. 1997) (discussing the standards of "reasonableness" and "necessity".) *See also* G.S. 160D-705(d)(2), stating that "[a] variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability."
4. *See, e.g., Shoney's of Enka, Inc. v. Board of Adjustment of City of Asheville*, 119 N.C. App. 420, 458 S.E.2d 510 (1995) (board's findings on preprinted form reciting applicable standards were conclusory and therefore insufficient); *Cardwell v. Forsyth County Zoning Bd. of Adjustment*, 88 N.C. App. 244, 362 S.E.2d 843, *rev. denied*, 321 N.C. 742, 366 S.E.2d 858 (1987) (mere recitation of standards in decision was insufficient).
5. *See Ballas v. Town of Weaverville*, 121 N.C. App. 436, 465 S.E.2d 3224, 327 (1996) (failure to make written findings is not fatal if the minutes and record sufficiently informs the court of the basis for the decision on material issues); *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 710 S.E.2d 350 at n. 2 (2011) (absence of formal written decision with findings of fact and conclusions is not fatal if transcript of hearing makes clear the basis of the board's decision).
6. *See, e.g., Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment*, 213 N.C. App. 364, 713 S.E.2d 511 (2011) (minutes of meeting insufficient); *Clark v. City of Asheboro*, 136 N.C. App. 114, 524 S.E.2d 46, 52 (1999) (conclusory assertions in minutes were inadequate); *Welter v. Rowan City. Bd. of Comm'rs*, 160 N.C. App. 358, 585 S.E.2d 472, 478 (2003) (mere reference that there was testimony about the relevant standards was insufficient).
7. G.S. 160D-1402(j) codifies long-standing case law on the grounds for challenging a quasi-judicial decision, along with the scope of appellate review, and certain evidentiary standards applicable to quasi-judicial hearings.
8. This is also recommended considering the definition of a quasi-judicial decision in G.S. 160D-102(28) as a decision "involving the finding of facts regarding a specific application of a development regulation and that requires the exercise of discretion when applying the standards of the regulation" or a decision "on whether the application complies with one or more generally stated standards requiring a discretionary decision on the findings to be made by the decision-making board."
9. Under 160D-406(i), a majority of the board is required to decide any quasi-judicial matter other than granting a variance.
10. *See Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496, 499, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972).
11. Under 160D-406(i), the concurring vote of four-fifths of the board is necessary to grant a variance.
12. *China Grove 152, LLC v. Town of China Gove*, 242 N.C. App. 1, 773 S.E.2d 566, 569 (2015) (citing *In re Helms*, 127 N.C. 505, 510, 491 S.E.2d 672, 675 (1997)).
13. When expert testimony is submitted, the record and the "Findings of Fact" should reflect the "knowledge, skill, experience, training, or education" of the expert and how the expert applied reliable "principles and methods reliably to the facts of the case." *See* N.C. R. Evid. 702(a).
14. *See, e.g., Knight v. Town of Knightdale*, 164 N.C. App. 766, 596 S.E.2d 881 (2004) (error for town council to consider property values when site-plan approval standards only required consideration of physical impact of development); *Nw. Fin. Group, Inc. v. City of Gaston*, 329 N.C. 180, 405 S.E.2d 138, 144 (1991) (approvals under mobile-home-park ordinance cannot be based on general concerns of public welfare but only on specific standards set forth by ordinance); *Baker v. Town of Rose Hill*, 126 N.C. App. 338, 485 S.E.2d 78 (1977) (decision-making board must address all applicable standards).
15. *See In re City of Raleigh (Parks & Recreation Dep't) v. City of Raleigh*, 107 N.C. 505, 421 S.E.2d 174 (1992).
16. Under G.S. 160D-301(b)(6), a planning board may "provide a preliminary forum for review of a quasi-judicial decision, provided that no part of the forum or recommendation may be used as a basis for the deciding board." Thus, any reports of a planning board about a matter that is the subject of a quasi-judicial hearing should not be used or referenced in either the board's "Findings of Fact" or "Conclusions," even as these materials are often included in the record of quasi-judicial proceedings.
17. *See Woodhouse v. Board of Com'rs of Nags Head*, 299 N.C. 211, 261 S.E.2d 882, 886 (1980) (inclusion of use in ordinance as one which is permitted under certain conditions is equivalent to legislative finding that the use is in harmony with other uses permitted in the zoning district).
18. *Overton v. Camden County (Overton I)*, 155 N.C. App. 100, 574 S.E.2d 150, 153 (2002).
19. *Ward v. Inscoe*, 166 N.C. App. 586, 603 S.E.2d 393 (2004); *Northwest Property Group, LLC v. Town of Carrboro*, 201 N.C. App. 449, 687 S.E.2d (2009).
20. *Brannock v. Zoning Bd. of Adjustment*, 260 N.C. 426, 132 S.E.2d 758 (1963); *Dellinger v. Lincoln Cty.*, 248 N.C. App. 317, 789 S.E.2d 21, *review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016); *Cox v. Hancock*, 160 N.C. App. 473, 586 S.E.2d 500 (2003).

Grievance Committee and DHC Actions

NOTE: More than 32,500 people are licensed to practice law in North Carolina. Some share the same or similar names. All public orders of discipline are available on the State Bar's website.

Disbarments

Martin Musinguzi of New York embezzled entrusted funds and did not respond to the Grievance Committee. In January 2024 the DHC entered a default Order of Discipline disbarring Musinguzi. Musinguzi filed a Motion for Relief from Judgment in the DHC and a Notice of Appeal to the court of appeals. The DHC denied the Motion for Relief from Judgment. The appeal is ongoing.

Jonathan Silverman of Sanford surrendered his law license and was disbarred by the State Bar Council at its July 2024 meeting. Silverman admitted to engaging in a sexual relationship with a client.

Michael Glenn Wilson II of Hickory surrendered his law license and was disbarred by the State Bar Council at its July 2024 meeting. Wilson admitted to misappropriating at least $55,000 from his current law firm by writing checks to himself, to his former law partner, and former law firm for his personal use.

Suspensions & Stayed Suspensions

Penny K. Bell of Clinton made false representations to the Grievance Committee, gave false testimony during remand of a *Batson* claim, and made false statements in an *ex parte* motion. After a hearing in April 2024, the DHC imposed a three-year suspension with the ability to apply for a stay after one year upon compliance with conditions.

Antwoine Edwards of Fayetteville improperly disbursed funds from his trust account in amounts exceeding the funds he held for the clients, failed to timely disburse funds from the trust account, failed to timely reconcile, failed to properly disburse earned fees from the trust account, and provided the State Bar with reconciliation reports that misrepresented when the reports had been completed. By consent order, the DHC imposed a four-year suspension with the ability to apply for a stay after six months upon compliance with conditions.

Christopher Peebles of Fayetteville made misrepresentations to the court in both an initial act of dishonesty and subsequent efforts to exculpate himself from the same. He also attempted to have his client "release" him from any acts of professional misconduct and repeatedly made dishonest statements to the State Bar. The DHC suspended him for two years. The suspension is stayed for three years upon compliance with conditions.

Randall Place of Bonita Springs, Florida, engaged in conduct that constituted cyberstalking of his ex-wife in violation of Florida law and was enjoined from contacting his ex-wife. Place violated the injunction and the terms of his subsequent probation by continuing to contact his ex-wife. The DHC suspended Place's license for 30 days.

Neil Scarborough of Nags Head neglected multiple clients, charged a clearly excessive fee, made statements with no substantial purpose other than to embarrass a third party, did not protect a client upon termination of the attorney-client relationship, engaged in the practice of law while his license was administratively suspended, violated trust account record-keeping rules, and did not timely respond to the Grievance Committee. By consent order, the DHC suspended his license for two years. The suspension is stayed for three years upon compliance with conditions.

Grievance Noncompliance Actions before the DHC

Ryan P. Ames of Cornelius failed to comply with a grievance investigation and failed to show good cause for his noncompliance. The DHC entered an order suspending Ames' license until he demonstrates that he has complied with the investigation.

Interim Suspensions

Derek R. Fletcher of Charlotte was placed on interim suspension on June 24 after admitting guilt to a crime showing professional unfitness.

Reprimands

Windy Rose of Columbia initiated a wire transfer of a seller's proceeds in a real estate transaction pursuant to fraudulent wiring instructions without verifying the wiring instructions with the seller. She and her staff failed to note numerous "red flags" that should have raised suspicions about the fraud. She was reprimanded by the Grievance Committee.

The Grievance Committee reprimanded **Tia Willis** of Durham. Willis agreed to split fees with a nonlawyer, assisted the nonlawyer in the unauthorized practice of law, and effectively allowed the nonlawyer to control her firm's operations. Willis, then a solo practitioner, also abandoned and failed to adequately communicate with her firm's clients when the nonlawyer assistant (an inactive lawyer) purported to take exclusive control of the firm.

Completed Petitions for Reinstatement/Stay – Uncontested

In 2008, the DHC transferred **Peter K. Gemborys** of Wilmington to disability inactive status. In April 2024, Gemborys petitioned the DHC for reinstatement, presenting evidence he was no longer disabled. By consent order, the DHC reinstated Gemborys' license and transferred him back to active status.

Completed Petitions for Reinstatement/Stay – Contested

Charles K. Blackmon of Greensboro surrendered his law license and was disbarred by the council in January 2019 for misappropriating funds to which his employer was entitled. In February 2024, Blackmon petitioned for reinstatement. In May 2024, Blackmon withdrew his petition.

Douglas T. Simons of Charlotte surrendered his law license and was disbarred by the council in 2005 for misappropriating at least $300,000 in entrusted client funds for personal use over a period of three years. He

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Quid Pro No

By Suzanne Lever, Assistant Ethics Counsel

It is natural for lawyers to develop preferences for working with particular third party service providers. Likewise, vendors often have favorite legal professionals they enjoy working with more than others. While developing good working relationships with vendors may provide advantages to a lawyer and his clients, the Rules of Professional Conduct put limitations on these professional relationships. Importantly, the ethics rules prohibit a lawyer from entering into a *quid pro quo* referral agreement with any service provider.

For real estate lawyers, third party service providers regularly include lenders and title insurance agencies. RPC 57 discusses the ethical parameters of relationships between real estate lawyers and these service providers. In RPC 57, a lender plans to require borrowers to use one of three "approved" lawyers to do all the title work on closings on his loans. The opinion provides that a lawyer may ethically request lenders and title insurance companies to place him on an "approved" attorney list. However, the opinion explicitly cautions that the lawyer may not "give any special remuneration" to the lender in return for placing his name on the list of approved attorneys.

2006 FEO 7 considers referral requirements that are often a condition of membership in a for-profit networking organization. 2006 FEO 7 provides that a lawyer may be a member of a for-profit networking organization provided the lawyer does not make referrals to other members of the organization on a *quid pro quo* basis. The opinion emphasizes a lawyer's ethical duty to maintain impartiality, prioritize client interest, and give competent advice in referral decisions. The opinion states that any lawyer who participates in this type of organization "is expected to act in good faith" and must discontinue participation if reciprocal referrals are, in fact, "an explicit or implicit condition of membership in the organization."

In 2011 FEO 4, the ethics committee again scrutinizes the relationship between a real estate lawyer and a service provider and concludes that the lawyer may not enter into an exclusive reciprocal referral agreement with a title insurance company. Pursuant to the opinion, a reciprocal referral arrangement impairs the lawyer's ability to provide independent professional judgment and creates a nonconsentable conflict of interest between the lawyer and the client. In addition, the arrangement amounts to improper compensation for referrals in violation of Rule 7.2(b). The opinion notes that, when referring a client to one or more title insurance companies, the lawyer is charged with acting in the best interest of the client. One of the factors the lawyer can consider when making a referral is the lawyer's working relationship with specific title insurers, particularly where the relationship may prove beneficial to the client. As stated in the opinion, a lawyer "may, and should, strive to cultivate the types of business relationships and provide the quality of legal services that will encourage clients and other professionals to recommend the lawyer's services. What a lawyer cannot do, however, is permit a person who recommends the lawyer's services to direct or regulate the lawyer's professional judgment in rendering the legal services."

2022 FEO 3 examines a potential referral arrangement between a lawyer and a doctor who is creating a list of potential legal service providers to be given to interested patients. The opinion concludes that the lawyer may agree to be included on the list "provided that there is no *quid pro quo* exchange" for recommending the lawyer's services and the doctor does not engage in improper solicitation. The opinion reemphasizes the prior ethics opinion's holdings that a lawyer "offering to refer a client to an allied professional in exchange for a referral from the professional to the lawyer's practice, rather than based on the professional's independent analysis of the lawyer's qualifications, constitutes an improper *quid pro quo*."

A prohibited referral agreement does not need to be formal or written. For example, 2006 FEO 7 prohibits a lawyer from participation in a networking organization if *quid pro quo* referral arrangements are "an explicit or implicit condition" of membership in a networking organization. In the context of real estate closings, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq*. ("RESPA") sets out that a prohibited agreement or understanding can be oral, or it can be implied by the party's course of conduct. 12 U.S.C. § 2607(a) prohibits any person from giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, *oral or otherwise*, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a) (emphasis added). The Code of Federal Regulations further provides: "An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern, or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business." 12 CFR 1024.14(e). In sum, the informal "wink-wink" exclusive referral agreement is just as prohibited by the Rules of Professional Conduct as the formal/explicit exclusive referral agreement.

Referrals should be made based on the best interests of the client, rather than financial gain or reciprocal arrangements. However, the reality is that some lawyers may still engage in questionable referral arrangements with service providers. Ensuring that referrals are genuinely made in the best interests of clients, without being influenced by financial gain or reciprocal arrangements, is fundamental to maintaining ethical standards in the legal profession. If a

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Matthew J. Ladenheim, Board Certified Specialist in Trademark Law

By Sheila Saucier, Certification Coordinator

I recently had an opportunity to talk with Matthew Ladenheim, a board certified specialist in trademark law and chair of the North Carolina State Bar Board of Legal Specialization. Matthew practices at Trego, Hines and Ladenheim, PLLC in Huntersville.

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

I attended the University of Mary Washington in Fredericksburg, Virginia, where I studied history and theater. After undergraduate school, I did a gap year in London, UK, where I worked for the London Law Agency in Temple Chambers. I didn't know it at the time, but that experience was instrumental to the formation of my career path—it was my first introduction to the practice of trademark law. I took the LSAT while I was living in the UK, and returned home to attend the Pennsylvania State University Dickinson School of Law. After law school I moved to Olympia, WA, to complete a clerkship with a justice on the Washington State Supreme Court. Once my clerkship was completed, I set down roots in Charlotte and have been here ever since. After almost 25 years, it seems like home now.

Q: Why did you pursue becoming a board certified specialist?

By mistake, actually. During the early 2000s the Intellectual Property Section of the North Carolina Bar Association was concerned about the growing number of "trademark dabblers" in the Bar. The IP Section formed an investigation committee, and I was on it. Next thing you know, I was on the State Bar Trademark Committee, then the Specialization Drafting Committee. Following that, I chaired the Trademark Committee, then I became a member of the board at large. Now I've been installed as the chair of the State Bar's Board of Legal Specialization—something I never set out to do, but it has been a fantastic journey and I wouldn't change a thing.

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

Certification is incredibly important for trademark lawyers in North Carolina. Members of the public and the Bar often conflate patent and trademark law. Even though both fall under the umbrella of "intellectual property," they are actually very different. As a practical matter, no one can dabble in patent law. Patent practitioners must sit for a separate bar exam in order to practice before the United States Patent and Trademark Office. There is no separate bar exam for trademark lawyers, which means anyone with a law license can practice trademark law. However, just because you can do a thing doesn't necessarily mean you should do a thing. Dabbling in trademark law is, objectively, a pretty terrible idea. Like any narrow practice area, trademark law is full of nuance and pitfalls that can easily ensnare a casual practitioner to the ultimate detriment of the client. Certification is extremely important in my practice area because it provides a mechanism for identifying attorneys who are well versed in a nuanced area of the law.

