

THE NORTH CAROLINA STATE BAR

# JOURNAL

WINTER  
2016



## IN THIS ISSUE

Our New President, Mark W. Merritt *page 9*

NCBA Ushers In New Era *page 12*

Interstate Law Firms *page 14*

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# Contents

## FEATURES



- 9 An Interview with New President  
Mark W. Merritt

- 12 NCBA Ushers In New Era  
of Leadership

*By Russell Rawlings*



- 14 Interstate Law Firms: Compliance  
and Suggestions

*By Joshua Walthall*

- 16 Judge Marion Warren Delivers  
Vision for NC Judicial Branch

*By Sharon Gladwell*



- 18 What is Collaborative Law?

*By John Sarratt and Mark Springfield*

- 22 "12 in the Box"

*By Cheryl Denise Andrews*

- 24 Civil Legal Aid Community in  
North Carolina Celebrates Work  
this Fall

*By Mary Irvine*

- 26 Pro Bono Reporting Comes to  
North Carolina

*By Jennifer Lechner*

- 27 The Deliberation

*Fiction Competition*

*By Landis Wade*

# Contents

## DEPARTMENTS

- 6 State Bar Outlook
- 31 Profile in Specialization
- 32 Legal Ethics
- 34 The Disciplinary Department
- 36 Lawyer Assistance Program

- 38 IOLTA Update
- 39 Trust Accounting
- 40 Proposed Ethics Opinions
- 42 Rule Amendments

## BAR UPDATES

- 48 State Bar Swears in New Officers
- 49 Resolution of Appreciation

- 50 Fifty-Year Lawyers Honored
- 50 Client Security Fund
- 51 Law School Briefs
- 52 In Memoriam
- 53 Distinguished Service Award
- 55 February Bar Exam Applicants
- 58 Annual Reports of Boards
- 61 Classified Advertising
- 62 Selected Financial Data

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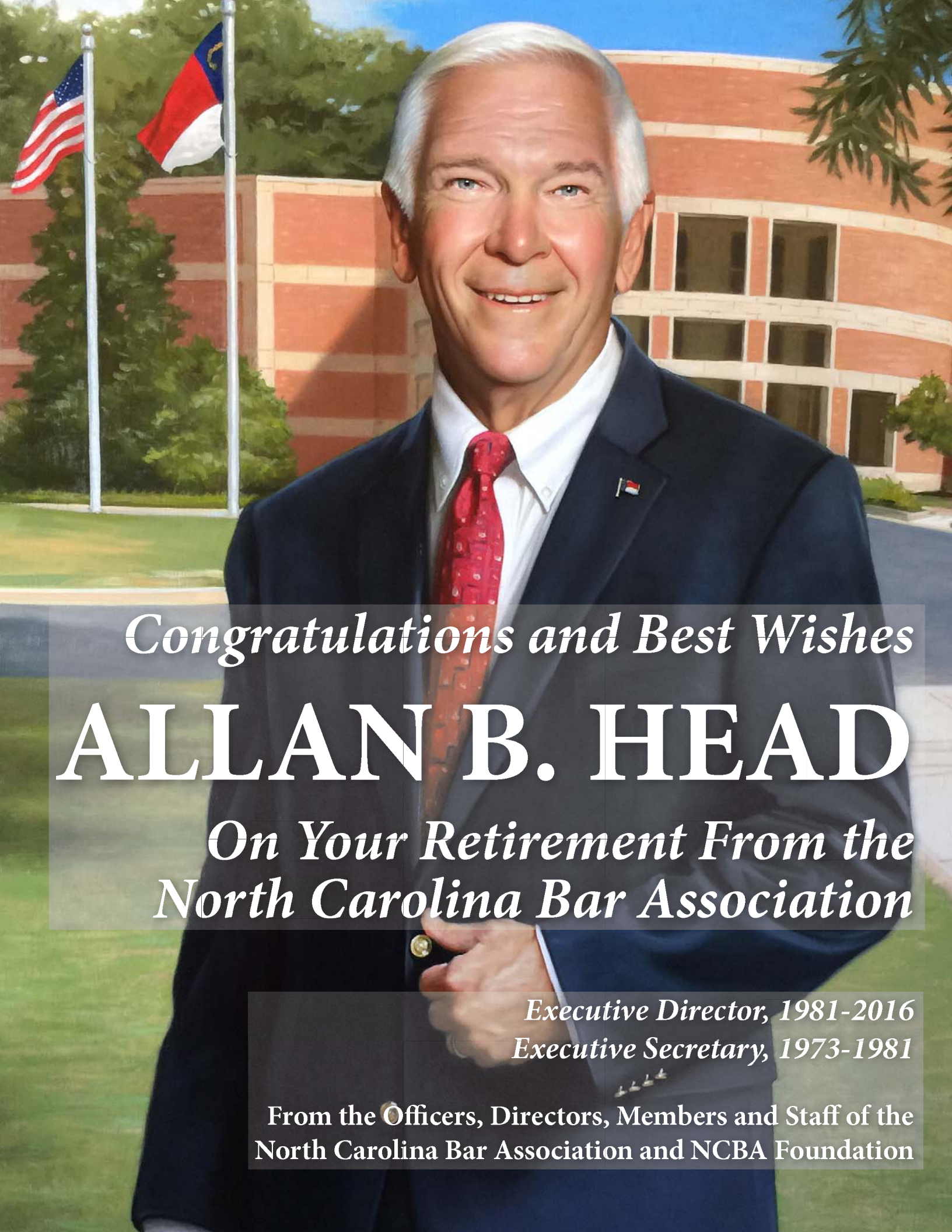
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*Executive Director, 1981-2016  
Executive Secretary, 1973-1981*

**From the Officers, Directors, Members and Staff of the  
North Carolina Bar Association and NCBA Foundation**

# Going Overboard(s)

BY L. THOMAS LUNSFORD II

*“The State Bar’s money, like Gaul, is divided into three parts.”* Julius Caesar

The trilogy is a literary form that was invented by the Greeks. In antiquity, playwrights, philosophers, and mathematicians theorized that related compositions might somehow be written in series, one after another. They speculated that the greatest possible number of such undertakings might be three. The search for such a sequence was prompted by the groundbreaking work of Isosceles on the triangle. He demonstrated that it was possible for interesting things to come in threes and inspired Homer to imagine that it might be fun to expand thusly upon the adventures of Odysseus, whom he had recently featured in the *Iliad*.

This historical fact was confirmed a few years ago by archaeologists working in Macedonia who discovered a papyrus letter Homer apparently delivered to his agent, Murrayides, in 826 BC. In the letter, Homer described how he planned to think up, memorize, and begin reciting two additional epic poems about Odysseus entitled the *Odyssey* and *Beowulf*. Unfortunately, he never finished *Beowulf* and cannot therefore be fairly credited with inventing it or the trilogy. He is, however, generally acknowledged as the “father of the modern sequel.”

Perhaps not surprisingly, it is Sophocles to whom trilogic paternity is now ascribed. Regrettably, his accomplishment was not fully recognized in his own time. As you may recall, he wrote three related plays: *Oedipus the King*, *Oedipus at Colonus*, and *Antigone*. As fate would have it