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

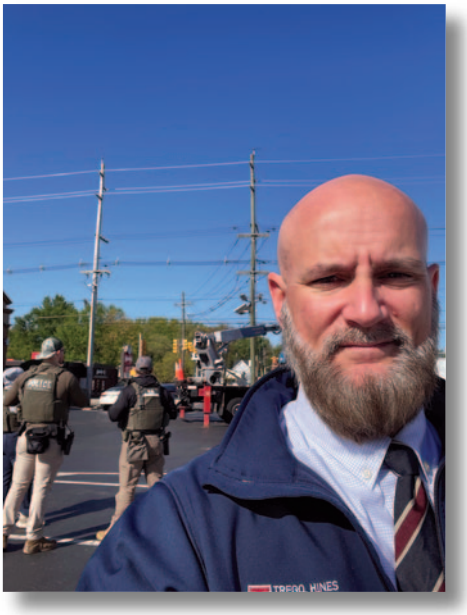
Certification provides the consuming public an objective basis for distinguishing between truly proficient practitioners and dabblers. This is an invaluable service. Certification and the certification process literally raise the bar for advanced practitioners. Achieving and maintaining specialty certification will absolutely make you a better lawyer.

Q: As the current Board of Legal Specialization chair, how do you see the future of specialization/board certification?

The state of specialization in North Carolina is strong. As the practice of law becomes more and more focused, I predict that the importance of specialization across all practice areas will continue to grow. I am fortunate to have inherited an extremely solid and well-run program. My predecessors and the permanent staff at the Bar are dedicated professionals who have devoted countless hours in service to the public and for the betterment of the Bar. My new role as chair is to ensure the stability and longevity of the specialization program at large so that it can continue to render valuable service to the Bar and the consuming public. I hope to be a worthy steward. During my term, I intend to promote: 1) the uniformity of standards across the myriad specialties, 2) a widespread understanding of the proficiency standard the Bar has adopted for the granting of certification, and 3) greater participation in the certification program by diverse applicants. This last point is particularly important to me. The Board of Legal Specialization is tasked with serving the public at large. I firmly believe that we best serve the public at large when we look like the public at large.

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

I encourage lawyers to pursue certification all the time. My sales pitch has remained largely unchanged over the past decade: First and foremost, the process of becoming a board certified specialist will absolutely make you a better lawyer. By the time you qualify for, prepare for, and ultimately pass the certification exam, you will have improved your craft.



Ladenheim working with US Marshals during a seizure operation.

This, in turn, means you can better serve your clients. Second, specialization sets you apart from other lawyers. Certification is an objective demonstration of subject matter proficiency in a specialized field of law—this is no small feat. Other members of the Bar and the consuming public will rely on this distinction when selecting counsel. Third, certification will bring you into a new professional circle populated with some of the best legal minds in our state, some of whom are truly masters in their fields.

Q: What do you enjoy most about the practice of trademark law?

This one is easy. I love the fact that trademark law very often affords me the opportunity to interact with clients when something good is happening in their lives. I am extremely lucky in this regard. As lawyers, we often only get to deal with people who are experiencing some type of immediate crisis. Don't get me wrong—there are plenty of intellectual property battles to be fought, and they can very often become contentious, but it's not all conflict all the time. As a trademark lawyer I also get to participate in the process of creating and protecting new brands, which can really be a lot of fun.

I also do a fair amount of brand enforcement work in Federal Court, which I really enjoy. These cases tend to go smoothly, especially once the defendants lawyer up and start getting some good advice. But that doesn't always happen. Sometimes the defendants don't lawyer up, sometimes they lawyer up and ignore the good advice they get, and sometimes they lawyer up and get terrible advice. The Trademark Act has some pretty robust enforcement mechanisms when things go sideways. On more than one occasion I've rolled up on a non-compliant infringer with the US Marshal Service in tow to conduct a seizure operation.

Q: How do you stay current in your field?

Attending specialty CLE programs is a tried-and-true method for staying current. In my field, there are one or two annual seminars that everyone attends. In our post-COVID world, there are also a plethora of high quality online and on-demand CLE services. These are both good ways to stay current in your field. That said, I submit that teaching at a specialty CLE is even better. It's one thing to sit through a CLE, even one you are genuinely interested in, but it is quite another to teach it. If you know the subject matter well enough to stand up in front of a bunch of other know-it-all lawyers and tell them what's what, you've probably got a good handle on it. Participating in CLE programs is also an excellent way to interact and connect with other members of the profession.

Q; What is something most people don't know about you?

I am a life-long martial artist. I started training when I was in middle school and have been at it ever since. My level of mat time ebbs and flows as my work and familial obligations change, but it is always present in my life. When I was younger, I studied the traditional striking arts, which tend to focus on inflicting as much damage on the opponent as possible. As an adult, I've switched to Aikido, which loosely translates to "the way of peace." Instead of striking to inflict as much damage as possible, Aikido uses joint locks and pain compliance to subdue an attacker without inflicting any permanent injury. So inflicting pain is ok, inflicting permanent injury is not. As one famous instructor used to say, "It is the way of peace, but not too much peace."

Q: What would be your dream vacation?

We took it this summer. We spent two weeks roaming around France. It was fantastic! We went from Paris, to Normandy, Provence, and Cannes. I couldn't have asked for a better family trip.

Q: What is the best advice you have ever received?

When I was a student, a lawyer once told me, "If you want to succeed in life, you need to do three things: 1) be honest, 2) be hard working, and 3) be easy to get along with. If you can do that, everything else with fall into place." Turns out, that's solid advice.

Q: What piece of art (book, music, movie, etc.) has most influenced the person you are today?

I was fortunate to grow up in a home where art—and the written word in particular—was valued and celebrated. Work is what we do for a living. Art is what makes life worth living. I have a charcuterie board of artistic influences. I am a devout Tolkien fan. My *Complete Works of Shakespeare* is tattered and dog-eared. I am moved by Van Gogh and Picasso. Seeing the Venus de Milo in real life gave me chills. I believe Eminem is a master poet. Tarantino's storytelling and cinematography are uniquely compelling. Lin-Manuel Miranda, Steven Spielberg, Bob Dylan, Robin Williams—all artists without equal.

Q: What is your next goal?

Tomorrow, I hope I can be a little bit better than I was today. ■

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

NC IOLTA Director to be President of the NAIP (cont.)

operating. She asks the right questions, she builds community, and she shows up. She has been and will continue to be an excellent national leader in the access to justice community."

Mary brings the same enthusiasm, expertise, professionalism, and passion to her work with NAIP that she brings to NC IOLTA. Her leadership makes both organizations better and stronger. Shelby Benton, current chair of the NC IOLTA Board, said, "Our board was not surprised when Mary was asked to lead NAIP. North Carolina has benefited from Mary's strong leadership and passion for this work. We look forward to supporting her as she takes on this national leadership role." ■

Claire Mills is the finance director and operations manager for NC IOLTA.

Internal Family Systems as a Leadership Model

By Laura Mahr

With countless professional leadership models available, it can be difficult to choose the one that will have the greatest impact on our professional decision-making. The sheer number of leadership models to choose from can be overwhelming for individual lawyers and law firms to select and implement. I have worked with several firms and attorneys who have attempted to operationalize a model, only to later end up stymied and ultimately reverting back to ad hoc ways of leading themselves and others. They have shared that this cycle feels both disappointing and frustrating.

Yet, with a constant barrage of decisions and leadership opportunities that arise daily in law practice, firms, legal organizations, and attorneys at every stage of practice are undoubtedly better off with a guiding framework than without one. The question remains: Does an effective decision-making and leadership model exist that is both straightforward and effective for law firms, legal organizations, and the individuals and teams who work at them?

The Internal Family Systems (IFS) Self-Leadership model developed by Dr. Richard Schwartz answers this question with a resounding "Yes!" IFS offers a transformative leadership framework that is both practical and profound.[1] Though IFS was originally developed as a therapeutic model, its principles are easily transferred to professional leadership and organizational development. I have used the IFS model with individual coaching clients for almost ten years, and recently started teaching the model to large groups of lawyers, law firms, and other businesses.

Other attorneys nationally are applying the IFS model to the practice of law. For example, I recently had the pleasure of speaking with attorney David Hoffman, a mediator, arbitrator, Harvard Law professor, and founding member of Boston Law Collaborative, LLC. David applies the IFS model to help parties come to resolution in mediation; he has written an exemplary law review article to articulate how.[2] Our conversation inspired us to organize the first "IFS and the Law" virtual gathering this fall.

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Leading with Self Versus Leading with Parts

The IFS model provides a framework for successful decision-making in the practice of law. It teaches us how to move through the world—to lead, learn, grow, and make choices—from an optimized mindset. In last quarter's Pathways to Well-Being, I discussed the basic principles of the IFS model, including the IFS terms of art: "parts" and "Self."[3] To briefly summarize, IFS views the human psyche as consisting of multiple aspects, called "parts." Parts can be recognized as our thoughts, emotions, behaviors, and sensations that arise in different situations.

In addition to parts, the IFS model includes the concept of the "Self." The Self refers to the core positive essence in each of us—our innately wise inner leader that naturally comes forth when our parts are tended to. Self's core qualities are described using eight words, all of which start with the letter "C." Self's "eight Cs" are: calm, compassion, clarity, curiosity, creativity, confidence, courage, and connectedness. These are explained in greater detail below.

If you've seen the Pixar movie *Inside Out* or *Inside Out 2* released this past summer, you'll immediately get the idea. In the movie, the audience is privy to the many "parts" inside head of Riley, the main character. The parts—aptly named things such as Anxiety, Sadness, Disgust, and Joy—personify Riley's thoughts and emotions as she navigates personal relationships and decision-making. In the movie, the parts wreak havoc when they "take the wheel" on Riley's life, leading her to make all kinds of less-than-optimal decisions until her Self energy steps in, recovers the wheel, and saves the day. While the movie is not an exact replica of the IFS model, it is an excellent way to better understand the model in an enjoyable way.

As *Inside Out* depicts, when accessing Self's core qualities and leading from Self, we align our decision-making and our leadership choices with our true values and intentions. When we lead with Self, we feel good mentally, emotionally, physically, and spiritually. If we don't lead with Self, we likely resort to listening to aspects of ourselves that may be anxious instead of calm, or afraid instead of courageous, thereby thwarting our ability to make good decisions, offer optimal solutions, and successfully lead ourselves and others.

Understanding the "8 Cs"

Below I define the "8 Cs" of Self-Leadership and then briefly address how each one optimizes decision-making and leadership choices in the practice of law.

Calm: allows us to maintain a regulated, composed state, even in the face of internal or external turmoil. Calm helps us stay relaxed and think clearly while also demonstrating to those around us that we are at ease instead of defensive. Calm helps maintain composure, which reduces stress-induced errors and enhances clear thinking, even under pressure. By approaching decision-making with calm, we are less likely to react impulsively and more likely to consider the options and the likely results of our choices—or the choices we advise our clients to make—thoughtfully.

Compassion: is a naturally occurring sense of empathy and understanding toward ourselves and others. Compassion helps us to shift out of strong emotions that disconnect us from others and cultivates an ability to extend generosity, care, and kindness towards ourselves, others, and situations. Odd as it may seem, there is a role for compassion in the field of law. By approaching decision-making and leadership with compassion, we consider the emotional and personal aspects of our clients' and colleagues' situations and foster positive relationships with opposing counsel and decision makers. Compassion can make even the most contentious cases and interpersonal challenges less taxing on everyone involved.

Clarity: allows us to have a clear and unobstructed perspective of ourselves and others. Clarity allows us to think, plan, organize, and communicate in a way that is easy for us and others to understand. When decision-making or leading with clarity, we evaluate the pros and cons of options accurately and advise accordingly. This ensures that our decisions and guidance are based on a realistic understanding of the situation and not on the distortions caused by intense emotions or preconceived biases. Clarity is a key component of effective lawyering as it allows us to understand complex legal issues, navigate intricate case details, and make the best decisions for ourselves and our clients.

Curiosity: is experienced as the capacity to extend an open and non-judgmental interest in what is occurring both internally (within us) and externally (with those around us). Curiosity gives us room to find out more information before jumping to conclusions. It also permits us to ask questions of both ourselves and others. Curiosity helps make room for different perspectives (our own or another's). It provides an opportunity to uncover crucial details, find creative case strategies, and think of out-of-the-box settlement offers. By applying curiosity to decision-making and leadership, lawyers can explore and understand all aspects of a situation before making a decision or advising a client.

Creativity: is the capacity to think, act, and respond in innovative and flexible ways. Creativity allows for the development of new solutions and strategies for internal and external challenges, enhancing adaptability and resilience. Applying creativity to decision-making or leadership allows us to brainstorm innovative solutions, thereby helping to resolve cases and also infusing a sense of novelty and vitality in work, preventing burnout over the long haul.

Confidence: is the cognitive, emotional, and physiological sense of "I've got this." Confidence is the recognition that we can trust our own judgment, abilities, and capacity without needing to be in control of the situation or other people. Applying confidence to decision-making and leadership allows us to ruminate less and be more decisive—enabling us to take action when needed. When we are confident, we are able to persuasively present cases, negotiate assertively, inspire trust in clients, and lead effective teams.

Courage: gives us the strength to face and address challenging situations. It helps us appropriately address our own or others' strong emotions, demanding people or assignments, and unexpected change. When we cultivate courage, we foster a growth mindset and transform our lives and experiences with less fear and angst. Applying courage to decision-making and leadership helps us approach difficult or uncomfortable decisions head-on, rather than avoiding them. Courage also enables us to take on challenging cases and persist in pursuing justice, even when it's hard.

Connectedness: cultivates a sense of equanimity in relationships—whether it be our relationship with ourselves or with others. Connectedness enhances teamwork and collaboration within a law firm, the broader legal community, and with clients. By fostering a sense of connectedness in decision-making, we can regard opposing views within ourselves (for example, one part of us that wants to take a case and another part that doesn't) and build stronger, more satisfying relationships, work more cohesively with teams, exhibit greater professionalism with opposing counsel and judges, and cultivate a supportive and rewarding work environment.

Applying the "8 Cs" to a Case Study

Let's walk through an example of applying the "8 Cs" to illustrate how approaching decision-making with the "8 Cs" results in a more favorable outcome for both the individual attorney making the choice and those impacted by the decision. Note that the "Cs" can be applied in any order, and often spontaneously arise in unique sequences in different situations.

Manuel is working on matters for four different partners at his firm. At times, he feels overwhelmed with what's on his plate; at other times, he feels panicked because he is low on his billable hours. The firm has a flexible "work from home" policy; Manuel usually works in the office three days a week. Next month, Manuel is going on vacation in the Bahamas with his partner, Avery, for a week.

This month has been busy for his team, and Manuel is not sure if he should tell anyone at the firm (or the four partners, specifically) that he will be on vacation for the week. He's contemplating saying he's working from home for the week and trying to keep up with email communications and requests while he's away. One part of Manuel is worried about being perceived as ineffective and not a "team player" if he goes incommunicado for the week, especially since the team needs him right now. Another part is worried that taking a week off may impact his desirability for future assignments when work slows down. Another part of

Manuel is convinced he can keep up with the matters he's assigned while he's in the Bahamas and still have some time to relax. Another part of him knows he is tired, needs a break, and wants to completely unplug for the week. And yet another part is concerned about getting caught omitting the fact that he's in the Bahamas and not technically "working from home." Manuel recently took a training on the IFS "8 Cs" of the Self Leadership model and decides to apply the framework to this decision. Let's see what happens:

Calm: Manuel has been ruminating on what to do for weeks and can't land on the "right" decision. He asks himself, "What would it feel like to pause and calm down so I can apply the '8 Cs' to this situation?" Manuel shuts the door to his office, closes his eyes, and focuses solely on his breathing for five minutes. As he does this, he becomes aware of the tightness he feels in his stomach because he is putting his integrity at stake. Manuel sighs, sensing that honesty is a core value for him and that hiding doesn't feel good.

Compassion: While Manuel is sorting out what to do, he asks himself, "How can I turn an understanding lens toward myself and others in this situation?" He tries it out by saying to himself, "This is hard. It makes sense to me that I'm conflicted. I'm a responsible person and I want my team to know I'm good at my job and I care about showing up. I also have been working really hard and I need a break." He lets out a long exhale. Manuel then turns his understanding toward his colleagues and thinks, "They work hard, too. I don't want them to have to wait if my work is delayed when I'm out scuba diving for the day. I also want them to feel like they can really 'check out' when it's their turn to go on vacation." Then Manuel turns his compassion toward his partner Avery and thinks, "I don't want to be distracted on this vacation. That wouldn't be very fun for Avery; it feels sad to think of doing that." Manuel feels his stomach relaxing.

Clarity: As Manuel pauses to integrate his thoughts and feelings, he asks himself, "Am I accurately perceiving myself and others in this situation?" It becomes clear to him that while he is an important part of the team, the team is capable of handling things for a week without his help. He also realizes that his work is timely and high quality, and it's not likely that the partners will forgo giving him work in the future if he takes a week off now. Manuel starts to feel lighter. He realizes that his best option is to be upfront about being in the Bahamas, set boundaries around communication with the team when he's on vacation, and figure out a plan for getting his assignments handled while he's away. He feels his shoulders lighten as the clarity emerges.

Curiosity: While Manuel starts feeling relief, he evokes curiosity and asks himself, "What is the boundary I want to set around communication from my colleagues when I'm out of town?" He realizes that he wants to find a middle ground for all of his parts: the part of him that wants to be a team player, the part of him that needs a break, and the part of him who wants to be present with Avery in the Bahamas. He ponders, "How can I invest in the cases, my team, my partnership, and myself with foresight and initiative?" As Manuel gets curious about finding a solution, he feels his heart beating a little faster, excited to find a solution. He realizes that it would be ideal to be completely off of work email while he's away, but that he would welcome texts from team members if an urgent client matter arises.

Creativity: Manuel considers how to approach the needed communications with creativity. He realizes that he's never talked with Avery about work boundaries when they're on vacation together—that would be novel! He also discerns that he can state his vacation communication preferences to his team members and ask for their input. Manuel realizes that in doing so, he might set a helpful precedent about communicating preferred boundaries for others when they go on vacation, and that feels satisfying.

Confidence: Manuel thinks about having these conversations with his team members and with Avery and feels his throat get tight. He asks himself, "What am I capable of doing well here?" He remembers a time when he successfully communicated and set a difficult boundary in the past, and says aloud, "I did it well then: I can do it well now. I've got this." He feels his throat relax and swallows.

Courage: As Manuel's confidence rises, he feels his chest opening and his shoulder blades relaxing down his back. He decides to draft an email right then and there to his team members and to each of the four partners about his upcoming trip and his preferred boundaries. When he's done drafting the emails, he pauses to stretch and yawn. He then sends a text to Avery to see if they can discuss vacation work boundaries after dinner that night.

Connectedness: Before sending the emails, Manuel checks to see if his words convey a sense of collaboration and cultivate connection while also being clear about his own needs and capacities when on vacation. He asks himself, "How would I respond if I received this email?" He then tweaks a few things, remembering to convey his openness to hear input from the email recipient. After sending the emails, Manuel breathes a sigh of relief. He reflects that, while stopping to pause and work through the "8 Cs" during his workday initially felt burdensome, he realizes it didn't actually take much time. He is looking forward to the night ahead and realizes what a relief it will be to have extra energy for his conversation with Avery, as he won't be ruminating about what to say to the firm. Whew!

One "C" at a Time

By integrating the principles of IFS's "8 Cs" into our professional lives, attorneys and firms can enhance not only our individual leadership skills and well-being, but also foster a more cohesive, resilient, and productive organizational culture. The IFS model cultivates a mindset that empowers us to lead from our true and best selves, resulting in improved decision-making, more satisfying client relationships, and greater overall job satisfaction. Reading Dr. Schwartz's book, *No Bad Parts*, can help flesh out the principles of the IFS model in greater depth.

The next time you have a decision to make, try processing it through the lens of one or more of the "Cs" of Self-Leadership. As you apply the "8 Cs" to your decision-making and case strategies, as well as to your interactions with yourself and others, notice if it helps you to feel more aligned with your core values. Simultaneously, as you cultivate the "8 Cs," you may find that you naturally begin enjoying your professional life even more as you trade out anxiety for calmness; confusion for clarity; rigidity for curiosity; judgment for compassion; self-doubt for self-confidence; fear for courage; unimaginative for creativity; and disconnection for connectedness. What does it feel like to be a lawyer and lead from *that* kind of Self? ■

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

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Thinking Like a Lawyer: Gold Standard or Occupational Hazard?

CATHY KILLIAN AND CANDACE HOFFMAN

The Lawyer Assistance Program is uniquely positioned at a crossroads of two very different professions: lawyering and mental health counseling. The LAP is staffed with two professional counselors, Cathy Killian and Nicki Ellington, and two lawyers, Robynn Moraites and Candace Hoffman. We four often tease each other about how differently we think about things. One group of us (say, the counselors) can be positively alarmed about something that did not even hit the other group's (the lawyers) radar, and vice versa. Both perspectives are essential for successful client outcomes as well as to the successful operation of our program.

Some of us didn't get the memo that "thinking like a lawyer is a technique, not a lifestyle." Many lawyers have no idea that the way that they were taught to think in law school would contribute in any way to emotional problems later in life. But the research bears this out. Studies consistently show that law students enter law school with the same (or even lower) rates of alcoholism, depression, and suicidal ideation as the general public but graduate at rates that mirror those seen in the profession, which are three to four times higher than those seen upon admission.

So, we thought we would have some fun this quarter and deviate from our normal column format. We will highlight some aspects of lawyer thinking explored from both a counselor's and a lawyer's perspective, illuminating the pros and cons. Cathy Killian, LAP clinical director, will provide the counselor's perspective. Candace Hoffman, LAP assistant director, will provide the lawyer's perspective. Becoming aware of and examining our thinking are ways for lawyers to start to achieve a better balance in our professional and personal lives.

From the first day of law school, students are taught how to think differently. As Professor Kingsfield said, "You come in here with a skull full of mush and you leave thinking like a lawyer." Students quickly learn to identify the issues, decide the applicable rulings, analyze possibilities, and arrive at a conclusion, while painfully aware that failing to recognize all possible aspects could be disastrous.

Cathy: And students must do this in an extremely competitive environment where they are constantly being challenged by their professors, peers, and themselves. This continual and intense pressure creates neural pathways in the brain where their ability to think like a lawyer becomes ingrained and automatic. I prefer to view it as they enter law school with a head full of Play-Doh and leave thinking like a lawyer.

Candace: It absolutely does change the way our brains work, and it should, considering how much we invest in law school. I love talking about the great research on neuroplasticity in our CLEs. It's amazing the ways we can alter our brains, creating new neural pathways. The thing is, it's unrealistic to expect that we work so hard in law school to create these neural pathways and then expect the train to just magically "switch tracks" when we clock out at 5pm (if we are lucky enough to do so). And no one expects a doctor to ignore signs and symptoms of disease and illness in their family members and friends (in fact, we might find them unethical if they do).

Cathy: But we can conjure up some "magic" to change tracks in our neural pathways by reframing our thoughts and having intentionality. Doctors may not ignore illnesses in their family members and friends, but they aren't conducting a physical exam on them when they get home either (we might find them unethical if they do).

Candace: Very good point. And if you don't have any tools to help your brain transition out of that three-piece suit at the end of the day, reach out to LAP for ideas.

Being taught to believe the legal system is a "supreme system of order," law students develop a very logical and rational way to reason their way to a conclusion. It requires a specific and unique skill set, primarily grounded in deductive reasoning. They are critical thinkers who use the process of analysis to view all perspectives, then strategically think three or four steps ahead to reason their way to a solution. Law schools convey this as a superior way of thinking.

Candace: Yes, we become critical thinking assassins, and it's not only helpful, but necessary. When I used to prepare my cases for litigation, I would comb the files for every weak point that my opposing counsel could exploit so that I could come up with every counter argument. Only looking at the positive aspects of the case would leave me open to assault and not provide competent representation for my clients.

Cathy: But these positive professional attributes can become negative personal impediments. Critical thinking requires analyzing, conceptualizing, synthesizing, and applying facts, evidence, data, and as you said, every bit of information possible. It also requires ignoring your feelings while doing so.

So, if you get really good at critical thinking, you can get really bad at identifying your feelings or processing them appropriately. For example, lawyers sometimes "stay in their heads" and analyze situations (outside of work) when they are meant to be feeling them, so they stay focused on problem solving rather than being present in their experience or someone else's.

It takes a great deal of effort/focus to create critical thinking skills and override the innate way our brains normally function—and how they evolved to function—so much so, it can be to the almost total exclusion of one's feelings (as well as others' feelings). In turn, being disconnected from one's emotions can detrimentally impact one's relationships and quality of life.

I see so many lawyers who, when they get to LAP, are literally unable to feel happy, excited, or motivated, and instead are in a constant state of restlessness or even hopelessness. Being cut off from this emotional side of life, they have difficulty establishing and maintaining relationships. As a consequence, many lawyers find themselves completely isolated.

Critical thinking proves invaluable in lawyers' professional lives, but it is not an all-or-nothing proposition. Emotional intelligence can be an expansion of, rather than a replacement for, lawyers' current critical thinking skill set.

This ability to look at issues from all perspectives and being adept at scrutinizing them means lawyers can discern things that others could not care less about.

Candace: I very much agree with this. It's impossible for me to view a situation from only one perspective, or very rare if it does happen. In fact, I find myself uneasy when people declare things in "always" or "never" terms or employ extremely black and white thinking.

Cathy: The need to gather all that info can make it difficult to come to a decision in a personal context. You can spend years "researching" what kind of car to buy and still be undecided because there is always one more person to ask or place to look. The nonlawyers in your life may view this as you being difficult or interpret it as a sign of insecurity or avoidance. Or they may see it as you getting hung up on something nobody cares about but you.

Candace: I see that from your perspective—whoops...did it again. It's good practice for lawyers to have an end date or time to stop the research and pull the trigger. That's easier to do with work—eventually the hearing is calendared or the contract is due. With our personal lives we have to be intentional, like Cathy always reminds us.

Lawyers focus on flaws and potential problems so they can plan accordingly, but still tend to remain skeptical about all possible solutions.

Candace: I love the scene in *Home Alone* where Peter McCallister tells Uncle Frank to think positive (about making it to the airport and on the plane in 45 minutes from their house in downtown Chicago), and Frank replies, "You be positive. I'll be realistic." I think we see more problems than the average nonlawyer, but don't you wish you'd consulted with us before planning your trip where you ended up stranded with no back-up hotel and didn't have the right cell phone plan for Indonesia?

Cathy: The downside is that by the time you provide me with the needed information to address all the potential issues that might occur in Indonesia, I'll be switching planes to Switzerland where it's safer to travel. On a personal level, realistic thinking is considering outcomes that are both negative and positive. Only considering worst case scenarios isn't realistic, it's just negative. I also think this ability to recognize worst case scenarios sets lawyers up for anxiety. Additional stress ramps up the internal posture from the *possibility* of these problems happening to excessive worry about the *probability* of these problems happening. It's all about fear, but not the fear of what might happen—the fear that we won't be able to handle what might happen. Never a good belief for a lawyer to have. By the way, about 90% of things we worry about never happen.

Candace: Yes, another plug for sharing your fears with a trusted counselor (like LAP counselors Nicki and Cathy), or a trusted, supportive friend, because they can remind you of all the times you have handled situations just like the current one and been just fine.

Lawyers seek a clear precedent as an authoritative platform for subsequent decisions/actions and are reluctant to proceed without one.

Cathy: This dislike of situations with uncertainty can create a lack of spontaneity, avoidance of taking risks, and behavior that seems extraordinarily rigid.

Candace: Yes, most of us are allergic to the words "arbitrary" and "capricious." We want something that shores up our reasoning, which again is necessary for our professional lives. I think we can divorce ourselves from this in our personal lives when we weigh the risk versus reward. For example, I don't love taking risks with litigation, but when I weigh the risk of sky diving with the reward of the free fall, sky diving wins the day.

Cathy: I think that would only be true for the majority of lawyers if they had reviewed the research and civil litigation case histories on deaths from skydiving, found the fatality index rate was just .027 fatalities per 100,000 skydives, and were assured their family had the best skydiving personal injury attorney on speed dial.

Lawyers are defensive thinkers and thus "disagreeable" either by nature or training, looking to re-negotiate, amend, or convince you their perspective is correct. This requires them to be very good at active listening, and excellent at focusing on what appears to be the other person's primary point.

Candace: With comedians and lawyers, you can't take every response personally (at least at first blush). Julia Louis-Dreyfus asks Jerry Seinfeld in *Comedians in Cars Getting Coffee* why his opinion on marriage changed. He had always said he would never get married and is now married to Jessica Seinfeld. She exclaims, "You said you were never going to get married." Seinfeld replies, "I still feel that way." He loves his wife and is very vocal about it, but that's not his immediate reaction to Julia. His hardwiring as a comic is looking for the punchline, knowing that the truth or authenticity is under there somewhere, but it's not pertinent to the goal at hand. We lawyers don't get quite the laughs that stand-ups do or the pats on the back for falling back into our hard wiring, but people still want to bring their problems to us, both professionally and personally, when they want the right answer.

Cathy: What may merely be an automatic cognitive exercise on the part of a lawyer can be seen as controlling and condescending to someone on the receiving end in a personal situation. Initially, their listening ability may be interpreted as engagement and even respect. But it can take a dark turn if they utilize the other person's point as an entry point for destruction, kind of like Luke entering the Death Star. Defensive thinking is an asset in the courtroom or boardroom, but it really stinks in the bedroom. Speaking of Seinfeld, I doubt many lawyers would find much humor in Seinfeld's #1 Key to Life…"Just pure,

The ability to disconnect from and mentally lock away values and emotions obviously makes it possible for lawyers to function well and to adequately represent their clients. But it can also make it possible for them to act out in destructive ways, become detached from all feelings, become emotionally unavailable (including to themselves), and experience burnout.

stupid, no-real-idea-what-I'm-doing-here effort always yields a positive value, even if the outcome of the effort is absolute failure of the desired result."

Candace: Yes, says the man with one of the highest grossing sitcoms of all time.

Lawyers tend to question everything as a way to gather facts and information.

Candace: Yes, this is very true; however, a little gentle questioning is great for people to strengthen their beliefs (which most claim to want to do). There is a balance of when to ask the question and when to file those away for a rainy day. Sometimes when talking with friends and colleagues, I will ask (without sarcasm) whether they want problem solving or commiseration. Another thing I think the most aware lawyers can or will do is start with "I could be wrong…" "For me this is how it has worked," and then give an alternative perspective.

Cathy: As one lawyer put it, "[She] deemed the way I questioned things as argumentative and adversarial when I wasn't trying to be." He was specifically talking about his wife...ex-wife, that is.

Lawyers have helicopter thinking, being able to see a situation in its overall context and current environment.

Cathy: However, in focusing so intensely on the bigger picture, they are unable to see anything but that point of focus. Being something of a research nerd, I often come across interesting and/or applicable studies. There is a Nobel Prize winning study conducted by Daniel Simons of the University of Illinois, and Christopher Chabris of Harvard University that exemplifies this concept. Subjects were asked to watch a video, which has two teams passing balls between each other, and to count the number of passes made by one of the teams. At some point in the video, a person in a gorilla suit casually walks through, beats its chest, and then walks off. The subjects were then asked how many times the ball was passed, and if they had noticed anything unusual. While seeing a gorilla appearing out of nowhere and out of context sounds incredibly obvious, half of the subjects didn't see it and were astonished they could have missed it. I'm guessing lawyers with this "perceptual blindness" would also miss the gorilla, and likely argue that you were wrong.

Candace: Are you sure you're right? Only kidding, but this is an incredibly interesting study, and while that may be true, I guarantee you any lawyers who participated in this study correctly recorded the right number of passes.

The precision of their thinking is also conveyed in the way they communicate. They choose their words carefully and structure verbal and written communication to narrow and intensify the focus of what they want to convey.

Cathy: Lawyers can use their ability to make articulation an art form for good or "evil." They can manipulate their words as a method to manipulate people. This can morph into dishonesty (including by omission), or denial (including to themselves), or it can narrow and intensify the focus to get what they want. This is definitely true of a lawyer with substance abuse issues, and it can prove to be a huge impediment to their recovery efforts. As is said in Alcoholics Anonymous, you are never too dumb to get into recovery, but you can be too smart.

Candace: It's an easy transition to make, as lawyers generally operate in the absence of absolute certainty. Fulfilling our ethical requirement of "zealous advocacy" virtually requires the lawyer to argue from the client's perspective, however implausible, not from the truth. But whose truth? If eyewitness testimony has taught us anything, it's that we all perceive things differently, but I digress. Yes, 100 percent we must be precise communicators/manipulators at work. Lawyers are skilled at manipulation or effective communication (two sides of the same coin), but internal denial can be combatted by having great support systems to check our motives, perceptions, and internal beliefs with others who understand.

Cathy: Others who understand and will tell us what we need to hear—not just what we want to hear…like what happens in the LAP support groups. Group members come from a place of respect and caring, without judgement.

This skillful analytical approach requires focusing on real and tangible facts while putting aside emotional opinions or reactions. It is a purposeful discounting of the lawyer's morals and values. Yale Law School Professor Stephen Wizner states, "The process of teaching law students to think like lawyers causes them to suppress the very feelings and moral concerns that they brought with them to law school, and…that brought them to law school." Not only do lawyers learn to dismiss their own emotions, but they must also be able to help clients dismiss theirs and navigate through a decision-making process that transforms their often-overwhelming outpouring of emotions into concrete decisions and definitive actions.

Candace: Yes, and I think that it is a benefit to learn how to artfully compartmentalize our emotions when helping a client reach the best outcome possible. The key I learned is to reintegrate at the end of the day and be intentional about acknowledging the effect it has. One of the greatest tools I employed while litigating was connecting with my colleagues and sharing some of the cases that were rife with abuse and neglect. It did not take away the reality of having to look at the darker side of humanity, but it did lessen the impact significantly. As for helping clients dismiss emotions, I think to some extent that is a skill that is incredibly beneficial in our professional lives and our personal relationships. To be in touch with our emotions is good, but to be ruled by them is not ideal. Because we have learned how to artfully compartmentalize, we can give great objective feedback to our clients and help them not make permanent decisions on temporary emotions. We can do the same for our loved ones (if we have confirmed they

are open to it).

Cathy: The ability to disconnect from and mentally lock away values and emotions obviously makes it possible for lawyers to function well and to adequately represent their clients. But it can also make it possible for them to act out in destructive ways, become detached from all feelings, become emotionally unavailable (including to themselves), and experience burnout. One way to view healthy compartmentalizing is that it should only be temporary. We can put our personal feelings and values in that little compartment in our desk drawer where we keep our car keys, but like our keys, we need to take them with us when we leave. The reverse is also true. Lawyers need to be able to leave all the bad stuff they see behind at the end of the day so they don't allow those feelings and experiences to impact their personal lives. However, neither of these buckets of compartmentalized feelings can stay locked up like a 12-year-old's diary. We need to admit them, honor them, and address them as Candace described or in whatever ways that work for us. It is incredibly difficult terrain to navigate, and most lawyers need some training on how to do this effectively.

Many believe this exclusion of emotions and specific personal aspects occurs because it is viewed as "inconsistent with legal thinking." Lawyer Jordan Furlong states that a purely analytical approach can "drown out your instincts, stifle your emotions, and numb your heart, but frequently neglects to enlighten and illuminate your soul." Anthropologist and Law Professor Elizabeth Mertz discovered that this detachment from emotions and values increases a lawyer's tendency to isolate and makes them less likely to ask for support or help from others.

Candace: We attorneys will work the hardest to fix your problem because we are the fixers. The tendency to isolate is real. We do not want to appear weak or rely on others to fix something we think we should be fixing. Through the LAP community and support networks in the profession, we are decreasing those mental and emotional barriers to reach out and get help. We have this beautiful blend of lawyers and clinicians at LAP, and that is what in fact makes us so effective. Our incredible LAP volunteers who share their stories, whether in CLE or in the *Sidebar* column or podcast, or those that reach out to a lawyer who might be struggling, help break down that isolation. We are the most critical of ourselves, but when we sit across from another lawyer who has struggled with the same issues and is on the other side, we don't have that same level of judgement for them. We can see that we are not alone. And then that isolated lawyer, having seen the miracle of recovery, can access those clinical tools that will help them make it over the bridge to stability.

Cathy: There is a pattern of abusive relationships worth mentioning. Hang with me here. Isolation is one of the most effective forms of manipulation in abusive situations. Without checks and balances from others, the abuser creates a sense of doubt in a victims' perception of reality, causing them to question their own feelings, instincts, and even sanity. Their confidence becomes weakened, making them easier to control. The degree of power and control over the abused is contingent upon the degree of their physical or emotional isolation. This is the same dynamic that occurs within our minds when we isolate in an unhealthy way. We become a victim of our distorted thinking and detached from our authentic self. It sets the stage for a lawyer to measure their worth in terms of what they have achieved as a lawyer, rather than their value as a person. Perhaps it also helps to explain why, even though medical students and doctors have competitive environments, enormous stress, and high educational debt, it is the lawyers who have the highest rate of alcoholism, depression, and anxiety.

Avoiding overidentification with the professional side allows for balance and more fluidity in thinking and behaviors.

Cathy: Thinking like a lawyer can be a positive quality if viewed as a "legal skill, not a life skill." It should be a complement to the way a lawyer thinks, not a replacement for the way a person thinks. By keeping this perspective, the lawyer can inspire people instead of manipulating them. They can respond to change rather than resist it. They can make creative choices instead of strictly calculated ones. They can move from being rigid to being relaxed. They are aware of their values and live a life reflective of that. They adhere to the fact that being a lawyer is what they do, not who they are.

Candace: And lawyers like that are some of the best people you will ever meet. That balance can bring us to the very best parts of life.

Lawyer Steven Radke's remarks to entering Marquette Law School students summarize it well: "Over the next few years, you will develop a highly tuned ability to make distinctions that do not make a difference to most people, a capacity to see ambiguity where others see things as crystal clear, and an ability to see issues from all sides. You will be able to artfully manipulate facts and sharply and persuasively argue any point…[But] your spouse is not the appropriate person on whom you should practice any of these skills."

Through our own blending of diverse perspectives of staff and volunteers, the LAP can provide the guidance and support to help you establish and maintain a healthy and happy professional and personal life. ■

Cathy Killian is the clinical director and Candace Hoffman is the assistant director of the North Carolina Lawyer Assistance Program, 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.

Pathways to Well-being (cont.)

Legal Minds LLC, providing well-being consulting, training, and resilience coaching for attorneys and law offices nationwide. Through the lens of neurobiology, Laura helps build strong leaders, happy lawyers, and effective teams. Her work is informed by 13 years of practice as a civil sexual assault attorney, 25 years as a teacher and student of mindfulness and yoga, and eight years studying neurobiology and neuropsychology with clinical pioneers. Laura has been applying the IFS "8 Cs" model to her training, coaching, and consulting since receiving her IFS Level One certification in 2017. If you are interested in learning more about Laura's CLE offerings that grow your team's confidence and build resilience through the IFS model, contact her through consciouslegalminds.com

Endnotes

1. ifs-institute.com.
2. bit.ly/3zPQLwU.
3. ncbar.gov/media/730791/journal-29-2.pdf#page=29.

Committee Publishes Revised Opinion on Artificial Intelligence

Council Actions

At its meeting on July 19, 2024, the State Bar Council adopted the ethics opinion summarized below:

2023 Formal Ethics Opinion 3

Installation of Third Party's Self-Service Kiosk in Lawyer's Office and Inclusion of Lawyer in Third Party's Advertising Efforts

Opinion provides that a lawyer may allow a third-party business to install a self-service kiosk in the lawyer's office for the provision of ignition lock services but may not receive rent or referral fees, and further concludes that a lawyer may be included in the business's advertising efforts upon compliance with Rule 7.4.

Ethics Committee Actions

At its meeting on July 18, 2024, the Ethics Committee considered a total of eight inquiries, including the adopted opinion referenced above. Four inquiries were sent or returned to subcommittee for further study, including an inquiry examining the ethical requirements relating to a lawyer's departure from a law firm and an inquiry addressing a lawyer's ability to obligate a client's estate to pay the lawyer for any time spent defending the lawyer's work in drafting and executing the client's will. The committee also approved an advisory opinion concerning short-term limited legal service programs, and the committee approved the publication of two proposed formal ethics opinions for comment—including a revised opinion on a lawyer's use of artificial intelligence in a law practice—which appear below.

Proposed 2024 Formal Ethics Opinion 1
Use of Artificial Intelligence in a Law Practice
July 18, 2024

Proposed opinion discusses a lawyer's professional responsibility when using artificial intelligence in a law practice.

Editor's Note: There is an increasingly vast number of helpful resources on understanding Artificial Intelligence and the technology's interaction with the legal profession. The resources referenced in this opinion are not exhaustive but are intended to serve as a starting point for a lawyer's understanding of the topic. Over time, this editor's note may be updated as additional resources are published that staff concludes would be beneficial to lawyers.

Background:

"Artificial intelligence" (hereinafter, "AI") is a broad and evolving term encompassing myriad programs and processes with myriad capabilities. While a single definition of AI is not yet settled (and likely impossible), for the purposes of this opinion, the term "AI" refers to "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments." Nat'l Artificial Intelligence Initiative Act of 2020, Div. E, sec. 5002(3) (2021). Said in another, over-simplified way, AI is the use of computer science and extensive data sets to enable problem solving or decision-making; often through the implementation of sophisticated algorithms. AI encompasses, but is not limited to, both extractive and generative AI,[1] natural language processing, large language models, and any number of machine learning processes.[2] Examples of law-related AI programs range from online electronic legal research and case management software to e-discovery tools and programs that draft legal documents (e.g., a trial brief, will, etc.) based upon the lawyer's input of information that may or may not be client-specific.

Most lawyers have likely used some form of AI when practicing law, even if they didn't realize it (e.g., widely used online legal research subscription services utilize a type of extractive AI, or a program that "extracts" information relevant to the user's inquiry from a large set of existing data upon which the program has been trained). Within the year preceding the date of this opinion, generative AI programs that *create* products in response to a user's request based upon a large

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 its next quarterly meeting. Any comment or request should be directed to the Ethics Committee at ethicscomments@ncbar.gov no later than September 30, 2024.

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for a formal opinion are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

set of existing data upon which the program has been trained (e.g., Chat-GPT) have grown in capability and popularity, generating both positive and negative reactions regarding the integration of these technological breakthroughs in the legal profession.[3] It is unquestioned that AI can be used in the practice of law to increase efficiency and consistency in the provision of legal services. However, AI and its work product can be inaccurate or unreliable despite its appearance of reliability when used during the provision of legal services.[4]

Inquiry #1:

Considering the advantages and disadvantages of using AI in the provision of legal services, is a lawyer permitted to use AI in a law practice?

Opinion #1:

Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying upon or implementing the AI's work product in the provision of legal services.

On the spectrum of law practice resources, AI falls somewhere between programs, tools, and processes readily used in law practice today (e.g. case management systems, trust account management programs, electronic legal research, etc.) and nonlawyer support staff (e.g. paralegals, summer associates, IT professionals, etc.). Nothing in the Rules of Professional Conduct specifically addresses, let alone prohibits, a lawyer's use of AI in her law practice. However, should a lawyer choose to employ AI in her practice, the lawyer must do so competently, the lawyer must do so securely, and the lawyer must exercise her independent judgment in supervising the use of such processes in her practice.

Rule 1.1 prohibits lawyers from "handl[ing] a legal matter that the lawyer knows or should know he or she is not competent to handle[,]" and goes on to note that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 recognizes the reality of advancements in technology impacting a lawyer's practice, and states that part of a lawyer's duty of competency is to "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Rule 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 5.3 requires a lawyer to "make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[,]" and further requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[.]" Rules 5.3(a) and (b). The requirements articulated in Rule 5.3 apply to nonlawyer assistants within a law firm as well as those outside of a law firm that are engaged to provide assistance in the lawyer's provision of legal services to clients, such as third-party software companies. *See* 2011 FEO 6 ("Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer.").

A lawyer may use AI in a variety of manners in connection with her law practice, and it is a lawyer's responsibility to exercise her independent professional judgment in determining how (or if) to use the product of an AI tool in furtherance of her representation of a client. From discovery and document review to legal research, drafting contracts, and aggregating/analyzing data trends, the possibilities for employing AI in a law practice are increasingly present and constantly evolving. A lawyer's decision to use and rely upon AI to assist in the lawyer's representation of a client is generally hers alone and one to be determined depending upon a number of factors, including the impact of such services, the cost of such services, and the reliability of the processes. This opinion does not attempt to dictate when and how AI is appropriate for a law practice.[5]

Should a lawyer decide to employ AI in the representation of a client, however, the lawyer is fully responsible for the use and impact of AI in the client's case. The lawyer must use the AI tool in a way that meets the competency standard set out in Rule 1.1. Like other software, the lawyer employing an AI tool must educate herself on the benefits and risks associated with the tool, as well as the impact of using the tool on the client's case. Educational efforts include, but are not limited to, reviewing current and relevant resources on AI broadly and on the specific program intended for use during the provision of legal services. A lawyer that inputs confidential client information into an AI tool must take steps to ensure the information remains secure and protected from unauthorized access or inadvertent disclosure per Rule 1.6(c). Additionally, a lawyer utilizing an outside third-party company's AI program or service must make reasonable efforts to ensure that the program or service used is compatible with the lawyer's responsibilities under the Rules of Professional Conduct pursuant to Rule 5.3. Whether the lawyer is reviewing the results of a legal research program, a keyword search of emails for production during discovery, proposed reconciliations of the lawyer's trust account prepared by a long-time assistant, or a risk analysis of potential borrowers for a lender-client produced by an AI process, the lawyer is individually responsible for reviewing, evaluating, and ultimately relying upon the work produced by someone—or something—other than the lawyer.

Inquiry #2:

May a lawyer provide or input a client's documents, data, or other information to a third-party company's AI program for assistance in the provision of legal services?

Opinion #2:

Yes, provided the lawyer has satisfied herself that the third-party company's AI program is sufficiently secure and complies with the lawyer's obligations to ensure any client information will not be inadvertently dis-

Need Ethics Advice?

After consulting the Rules of Professional Conduct and the relevant ethics opinions, if you continue to have questions about your professional responsibility, any lawyer may request informal advice from the ethics department of the State Bar by calling (919) 828-4620 or by emailing ethicsadvice@ncbar.gov.

closed or accessed by unauthorized individuals pursuant to Rule 1.6(c).

At the outset, the Ethics Committee does not opine on whether the information shared with an AI tool violates the attorney-client privilege, as the issue is a legal question and outside the scope of the Rules of Professional Conduct. A lawyer should research and resolve any question on privilege prior to engaging with a third-party company's AI program for use in the provision of legal services to a client, particularly if client-specific information will be provided to the AI program.

This inquiry is akin to any lawyer providing confidential information to a third-party software program (practice management, cloud storage, etc.), on which the Ethics Committee has previously opined. As noted above, a lawyer has an obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating the representation of the client." Rule 1.6(c). What constitutes "reasonable efforts" will vary depending on the circumstances related to the practice and representation, as well as a variety of factors including the sensitivity of the information and the cost or benefit of employing additional security measures to protect the information. Rule 1.6, cmt. [19]. Ultimately, "[a] lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties" when using technology to handle, communicate, analyze, or otherwise interact with confidential client information. 2008 FEO 5; *see also* 2005 FEO 10; 2011 FEO 6.

The Ethics Committee in 2011 FEO 6 recognized that employing a third party company's services/technology with regards to confidential client information requires a lawyer to exercise reasonable care when selecting a vendor. The opinion states:

> [W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality....A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of [technology] that the lawyer is required to apply when representing clients.

2011 FEO 6 (internal citations omitted). In exercising reasonable care, the opinion discusses a sample of considerations for evaluating whether a particular third party company's services are compatible with the lawyer's professional responsibility, including:

- The experience, reputation, and stability of the company;
- Whether the terms of service include an agreement on how the company will handle confidential client information, including security measures employed by the company to safeguard information provided by the lawyer; and
- Whether the terms of service clarify how information provided to the company will be retrieved by the lawyer or otherwise safely destroyed if not retrieved should the company go out of business, change ownership, or if services are terminated.

2011 FEO 6; *see* Rule 5.3. A proposed ethics opinion from the Florida Bar on a lawyer's use of AI adds that lawyers should "[d]etermine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information" when determining whether a third party company's technological services are compatible with the lawyer's duty of confidentiality. *See* Florida Bar Proposed Advisory Opinion 24-1 (published Nov. 13, 2023). Furthermore, this duty of reasonable care continues beyond initial selection of a service, program, or tool and extends throughout the lawyer's use of the service. A lawyer should continuously educate herself on the selected technology and developments thereto—both individually and by "consult[ing] periodically with professionals competent in the area of online security"—and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure. 2011 FEO 6.

The aforementioned considerations—including the consideration regarding ownership of information articulated by the Florida Bar opinion—are equally applicable to a lawyer's selection and use of a third party company's AI service/program. Just as with any third-party service, a lawyer has a duty under Rule 5.3 to make reasonable efforts to ensure the third-party AI program or service is compatible with the lawyer's professional responsibility, particularly with regards to the lawyer's duty of confidentiality pursuant to Rule 1.6. Importantly, some current AI programs are publicly available to all consumers/users, and the nature of the AI program is to retain and train itself based on the information provided by any user of its program. Lawyers should educate themselves on the nature of any publicly available AI program intended to be used in the provision of legal services, with particular focus on whether the AI program will retain and subsequently use the information provided by the user. Generally, and as of the date of this opinion, lawyers should avoid inputting client-specific information into publicly available AI resources.

Inquiry #3:

If a firm were to have an AI software tool initially developed by a third-party but then used the AI tool in-house using law firm owned servers and related infrastructure, does that change the data security requirement analysis in Opinion #2?

Opinion #3:

No. Lawyer remains responsible for keeping the information secure pursuant to Rule 1.6(c) regardless of the program's location. While an in-house program may seem more secure because the program is maintained and run using local servers, those servers may be as much if not more vulnerable to attack because a lawyer acting independently may not be able to match the security features typically employed by larger companies whose reputations are built, in part, on security and customer service. A lawyer who plans to independently store client information should consult an information technology/cybersecurity expert about steps needed to adequately protect the information stored on local servers.

Relatedly, AI programs developed for use in-house or by a particular law practice may also be derivatives of a single, publicly available AI program; as such, some of these customized programs may continue to send information inputted into the firm-specific program back to the central program for additional use or training. Again, prior to using such a program, a lawyer must educate herself on the nuances and operation of the program

to ensure client information will remain protected in accordance with the lawyer's professional responsibility. The list of considerations found in Opinion #2 offers a starting point for questions to explore when identifying, evaluating, and selecting a vendor.

Inquiry #4:

If a lawyer signs a pleading based on information generated from AI, is there variation from traditional or existing ethical obligations and expectations placed on lawyers signing pleadings absent AI involvement?

Opinion #4:

No. A lawyer may not abrogate her responsibilities under the Rules of Professional Conduct by relying upon AI. Per Rule 3.1, a lawyer is prohibited from bringing or defending "a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]" A lawyer's signature on a pleading also certifies the lawyer's good faith belief as to the factual and legal assertions therein. *See* N.C. R. Civ. Pro. 11 ("The signature of an attorney...constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."). If the lawyer employs AI in her practice and adopts the tool's product as her own, the lawyer is professionally responsible for the use of the tool's product. *See* Opinion #1.

Inquiry #5:

If a lawyer uses AI to assist in the representation of a client, is the lawyer under any obligation to inform the client that the lawyer has used AI in furtherance of the representation or legal services provided?

Opinion #5:

The answer to this question depends on the type of technology used, the intended product from the technology, and the level of reliance placed upon the technology/technology's product. Ultimately, the attorney/firm will need to respond to each case and each client individually. Rule 1.4(b) requires an attorney to explain a matter to her client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Generally, a lawyer need not inform her client that she is using an AI tool to complete ordinary tasks, such as conducting legal research or generic case/practice management. However, if a lawyer delegates substantive tasks in furtherance of the representation to an AI tool, the lawyer's use of the tool is akin to outsourcing legal work to a nonlawyer or other third-party resource or service, for which the client's advanced informed consent is required. *See* 2007 FEO 12. Additionally, if the decision to use or not use an AI tool in the case requires the client's input with regard to fees, the lawyer must inform and seek input from the client. As stated before, it is ultimately a lawyer's professional responsibility to exercise independent judgment when deciding to use or rely upon the work product of any outsourced, third-party service. *See* 2007 FEO 12; Opinions #1 & 4.

Inquiry #6:

Lawyer has an estate planning practice and bills at the rate of $300 per hour. Lawyer has integrated an AI program into the provision of legal services, resulting in increased efficiency and work output. For example, Lawyer previously spent approximately three hours drafting standard estate planning documents for a client; with the use of AI, Lawyer now spends only one hour preparing those same documents for a client. May Lawyer bill the client for the three hours of work that the prepared estate documents represent?

Opinion #6:

No, Lawyer may not bill a client for three hours of work when only one hour of work was actually experienced. A lawyer's billing practices must be accurate, honest, and not clearly excessive. Rules 7.1, 8.4(c), and 1.5(a); *see also* 2022 FEO 4. If the use of AI in Lawyer's practice results in greater efficiencies in providing legal services, Lawyer may enjoy the benefit of those new efficiencies by completing more work for more clients; Lawyer may not inaccurately bill a client based upon the "time-value represented" by the end product should Lawyer not have used AI when providing legal services.

Rather than billing on an hourly basis, Lawyer may consider billing clients a flat fee for the drafting of documents—even when using AI to assist in drafting—provided the flat fee charged is not clearly excessive and the client consents to the billing structure. *See* 2022 FEO 4.

Relatedly, Lawyer may also bill a client for expenses incurred related to Lawyer's use of AI in the furtherance of a client's legal services, provided the expenses charged are accurate, not clearly excessive, and the client consents to the charge, preferably in writing. *See* Rule 1.5(b). Such costs include:

- a lawyer's use of AI that is specifically identified and directly related to the legal services provided to the client during the representation; or
- a general administrative fee to cover the costs of generic expenses incurred during the representation for the benefit of the client, e.g., copies, printing, postage, or general technology-related expenses—including AI—that are implemented to improve services or client convenience.

Endnotes

1. For a better understanding of the differences between *extractive and generative AI, see Jake Nelson, Combining Extractive and Generative AI for New Possibilities*, LexisNexis (June 6, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/combining-extractive-and-generative-ai-for-new-possibilities (last visited January 10, 2024).
2. For an overview of the state of AI as of the date of this opinion, *see What is Artificial Intelligence (AI)?*, IBM, ibm.com/topics/artificial-intelligence (last visited January 10, 2024). For information on how AI relates to the legal profession, *see AI Terms for Legal Professionals: Understanding What Powers Legal Tech*, LexisNexis (March 20, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech (last visited January 10, 2024).
3. John Villasenor, *How AI Will will Revolutionize the Practice of Law*, Brookings Institution (March 20, 2023), brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/ (last visited January 10, 2024); Steve Lohr, *AI is Coming for Lawyers Again*, New York Times (April 10, 2023), nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html (last visited January 10, 2024).
4. Larry Neumeister, *Lawyers Blame ChatGPT for Tricking Them Iinto Citing Bogus Case Law*, AP News (June 8, 2023), apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fdf4f099aa122437dbb59b (last visited January 10, 2024).
5. In certain circumstances a lawyer may need to consult a client about employing AI in the provision of legal services to that client, *see* Opinion #5, below.

Proposed 2024 Formal Ethics Opinion 2 Withholding Criminal Discovery in District Court July 18, 2024

Proposed opinion concludes that it is ethically

permissible for a prosecutor to condition a plea offer on withholding discovery in district court provided the prosecutor complies with Rule 3.8 and any other constitutional requirements. The proposed opinion further concludes that a defense lawyer may participate in such a plea deal upon communication to and consent by the defendant.

Defense Counsel is appointed to represent Defendant for a class H felony, possession with intent to sell or deliver methamphetamine (PWISD). The PWISD is based solely on the amount of methamphetamine and no other indications of any intent to sell or deliver. The assistant district attorney (ADA) assigned to prosecute Defendant's charge sets the case in HI Plea Court (district court) and sends Defense Counsel a written plea offer. The offer is to plead guilty to a class I felony, possession of methamphetamine, and receive probation.

Defendant is not a convicted felon and wants to pursue a misdemeanor offer. Defense Counsel sends ADA a discovery request. ADA indicates that since there is no discovery requirement in district court, they will only provide the full discovery packet if Defendant rejects the HI felony plea offer, in which case they intend to move forward to trial on the class H felony PWISD methamphetamine and seek the maximum punishment available. After telling Defendant the ADA's indicated intent, Defendant reluctantly agrees to take the plea.

Inquiry #1:

May ADA condition a plea offer on Defendant's election to not request discovery in district court while indicating that Defendant's pursuit of discovery will result in revocation of the offer and the ADA's pursuit of a more significant outcome for Defendant's case?

Opinion #1:

Yes, provided ADA complies with Rule 3.8.

Rule 3.8 imposes "special responsibilities" on prosecutors in North Carolina. Specifically, Rule 3.8(a) requires a prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause[.]" Rule 3.8(d) requires a prosecutor—after reasonably diligent inquiry—to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. This includes evidence or information required to be disclosed pursuant to statutory and case law. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963). The reason for these special responsibilities is articulated in the comments to Rule 3.8. Comment [1] to Rule 3.8 provides that a "prosecutor's duty is to seek justice, not merely to convict[.]" The comment further states that the prosecutor's responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. *Id.*

Generally, there is no legal right to discovery in district court criminal cases in North Carolina beyond the evidence and information required to be disclosed by statutory law or case law. *See State v. Cornett*, 177 N.C. App. 452, 455, 629 S.E.2d 857, 859 (2006). Presuming ADA is otherwise compliant with Rule 3.8—particularly that ADA is not prosecuting a charge that is not supported by probable cause in violation of Rule 3.8(a) and ADA has made "timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"—ADA is acting within his lawful discretion in refusing to turn over discovery given the procedural posture of Defendant's case.

Whether such conditional plea offers are a "best practice" for a District Attorney's Office is beyond the scope of this committee, though the committee recognizes the reasonable, competing interests at stake. The district attorney is tasked with processing and resolving an enormous caseload as efficiently as possible in the public interest, and plea offers such as the one described in this opinion contribute to that efficiency. Simultaneously, conditioning a plea offer on Defendant not requesting discovery may ultimately undermine the integrity of ADA's plea offer and compliance with Rule 3.8 due to the impression left by the conditional plea offer and the potential for others to attribute an appearance of impropriety or avoidance of transparency to the offer. The committee encourages prosecutors to be mindful of the calling in the Preamble to the Rules of Professional Conduct to "uphold the legal process" and to "further the public's understanding of and confidence in the rule of law and the justice system[.]" Preamble [5], [6].

Nevertheless, if ADA is fully compliant with Rule 3.8, ADA may offer the plea deal conditioned upon Defendant's election to not pursue discovery.

Inquiry #2:

Is it permissible for Defense Counsel to advise Defendant on and participate in the plea deal without reviewing the discovery pursuant to ADA's conditional plea offer?

Opinion #2:

Yes, provided Defense Counsel advises Defendant about the conditions of the plea and the impact thereof, advises Defendant about the limitations of Defense Counsel's evaluation, and follows Defendant's directive.

Defense Counsel has a duty to "explain a matter to the extent reasonably necessary to permit [Defendant] to make informed decisions regarding the representation." Rule 1.4(b). Defense Counsel also has a duty to "abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued." Rule 1.2(a). In advising Defendant on whether to accept or reject ADA's plea offer, Defense Counsel has a duty to explain to Defendant the effect and possible consequences of the proposed plea, including the risk that there might be exculpatory evidence in the remainder of the discovery that is unavailable to Defense Counsel. Rule 1.4(b); RPC 129. Defense Counsel should also explain to Defendant that ADA has a professional responsibility under Rule 3.8 to refrain from prosecuting a charge that is not supported by probable cause and to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. Rule 3.8(a), (d). While not required, it is advisable for Defense Counsel to memorialize such a consultation in writing, preferably signed by Defendant.

Absent information indicating otherwise, Defense Counsel may presume that ADA is complying with his duties under the Rules of Professional Conduct and may communicate that understanding to Defendant. Defense Counsel may also rely upon Defendant's evaluation of his own conduct as it relates to the charges and resulting plea offer in determining whether the plea offer is in Defendant's best interests. After consultation with Defendant, Defense Counsel shall abide by the client's decision as to whether the plea will be accepted or rejected. Rule 1.2(a)(1). ■

Amendments Pending Supreme Court Approval

At its meeting on July 19, 2024, the 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 Summer 2024 edition of the *Journal* or visit the State Bar website: ncbar.gov.)

Proposed Amendments to the Rules Governing the Administrative Committee

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

Rule .0901, Transfer to Inactive Status

The proposed amendments create a clear process for lawyers to transfer directly from administrative suspension status to inactive status, and update the requirements for transfer from active status to inactive status.

Proposed Amendments to the North Carolina State Bar Discipline and Disability Rules

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

Rule .0132, Trust Accounts; Audit

The proposed amendments permit the specific criteria and procedures for eligibility to participate in the Trust Account Compliance (TAC) Program to be established by policy and guidelines of the council (rather than by rule), and facilitate referrals by the staff (the counsel, the director of the Trust Account Compliance Department, and the auditor) to the TAC Program of lawyers whose random audits have disclosed one or more violations of Rule 1.15 of the Rules of Professional Conduct.

Highlights

· On July 19, 2024, the State Bar council approved for publication amendments to the rules on discipline to implement the legislative requirements of Senate Bill 790.

· The State Bar Council also approved two new rules for publication: 27 N.C.A.C 1B.0136, which creates a new expungement process, and 27 N.C.A.C 1B.0137, which defines a vexatious complainant and the consequences of being so designated.

Proposed Amendments

At its meeting on July 19, 2024, the council voted to publish for comment the following proposed rule amendments:

Proposed Amendments to the Rules Governing Discipline

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

To implement the legislative requirements of Senate Bill 790, improve clarity, and add new deferral procedures and programs, there are proposed amendments to three existing rules (1B.0111, 1B.0112, and 1B.0113) and two new proposed rules (Rule 1B.0136 & Rule 1B.0137).

Rule .0111, Grievances: Form and Filing

(a) Standing Requirements – To be considered by the State Bar, a grievance must

(1) allege conduct that, if true, constitutes attorney misconduct in violation of Chapter 84 of the North Carolina General Statutes and/or constitutes a violation of the North Carolina Rules of Professional Conduct; and

(2) be filed by a person with standing, defined as:

(A) An attorney or judge pursuant to the obligation to report misconduct in accordance with Rule of Professional Conduct 8.3;

(B) A judge, attorney, court employee, juror, party, or client in the legal matter that is the subject of the grievance; or

(C) A person who has a cognizable interest in or connection with the legal matter or facts alleged in the grievance, or that person's representative.

(3) The State Bar may open and investigate a grievance upon its own initiative if it discovers facts that, if true, would constitute attorney misconduct.

~~(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose.~~

(b) Grievance Filing Form. The counsel may require that a grievance be reduced to writing and may prepare and require use of standard forms for this purpose.

(c) The counsel may investigate any allegations of attorney misconduct coming to the counsel's attention.

~~(b) Upon the direction of the council or the Grievance Committee, the counsel will investigate such conduct of any member as may be specified by the council or Grievance Committee.~~

(~~c~~**4**) ~~The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving authorization from the chairperson of the Grievance Committee.~~

If the counsel receives information that a member has used or is using illicit substances, the counsel will follow the provisions of Rule .0130 of this Subchapter.

(d) Confidential Reports of **Attorney** Misconduct. The ~~North Carolina~~ State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct ~~of another attorney~~ pursuant to ~~Rule 8.3 of the Revised Rules~~ **Rule** of Professional Conduct **8.3** and who requests to remain anonymous. Notwithstanding the foregoing, the North Carolina State Bar will reveal the identity of a reporting attorney or judge to the respondent ~~attorney where~~ **when** such disclosure is required by law, or by considerations of due ~~process~~ **process,** or ~~where~~ when identification of the reporting attorney or judge is essential to preparation of the **respondent's** ~~attorney's~~ defense to the grievance ~~and/or~~ **or defense to** a formal disciplinary complaint.

(e) Declining to Investigate. The counsel may decline to investigate the following allegations:

(1) that a member provided ineffective assistance of counsel in a criminal case, unless a court has granted a motion for appropriate relief based upon the member's conduct;

(2) that a plea entered in a criminal case was not made voluntarily and knowingly, unless a court granted a motion for appropriate relief based upon the member's conduct;

(3) that a member's advice or strategy in a civil or criminal matter was inadequate or ~~ineffective.~~ **ineffective; and**

(4) that a criminal prosecutor improperly exercised discretion in declining to bring criminal charges.

(f) ...

Rule .0112, Investigations; Initial Determination; Notice and Response; Committee Referrals

(a) Investigation Authority - Subject to the policy supervision of the council and the **supervision** ~~control~~ of the chair of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will **review** ~~investigate~~ the ~~grievance~~ **grievance, conduct any investigation the counsel determines to be necessary and appropriate,** and submit to the chair a report detailing the ~~findings of the investigation.~~ **facts established by the investigation and a recommendation for disposition of the grievance.**

~~(b) Grievance Committee Action on Initial or Interim Reports - As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chair of the Grievance Committee may~~

~~(1) treat the report as a final report;~~

~~(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or~~

~~(3) direct the counsel to send a letter of notice to the respondent.~~

(~~c~~**b**) Letter of Notice, Respondent's Response, and Request for Copy of Grievance - If the counsel serves a letter of notice upon the respondent, it will be served by certified mail **or by personal service. If the respondent consents to accept service of the letter of notice by email, the letter of notice may be served by emailing the letter of notice to the respondent's email address of record with the State Bar membership department. The respondent's response to the letter of notice** will **be due** ~~direct a response be provided~~ within 15 days of service of the letter of notice upon the respondent. The response to the letter of notice shall include a full and fair disclosure of all facts and circumstances pertaining to the alleged misconduct. The response must be in writing and signed by the respondent. ~~If the respondent requests it, the counsel will provide the respondent with a copy of the written grievance unless the complainant requests anonymity pursuant to Rule .0111(d) of this subchapter.~~

(c) Provision of Written Grievance and Supporting Materials to Respondent - Upon request of the respondent, the counsel will provide to the respondent a copy of the written grievance and any supporting material the complainant submitted with the grievance; provided that, if the grievance was submitted by a judge or an attorney pursuant to the obligation to report professional misconduct in accordance with Rule of Professional Conduct 8.3, and if the judge or attorney requests anonymity pursuant to Rule .0111(f) of this subchapter, the State Bar may redact the judge's or attorney's identifying information.

(d) Request for Copy of Respondent's Response - **If the complainant requests it, and unless the respondent objects in writing,** ~~The~~ **the** counsel may provide to the complainant a copy of the respondent's response to the letter of **notice.** ~~notice unless the respondent objects thereto in writing.~~

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments by October 15 to Alice Neece Mine, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the Journal. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Unless otherwise noted, proposed additions to rules are printed in bold and underlined; deletions are interlined.

~~(e) Termination of Further Investigation - After the Grievance Committee receives the response to a letter of notice, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chair of the Grievance Committee.~~

(~~f~~**e**) Subpoenas - For reasonable cause, the chair of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and **to** ~~may~~ compel the production of **documents, records, writings, communications, and other data of any kind that the chair determines are** ~~books, papers, and other documents or writings which the chair deems~~ necessary or material to the inquiry. Each subpoena will be issued by the chair or by the secretary at the direction of the chair. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chair may examine any such witness under oath or otherwise.

(~~g~~**f**) Grievance Committee Action on Final Reports – The Grievance Committee will consider the grievance as soon as practicable after it receives the final report of the counsel, except as otherwise provided in these rules.

(~~hg~~) ~~Failure of Complainant to Sign and~~ Dismissal Upon Request of Complainant - The investigation into alleged misconduct of the respondent will not be abated ~~by failure of the complainant to sign a grievance,~~ by settlement or compromise of a dispute between the complainant and the respondent, or by the respondent's payment of restitution. The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of the counsel where it appears that there is no probable cause to believe that the respondent violated the Rules of Professional Conduct.

(**h~~i~~**) Referral to Law Office Management Training

(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the committee may offer the respondent an opportunity to voluntarily participate in a law office management training program approved by the State Bar before the committee considers discipline.

If the respondent accepts the committee's offer to participate in the program, the respondent will ~~then~~ be required to complete a course of training in law office management prescribed by the chair which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. **The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff.** If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Law Office Management Training Program – If the respondent successfully completes the law office management training program, the committee may consider the respondent's successful completion of the ~~law office management training~~ program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the ~~law office management training~~ program as agreed, the grievance will be returned to the committee's agenda for consideration of imposition of discipline. The requirement that a respondent complete law office management training pursuant to this rule shall be in addition to the respondent's obligation to satisfy the minimum continuing legal education requirements contained in 27 NCAC 01D .1517.

(**~~j~~i**) Referral to Lawyer Assistance Program

(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance **use disorder** ~~abuse~~ or mental health **condition,** ~~problem,~~ the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers **imposition of** discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program. **The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff.** If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Rehabilitation Program – If the respondent successfully completes the rehabilitation program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be returned to the committee's agenda for **consideration of imposition** of discipline.

(**~~k~~j**) Referral to Trust Accounting Compliance Program

(1) Voluntary Deferral to Trust Account Compliance Program. If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to participate voluntarily in the Trust Account Compliance Program of the State Bar's Trust Account Compliance Department (the program) for up to two years before the committee considers imposition of discipline.

Policies governing the criteria and procedures for eligibility to participate in the program, participation in, and completion of the program shall be established by the council.

If the respondent accepts the committee's offer to participate in the compliance program, the respondent must fully cooperate with the staff of the Trust Account Compliance Department and must produce to the staff all documentation and proof of compliance requested by the staff. The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Trust Account Compliance Program. If the respondent successfully completes the program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent does not fully cooperate with the staff of the Trust Account Compliance Department and/or does not successfully complete the program, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(3) Ineligible for Referral. The committee will not refer to the program:

(A) any respondent whose grievance file involves possible misappropriation

of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other alleged misconduct the committee determines to be inappropriate for referral;

(B) any respondent who has not cooperated fully and timely with the committee's investigation;

(C) any respondent who has already participated in the program as the result of the conduct in issue; or

(D) any respondent who declined an offer to participate in the program before the conduct at issue was referred to the Grievance Committee.

(4) Termination of Deferral Upon Discovery of Evidence of Serious Misconduct. If the Office of Counsel or the committee learns of evidence that a respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the respondent's participation in the program and the disciplinary process will proceed.

(5) Referral Not a Defense to Allegations of Professional Misconduct. Referral to the Trust Accounting Compliance Program is not a defense to allegations of professional misconduct and does not immunize a lawyer from the disciplinary consequences of such conduct.

~~(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to voluntarily participate in the State Bar's Trust Account Compliance Program for up to two years before the committee considers discipline.~~

~~If the respondent accepts the committee's offer to participate in the compliance program, the respondent must fully cooperate with the Trust Account Compliance Counsel and must provide to the Office of Counsel quarterly proof of compliance with all provisions of Rule 1.15 of the Rules of Professional Conduct. Such proof shall be in a form satisfactory to the Office of Counsel. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.~~

~~(2) Completion of Trust Account Compliance Program - If the respondent successfully completes the program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent does not fully cooperate with the Trust Account Compliance Counsel and/or does not successfully complete the program, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.~~

~~(3) The committee will not refer to the program any case involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other case the committee deems inappropriate for referral. The committee will not refer to the program any respondent who has not cooperated fully and timely with the committee's investigation. If the Office of Counsel or the committee discovers evidence that a respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the respondent's participation in the program and the disciplinary process will proceed. Referral to the Trust Accounting Compliance Program is not a defense to allegations that a lawyer misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, and it does not immunize a lawyer from the disciplinary consequences of such conduct.~~

(k) Individualized Deferrals Program

(1) If, at any time before a finding of probable cause, the Grievance Committee, the chair of the Grievance Committee, or a representative of the Grievance Committee chair appointed by the chair determines that, due to the nature of the respondent's alleged misconduct, the respondent should be offered a deferral agreement as an alternative to discipline, the Grievance Committee may defer disposition of the grievance and offer the respondent an opportunity to comply voluntarily with a deferral agreement. If the respondent rejects the offer, the grievance shall proceed as otherwise provided in this chapter.

(2) The deferral agreement shall impose specific conditions the respondent must satisfy during a specified period not to exceed one year. For good cause shown, the committee may extend the time during which compliance with the conditions is required. The respondent shall collaborate with the Office of Counsel to develop the conditions to include in the deferral agreement that address the underlying misconduct. However, the Grievance Committee shall determine all conditions to be included in the deferral agreement. Deferral agreement conditions may include, but are not limited to, the following:

(A) Appointment of a practice monitor for the respondent's practice;

(B) Successful completion of specified continuing legal education courses, or other courses of study;

(C) Successful completion of an educational or other consulting program including, but not limited to, a program offered by the respondent's malpractice insurance carrier;

(D) Attainment of a passing score on the Multistate Professional Responsibility Exam;

(E) Restitution, if practicable;

(F) Written statement of reconciliation or apology to the court, client, or other person or institution adversely affected by the respondent's conduct.

(3) If the respondent accepts the Grievance Committee's offer to enter into a deferral agreement, the terms of the deferral agreement shall be set forth in writing. The written deferral agreement shall include the following:

(A) The respondent's admission to the misconduct at issue in the grievance investigation;

(B) The respondent's agreement that, should the respondent fail to comply with the deferral agreement, the respondent's admission to the misconduct at issue in the grievance investigation may be considered by the Grievance Committee and/or offered into evidence without objection in any subsequent proceeding arising from the

underlying grievance;

(C) A statement by the respondent that the respondent is participating in the deferral agreement freely and voluntarily and understands the nature and consequences of participation;

(D) A statement that the respondent accepts responsibility for the costs of the deferral conditions;

(E) An agreement by the respondent not to violate the Rules of Professional Conduct of this or any other jurisdiction while the deferral agreement is in effect;

(F) A statement specifying the general purpose of the deferral agreement;

(G) A specific and complete list of all conditions of the deferral agreement;

(H) A description of how the respondent's compliance with the deferral agreement's conditions will be monitored;

(I) The date by which the conditions of the deferral agreement must be completed;

(J) A description of how the respondent will provide evidence of the successful completion of the deferral agreement;

(K) The respondent's signature.

(4) A respondent is eligible to participate in a deferral agreement as an alternative to discipline when there is little likelihood of harm to the public, the respondent's participation in the deferral agreement is likely to benefit the respondent, and the deferral agreement conditions are likely to accomplish the goals of the deferral agreement. A respondent is not eligible for a deferral agreement as an alternative to discipline if any of the following circumstances are present:

(A) The respondent's alleged misconduct, standing alone, is likely to result in discipline that is more severe than a reprimand;

(B) The respondent's alleged misconduct is part of a pattern of misconduct that is unlikely to be changed by a deferral;

(C) The respondent's alleged misconduct is of the same nature as misconduct for which the respondent has been previously disciplined;

(D) The respondent's alleged misconduct involves dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;

(E) The respondent's alleged misconduct resulted in substantial harm to a client or other person or entity;

(F) The respondent's alleged misconduct involves misappropriation of funds or other property;

(G) The respondent's alleged misconduct involves a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(H) The respondent's alleged misconduct involves sexual activity with a client, sexual communications with a client, or request, requirement, or demand for sexual activity or sexual communications with a client as a condition of any professional representation.

(5) The respondent shall pay all costs incurred in connection with completing the conditions of the deferral agreement.

(6) The respondent must participate personally in the deferral program, must communicate directly with the deferral program staff, and must provide required documentation directly to the deferral program staff.

(7) Upon the respondent's successful completion of the conditions in the deferral agreement, the Grievance Committee, the chair of the Grievance Committee, or a representative of the Grievance Committee chair appointed by the chair shall dismiss the underlying grievance. If the grievance is dismissed, the respondent shall not be considered to have been disciplined; however, the respondent's participation in a deferral agreement as an alternative to discipline may be considered by the Grievance Committee in reviewing any subsequent grievance and offered into evidence without objection in any subsequent disciplinary proceeding within three years after the expiration of the deferral agreement.

(8) If the respondent fails to comply with the terms of the deferral agreement, the Office of Counsel shall notify the respondent of the apparent noncompliance and shall provide the respondent an opportunity to respond to those allegations. The respondent shall be given an opportunity to respond to the allegations in the same manner as prescribed by Rule .0112(b) of this subchapter. If the Grievance Committee determines that the respondent has failed to comply with the deferral agreement, the Grievance Committee may modify the deferral agreement or terminate the deferral agreement and proceed with the matter as otherwise provided in this chapter.

Rule .0113, Proceedings Before the Grievance Committee

(a) Probable Cause - The Grievance Committee or any of its subcommittees acting as the Grievance Committee with respect to grievances referred to it by the chair of the Grievance Committee will determine whether there is probable cause to believe that a respondent **committed** ~~is guilty of~~ misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chair of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

(b) Oaths and Affirmations - The chair of the Grievance Committee will have the power to administer oaths and affirmations.

(c) Record of Grievance Committee's Determination - The chair will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

~~(d) Subpoenas - The chair will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chair may designate the secretary to issue such subpoenas.~~

(~~c~~**d**) Closed Meetings - The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(e) Procedure when Counsel Recommends Admonition, Reprimand, Censure, or Referral to the Disciplinary Hearing Commission. If the counsel recommends admonition, reprimand, censure, or referral

to the Disciplinary Hearing Commission,

(1) At least 30 days before the committee's consideration of the counsel's recommendation, the counsel shall provide to the respondent:

(A) all financial audits and all other materials provided to the committee that are not privileged and are not work product; and

(B) any evidence in the possession of the State Bar that indicates the respondent did not engage in the alleged misconduct, or a certification that no such evidence is in the State Bar's possession.

(2) The respondent shall have the opportunity to hear the counsel's presentation of the factual basis for the recommendation and to address the subcommittee to which the grievance is assigned. The chair of the Grievance Committee shall have discretion to determine whether the respondent will hear the counsel's presentation of the factual basis in person or via video conference, to determine whether the respondent will address the subcommittee in person or via video conference, and to determine the amount of time the respondent will have to address the subcommittee.

(f) Disclosure of Matters Before the Grievance Committee ...

...

Rule .0136, Expungement or Sealing of Discipline [NEW RULE]

(a) By the Chair of the Grievance Committee.

(1) Expungement of Admonition by the Grievance Committee. A respondent who accepted an admonition from the Grievance Committee may petition the chair of the committee to expunge the admonition as set forth herein. The petition shall be served upon the State Bar Counsel and shall show that the petitioner has been rehabilitated by certifying the following:

(A) The admonition was not issued for violation of Rules of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c);

(B) Five years have elapsed since the effective date of the admonition;

(C) The petitioner has not been the subject of any order of professional discipline since the effective date of the admonition;

(D) There are no grievances pending against the petitioner; and

(E) There are no disciplinary complaints pending in the Disciplinary Hearing Commission or in any court against the petitioner.

(2) Expungement of Reprimand or Censure by the Grievance Committee. A respondent who accepted a reprimand or a censure from the Grievance Committee may petition the chair of the committee to expunge the reprimand or the censure as set forth herein. The petition shall be served upon the State Bar Counsel and shall show that the petitioner has been rehabilitated by certifying the following:

(A) The reprimand or censure was not issued for violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c);

(B) 10 years have elapsed since the effective date of the reprimand or censure;

(C) The petitioner has not been the subject of any order of professional discipline since the effective date of the reprimand or censure;

(D) There are no grievances pending against the petitioner; and

(E) There are no disciplinary complaints pending in the Disciplinary Hearing Commission or in any court against the petitioner.

(3) Determination by the Chair of the Grievance Committee. If the chair of the Grievance Committee concludes that the requirements in Rule .0136(a)(1) have been satisfied by the petitioner, the chair shall enter an order expunging the admonition. If the chair of the Grievance Committee concludes that the requirements in Rule .0136(a)(2) have been satisfied by the petitioner, the chair shall enter an order expunging the reprimand or censure.

(b) By the Chair of the Disciplinary Hearing Commission.

(1) Expungement of Admonition Entered by the Disciplinary Hearing Commission. A defendant in whose case the Disciplinary Hearing Commission entered an order of discipline imposing an admonition may petition the chair of the commission to expunge the admonition as set forth herein. The petition shall be filed with the commission and served upon the State Bar Counsel and shall show that the petitioner has been rehabilitated by certifying the following:

(A) The admonition was not issued for violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c);

(B) Five years have elapsed since the effective date of the admonition;

(C) The petitioner has not been the subject of any order of professional discipline since the effective date of the admonition;

(D) There are no grievances pending against the petitioner; and

(E) There are no disciplinary complaints pending in the Disciplinary Hearing Commission or in any court against the petitioner.

(2) Expungement of Reprimand or Censure Entered by the Disciplinary Hearing Commission. A defendant in whose case the Disciplinary Hearing Commission entered an order of discipline imposing a reprimand or a censure may petition the chair of the commission to expunge the reprimand or censure as set forth herein. The petition shall be filed with the commission and served upon the State Bar Counsel and shall show that the petitioner has been rehabilitated by certifying the following:

(A) The reprimand or censure was not issued for violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c);

(B) 10 years have elapsed since the effective date of the reprimand or censure;

(C) The petitioner has not been the subject of any order of professional discipline since the effective date of the reprimand or censure;

(D) There are no grievances pending against the petitioner; and

(E) There are no disciplinary complaints pending in the Disciplinary Hearing Commission or in any court against the petitioner.

(3) Determination by the Chair of the Disciplinary Hearing Commission. If the chair of the commission concludes that the requirements in Rule .0136(b)(1) have been satisfied by the petitioner, the chair shall enter an order expunging the admonition. If the chair of the commission concludes that the requirements in Rule .0136(b)(2) have been satisfied by the petitioner, the chair shall enter an order expunging the reprimand or censure.

(c) Effect of Expungement of Admonition, Reprimand, or Censure. An admonition, reprimand, or censure that is expunged by the chair of the Grievance Committee or by the chair of the Disciplinary Hearing Commission shall be removed from the petitioner's disciplinary record and from the State Bar website and cannot be used in any future disciplinary

proceedings against the petitioner.

(d) Sealing Order of Stayed Suspension Entered by the Disciplinary Hearing Commission.

(1) A defendant in whose case the Disciplinary Hearing Commission entered an order imposing a stayed suspension of the defendant's law license may petition the chair of the commission to seal the order of discipline as set forth herein. The petition shall be filed with the commission and served upon the State Bar Counsel and shall show that the petitioner has been rehabilitated by certifying the following:

(A) The stayed suspension was not issued for violation of Rule of Professional Conduct 1.19, 3.3(a), 8.4(b), or 8.4(c), or the stayed suspension was issued for violation of Rule 8.4(b) or (c) but those violations related solely to the defendant's failure to file and/or pay personal income taxes;

(B) 10 years have elapsed since the effective date of the stayed suspension;

(C) The petitioner has not been the subject of any order of professional discipline since the effective date of the stayed suspension;

(D) There are no grievances pending against the petitioner;

(E) There are no disciplinary complaints pending in the Disciplinary Hearing Commission or in any court against the petitioner; and

(F) The stayed suspension was not activated by the commission.

(2) Determination by Chair of the Commission. If the chair of the commission concludes that the requirements of Rule .0136(d)(1) have been satisfied by the petitioner, the chair shall enter an order sealing the order of stayed suspension.

(3) Effect of Sealing an Order of Stayed Suspension. An order of stayed suspension that has been sealed by the chair of the Disciplinary Hearing Commission shall be removed from the State Bar website and the publicly accessible records of the commission. The State Bar shall maintain a confidential record of the stayed suspension that shall not be available for public inspection. The sealed order of stayed suspension may be introduced into evidence and considered in any future disciplinary action against the petitioner.

(e) Order of Active Suspension, Activated Order of Stayed Suspension, and Order of Disbarment Shall Not Be Expunged or Sealed. An order of discipline imposing an active suspension, imposing a stayed suspension that was subsequently activated, or imposing disbarment shall not be expunged or sealed.

(f) Removal of Disciplinary Record of Deceased Lawyer from State Bar Website. One year after a lawyer's death, the State Bar shall remove from the State Bar website any orders of discipline entered against the lawyer.

Rule .0137, Vexatious Complainants [NEW RULE]

(a) Designation as a Vexatious Complainant.

(1) A person who submits to the State Bar grievances asserting allegations that, even if proven, would not constitute violations of the Rules of Professional Conduct or asserting allegations that are conclusively disproven by available evidence, and does so in a manner or in a volume amounting to abuse of the State Bar disciplinary process, may be designated by the chair of the Grievance Committee to be a vexatious complainant. Abuse of the State Bar disciplinary process includes repetitive, abusive, or frivolous allegations or communications by the complainant. Allegations that are contentious or are found to be without merit are not, standing alone, an abuse of the State Bar disciplinary process.

(2) The Office of Counsel shall mail a notice of the designation to the complainant at the complainant's last known address. The notice shall contain a statement describing the factual basis for the designation. If the complainant does not request review of the designation pursuant to paragraph (a)(3) of this rule, the designation by the chair of the Grievance Committee shall be final and not subject to further review or reversal.

(3) A complainant designated as vexatious may seek review of the designation by filing a request for review with the clerk of the Disciplinary Hearing Commission and addressed to the chair of the commission. The complainant shall serve a copy of the request upon the State Bar Counsel. The request for review must be filed within 30 days after the Office of Counsel mailed the notice issued under paragraph (a)(2) of this rule.

(4) The Office of Counsel may file a response to the request for review within 15 days of the State Bar's receipt of the request for review.

(5) Based upon the written submissions by the complainant and the Office of Counsel, the chair of the commission may either uphold or vacate the designation.

(6) Pursuant to GS 84-28.3(b), designation of a complainant as vexatious under this rule shall be final and conclusive and not subject to further review.

(b) Consequences of Designation as Vexatious Complainant.

(1) The State Bar may decline to review and process any grievance initiated by a person who has been designated a vexatious complainant, unless

(A) the grievance is submitted with a verification signed by the complainant under penalty of perjury that the allegations are true; and

(B) the grievance is submitted on the complainant's behalf by a member of the North Carolina State Bar who

(i) has an active North Carolina law license;

(ii) is not currently designated as a vexatious complainant; and

(iii) is not currently the respondent in a pending grievance investigation or the defendant in a pending attorney disciplinary proceeding.

Proposed Amendments to the Rules Governing the Specialization Program

27 N.C.A.C. 1D, Section .2600, Certification Standards for the Immigration Law Specialty

The proposed amendments reduce the CLE requirements for initial certification and for recertification.

Rule .2605, Standards for Certification as a Specialist in Immigration Law

Each applicant for certification as a specialist in immigration 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 immigration law:

(a) ...

...

(c) Continuing Legal Education - An applicant must earn no less than ~~48~~ 44 hours of accredited continuing legal education (CLE) credits in topics relating to immigration law during the four years preceding application. ~~At least 20 of the 48 CLE credit hours must be earned during the first and~~

~~second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.~~

(d) ...

...

Rule .2606, 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 .2606(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) ...

(b) Continuing Legal Education - The specialist must have earned no less than ~~60~~ **55** hours of accredited continuing legal education credits in topics relating to immigration law as accredited by the board. ~~At least 30 of the 60 CLE credit hours must be earned during the first three years after certification or recertification, as applicable. Of the 60 hours, at least 52 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.~~

(c) ...

... ■

In Memoriam

Talmage Sherrill Baggett Jr.
Fayetteville, NC

Lloyd Franklin Baucom
Charlotte, NC

Thomas Stephen Bennett
Morehead City, NC

Charles Melvin Brown Jr.
Rocky Mount, NC

Valerie Grey Chaffin
Burlington, NC

David B. Collins Jr.
Wilmington, NC

Richard T. Craven
Fayetteville, NC

Robert Lejay Cummings
Morehead City, NC

William Rade DeGraw Jr.
Lewisville, NC

Wilfred F. Drake
Durham, NC

Clifton Hardy Duke III
Kinston, NC

Samantha Rose Gamble
Houston, TX

William Thomas Graham Jr.
Winston-Salem, NC

Amanda Susan Grice
Belmont, NC

Harvey Clay Hemric Jr.
Crumpler, NC

Gregory Donald Hutchins
Asheville, NC

Henry Harris Joel Isaacson
Greensboro, NC

Francis Rivers Lawther Jr
Salisbury, NC

William R. Loftis Jr.
Winston-Salem, NC

Patricia Bryden Manning
Southport, NC

James C. Marrow Jr.
Tarboro, NC

Teresa Louise McCollum
Wilmington, NC

Robert Leroy McMillan Jr.
Raleigh, NC

Frank Pleasants Meadows Jr.
Rocky Mount, NC

Steven D. Michael
Chapel Hill, NC

Gilbert Hugh Moore Jr.
Sanford, NC

George Ricard Murphy
Benson, NC

Karen Krajci Murphy
Carrboro, NC

Frank Carlyle Newton Jr.
Charlotte, NC

Jennifer Susan O'Connor
Smithfield, NC

Joseph Patrick Olivieri
Franklinton, NC

Jean P. Faw Person
Currituck, NC

Jerome Karl Person
Fayetteville, NC

Robert Joseph Robinson
Asheville, NC

Rodney Walton Robinson
Southern Pines, NC

Harold Edward Russell Jr.
Raleigh, NC

Charles William Saunders Jr.
Greensboro, NC

Albert Leon Stanback Jr.
Durham, NC

James Harold Tharrington
Raleigh, NC

Donald Kenneth Tisdale Sr.
Winston-Salem, NC

Charles Hancock Turner Jr.
Greenville, NC

Elizabeth A. Weis
Osprey, FL

Otha Ray Wilson
Wilson, NC

Client Security Fund Reimburses Victims

At its July 16, 2024, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $27,450 to nine applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $2,000 to a former client of Charles R. Gurley of Goldsboro. The board determined that the client retained Gurley to handle a DWI charge. The client paid $2,000 towards the $3,000 quoted fee. Gurley made appearances on the client's behalf to obtain continuances, but otherwise provided no meaningful legal services for the fee paid prior to his disbarment. Due to misappropriation, Gurley's trust account balance was insufficient to pay his client obligations. Gurley was disbarred on June 27, 2023. The board previously reimbursed 75 other Gurley clients a total of $72,359.

2. An award of $6,500 to a former client of Charles M. Kunz of Durham. The board determined that the client retained Kunz to assist her with her immigration status. Kunz provided no meaningful legal services to the client for the fee paid. Kunz was disbarred on April 14, 2023, and then passed away on April 21, 2023. The board previously reimbursed 33 other Kunz clients a total of $224,830.

3. An award of $3,250 to a former client of Charles M. Kunz. The board determined that the client retained Kunz to represent her in removal proceedings and file an application for asylum. Kunz was paid $3,250 towards the quoted fee, but failed to attend any hearings or file the application for asylum. Kunz provided no meaningful legal services for the fee paid prior to his disbarment and passing.

4. An award of $3,250 to a former client of Charles M. Kunz. The board determined that the client retained Kunz to represent her in removal proceedings and file an application for asylum. Kunz was paid $3,250 towards the quoted fee, but failed to attend any hearings or file the application for asylum. Kunz provided no meaningful legal services for the fee paid prior to his disbarment and passing.

5. An award of $1,050 to a former client of Charles M. Kunz. The board determined that the client retained Kunz to file a custody petition and assist her with obtaining passports. Kunz was paid $1,050 towards his quoted $2,000 fee; however, Kunz failed to provide any meaningful legal services for the fee paid prior to his disbarment and passing.

6. An award of $5,200 to a former client of Charles M. Kunz. The board determined that the client retained Kunz to assist him and his family in adjusting their immigration status and obtaining residency. Kunz charged the client and his wife $2,000 each and then $8,000 to file the family petition applications. The client provided proof of $5,200 paid towards the quoted fees. Kunz provided little, if any, meaningful representation to the client and his wife, having filed only the I-130 petitions for them and not the remainder of the immigration applications. The board determined that Kunz failed to provide any meaningful legal services for the fee paid prior to his disbarment and passing.

7. An award of $5,000 to a former client of Charles M. Kunz. The board determined that the client retained Kunz to assist her with her immigration status. Kunz charged a fee of $7,500 and was paid $2,500 in July 2020. The client paid an additional $500 because Kunz failed to send in her documents on time, and then an additional $5,000 in March 2023. Kunz completed and filed the I-130 Petition for Alien Relative as originally requested for the initial fee; however, Kunz accepted the additional $5,000 payment knowing that he could not complete the representation due to his impending disbarment.

8. An award of $500 to an applicant who suffered a financial loss due to the conduct of Charles M. Kunz. The board determined that the applicant retained Kunz to represent her boyfriend in a criminal matter. The applicant paid Kunz $500 towards the $3,000 quoted fee. Kunz accepted payment to represent the client knowing of his impending disbarment and inability to complete the representation.

9. An award of $1,200 to a former client of Charles M. Kunz. The board determined that the client retained Kunz to assist his wife in preparing and filing an I-751 petition to remove conditions of residence and help with the interview process. Kunz charged and was paid a fee of $1,880. Kunz filed the I-751 petition which included paying the associated fees in the amount of $680, but the legal services were not meaningful because he accepted the fee knowing that his disbarment was pending and he would not be able to complete the representation.

Funds Recovered

It is standard practice to send a demand letter to each current or former attorney whose misconduct results in any payment from the fund, seeking full reimbursement or a confession of judgment and agreement to a reasonable payment schedule. If the attorney fails or refuses to do either, counsel to the fund files a lawsuit seeking double damages pursuant to N.C. Gen. Stat. §84-13, unless the investigative file clearly establishes that it would be useless to do so. Through these efforts, the fund was able to recover a total of $21,168.63 this past quarter. ■

Discipline Department (cont.)

also admitted to presenting false documentation to the State Bar during the investigation. Simons' previous petition for reinstatement was denied by the DHC in 2014. In March 2024, Simons filed a second petition for reinstatement. After a May 2024 hearing, the DHC entered an order recommending that his second petition for reinstatement be denied.

Transfers to Disability Inactive Status

B. Ervin Brown of Winston-Salem and **John C. MacNeill Jr.** of Charlotte were transferred to disability inactive status. ■

Williams Nominated as Vice-President

Winston-Salem attorney Kevin G. Williams has been selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina State Bar.

Williams earned his undergraduate degree in business administration from The University of North Carolina at Chapel Hill in 1993. He currently serves as president and chair of the Executive Committee of Bell, Davis & Pitt, PA, where he has practiced as a member of the firm's litigation section since graduating from Wake Forest University School of Law in 1998.

Williams is actively involved in his professional and local communities. Professionally, he has served as a State Bar councilor for the 21st (now 31st) Judicial District since 2016, and is currently serving in his second year as chair of the Grievance Committee. He is also an active member of the North Carolina Bar Association, the Forsyth County Bar Association, and the Joseph Branch Inn of Court, of which he currently serves as president. Personally, Williams is a member of St. Paul's Episcopal Church and serves on the Board of Directors of the YMCA of Northwest North Carolina. Williams and his wife, Aimee, celebrated 29 years of marriage in August. They have three children—Sydney (25), Ethan (23), and Trevor (21)—with whom they spend as much time as their children will allow.

Mr. Williams's election will take place at the State Bar's annual meeting in October 2024. At that time, Eden attorney Matthew Smith will assume the office of president, and Raleigh attorney Katherine Frye will also stand for election to president-elect. ■

John B. McMillan Distinguished Service Award

James K. Dorsett III

James K. Dorsett III received the John B. McMillan Distinguished Service Award on May 8, 2024, at a ceremony and reception held at the North Carolina State Bar Building in Raleigh. State Bar President A. Todd Brown and State Bar Councilor Walter Brock presented the award. Byron Kirkland and Kimberly J. Korando from Smith Anderson Law Firm also participated in the presentation.

Mr. Dorsett attended Davidson College where he majored in history and was a member of the school's varsity tennis team. After graduating from Davidson in 1974, he went to Wake Forest University Law School, from which he received his Juris Doctor in 1977. Mr. Dorsett has practiced law at Smith Anderson since he began his legal career more than 45 years ago, and has excelled in many areas of law, including business, trusts and estates, and insurance litigation. His work includes claims such as will caveats, legal malpractice cases, contract suits, and products liability cases in the state and federal courts. He is also a certified mediator.

Mr. Dorsett has served the North Carolina State Bar in many capacities. As a State Bar councilor he served on numerous committees including the Grievance Committee, Publications Committee, Professional Corporations Committee, Professional Organizations Committee, Policies & Procedures Committee, Paralegal Committee, Appointments Committee, Consumer Protection Committee, Executive Committee, and Administrative Committee. He also served as president of the State Bar from October 2002 to October 2003.

Mr. Dorsett also served as director of the Wake County Bar Association and the hair of its Endowment Committee. He served on the North Carolina State Bar Foundation including as president and chair, and continues his work with the State Bar on the Client Security Fund Board of Directors. Mr. Dorsett also served in the American Bar Association House of Delegates, is an American Bar Foundation life fellow and NC fellowship chair, and has worked with the North Carolina Supreme Court Historical Society. He has received recognition from his peers as an outstanding lawyer by being elected to membership in the American Board of Trial Advocates, the American Counsel Association, and the International Society of Barristers.

Outside of the legal profession, Mr. Dorsett has been active in his community. He has served as president of Food Runners Collaborative, Inc. He has also served on the boards of other charitable organizations including Legal Services of North Carolina and on the Board of Visitors of Davidson College. He is

CONTINUED ON PAGE 48

2024 Second Quarter Random Audits

Audits were conducted in Beaufort, Cleveland, Craven, Edgecombe, Franklin, Forsyth, Macon, Mecklenburg, Nash, New Hanover, Onslow, and Pitt Counties.

One audit each was conducted in Beaufort, Cleveland, Craven, Edgecombe, Macon, Nash, and Onslow Counties, two audits in Franklin County, three in Forsyth County, nine in Mecklenburg County, and five in New Hanover and Pitt Counties.

The following are the results of the audits.

1. 61% failed to review bank statements and cancelled checks each month.

2. 48% failed to sign, date, and/or maintain reconciliation reports.

3. 42% failed to complete quarterly transaction reviews.

4. 39% failed to:

- identify the client and source of funds, when the source was not the client, on the original deposit slip;
- identify the client on confirmations of funds received/disbursed by wire/electronic/online transfers.

5. 29% failed to:

- complete quarterly reconciliations;
- maintain images of cleared checks or maintain them in the required format.

6. 19% failed to take the required one-hour trust account CLE course.

7. 13% failed to:

- complete monthly bank statement reconciliations;
- indicate on the face of each check the client from whose balance the funds were drawn;
- provide a copy of the Bank Directive regarding checks presented against insufficient funds.

8. Up to 10% failed to:

- prevent over-disbursing funds from the trust account resulting in negative client balances;
- prevent bank service fees being paid with entrusted funds;
- maintain a ledger of lawyer's funds used to offset bank service fees;
- remove signature authority from employee(s) responsible for performing monthly or quarterly reconciliations;
- properly record the bank date of deposit on the client's ledger;
- promptly remove earned fees or cost reimbursements;
- provide written accountings to clients at the end of representation or at least annually if funds were held more than 12 months;
- escheat unidentified/abandoned funds as required by GS 116B-53;
- use business-size checks containing the Auxiliary On-Us field;
- sign trust account checks (no signature stamp or electronic signature used).

9. Areas of consistent rule compliance:

- properly maintained a ledger for each person or entity from whom or for whom trust money was received;
- properly deposited funds received with a mix of trust and non-trust funds into the trust account;
- promptly remitted to clients funds in possession of the lawyer to which clients were entitled;
- properly maintained records that are retained only in electronic format.

Based on the geographic plan for 2024, audits for the third quarter will be conducted in Bladen, Buncombe, Chatham, Cumberland, Durham, Harnett, Johnston, Lee, Mecklenburg, New Hanover, Orange, Pender, and Wake Counties. ■

Service Award (cont.)

past-president of the Rotary Club of Raleigh and remains active in its service projects. Mr. Dorsett received the Federal Bar Association's Judge David Daniel Award for Excellence in the Legal Community and the Citizen Lawyer Award from the North Carolina Bar Association.

Mr. Dorsett's dedication to the profession and his exemplary reputation makes him a most worthy recipient of the John B. McMillan Distinguished Service Award.

Nominations Sought

Members of the State Bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession for the John B. McMillan Distinguished Service Award. Information and the nomination form are available online: ncbar.gov/ bar-programs/distinguished-service-award. Please direct questions to Suzanne Lever at slever@ncbar.gov. ■

Upcoming Appointments

Anyone interested in being appointed to serve on any of the State Bar's boards, commissions, or committees should visit bit.ly/NCSBInterestForm to complete a "Boards and Commissions Interest Form." The deadline for completion of the interest form is October 14, 2024. Your information will be included in agenda materials for the October meeting of the council. The council will make the following appointments at its November 1, 2024, meeting:

Board of Continuing Legal Education (Three appointments; three-year terms)—There are three appointments to be made. Adrienne S. Blocker, current chair, and Leah A. Kane are not eligible for reappointment. Dayton T. Cole is eligible for reappointment. The rules governing the Board of Continuing Legal Education require the council to appoint the board's chair and vice-chair annually.

The Board of Continuing Legal Education (CLE) is a nine-member board composed of North Carolina licensed attorneys. The board establishes policy related to the execution of the CLE program's mission and is responsible for oversight of the operation of the program subject to the statutes governing the practice of law, the authority of the council, and the rules of the board. The board usually meets four times a year.

The North Carolina State Bar's mandatory CLE program requires lawyers licensed to practice and practicing in North Carolina to take CLE to help them to achieve and maintain professional competence for the benefit of the public they serve.

Board of Law Examiners (Three appointments; three-year terms)—There are three appointments to be made. Ronald G. Baker Sr., Ronald Gibson, and Judge Calvin E. Murphy are eligible for reappointment.

The 11 members of the North Carolina Board of Law Examiners are appointed by the State Bar Council. The board examines applicants and establishes rules and regulations for admission to the North Carolina State Bar. The board's objective is to ensure that all persons seeking admission to practice law in North Carolina possess the requisite competency and qualifications of character and fitness. Board members review bar examination questions, conduct character and fitness and comity hearings, supervise the bar examinations, and grade the examinations. Additionally, the board engages in periodic review of methods utilized in the examination and grading process. A board member donates an average of 35-45 days to service each year.

Client Security Fund Board of Trustees (One appointment; five-year term)—There is one appointment to be made. Amy E. Richardson is not eligible for reappointment. The rules governing the Client Security Fund require the council to appoint the board's chair and vice-chair annually.

The Client Security Fund was established by the North Carolina Supreme Court in 1984 to reimburse clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina. The fund is administered by a Board of Trustees composed of four North Carolina lawyers and one public member. The trustees are appointed by the North Carolina State Bar Council, and each serves a five-year term. The board usually meets in conjunction with the quarterly meetings of the council.

Board of Paralegal Certification (Two appointments; three-year terms)—There are two appointments to be made. S.M. Kernodle-Hodges (paralegal member) is eligible for reappointment. Benita Angel Gwynn Powell (lawyer member), the current chair, is eligible to serve an additional year as chair. The rules governing the Board of Paralegal Certification require the council to appoint the board's chair and vice-chair annually.

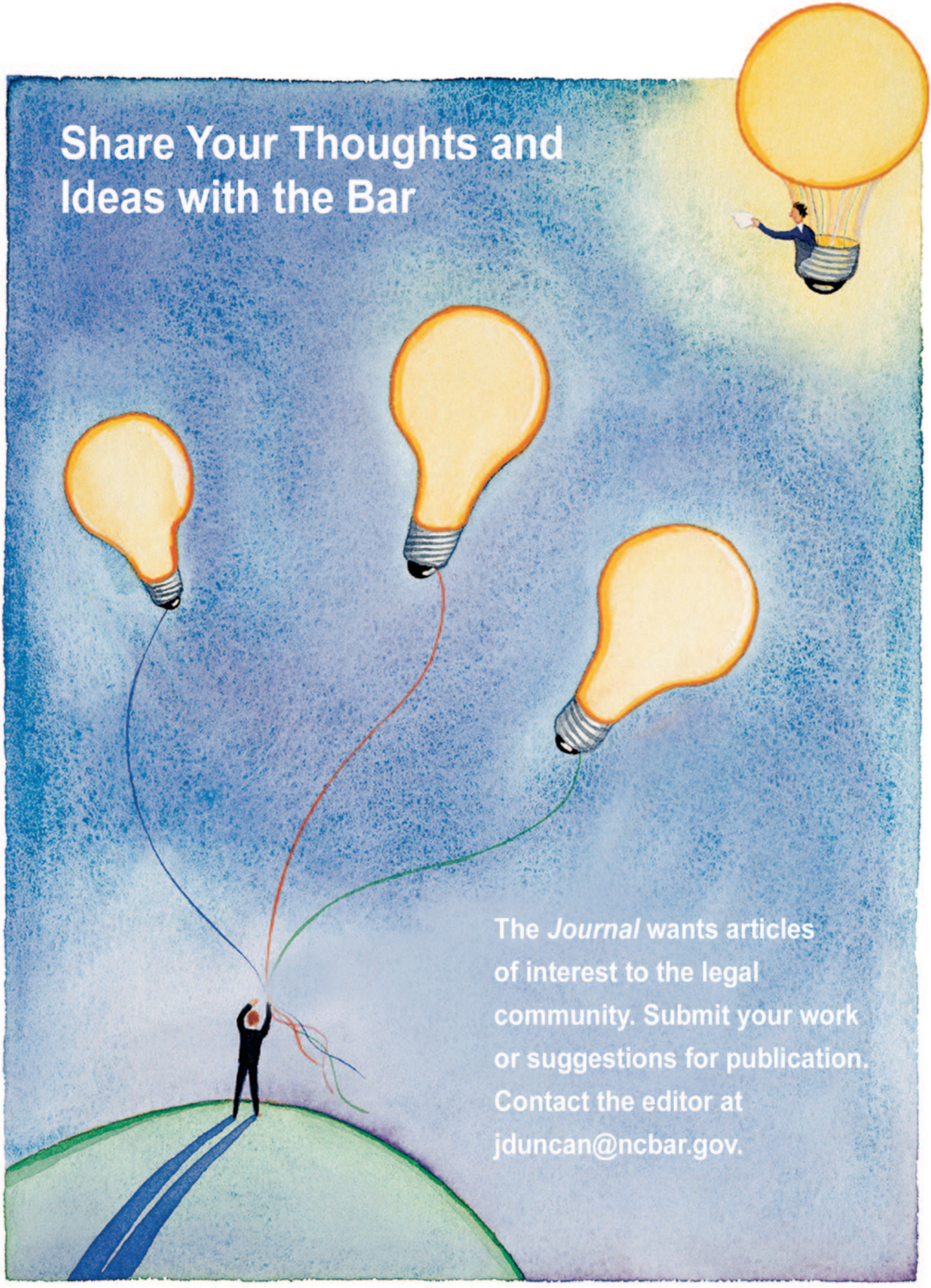
The Board of Paralegal Certification is a nine-member board composed of five North Carolina licensed attorneys (one of whom must be a paralegal educator) and four North Carolina certified paralegals. The board establishes policy related to the execution of the Paralegal Certification Program and is responsible for the oversight of the program's operation subject to the statutes governing the practice of law, the authority of the council, and the rules of the board. The paralegal certification program assists in the delivery of competent representation to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer. The board usually meets four times a year. ■

Quid Pro No (cont.)

lawyer knows that another lawyer is participating in an improper referral arrangement, the lawyer should communicate his concerns to the other lawyer and recommend that the lawyer contact the State Bar for ethics advice as to his participation in the referral arrangement. After this communication, if the concerned lawyer knows that the other lawyer has continued his participation in the improper referral arrangement, the lawyer should review Rule 8.3 and determine if reporting the participating lawyer to the State Bar is required.

As noted above, lawyers are permitted—and encouraged—to develop business relationships with other professionals who can assist with the representation of clients, provided the Rules of Professional Conduct are followed. Developing business referrals within the ethical boundaries of the Rules of Professional Conduct requires a lawyer to provide quality legal services rather than rely on financial incentives. The bottom line: Just say NO to *quid pro quo*. ■

Share Your Thoughts and Ideas with the Bar



The *Journal* wants articles of interest to the legal community. Submit your work or suggestions for publication. Contact the editor at jduncan@ncbar.gov.

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Fall 2024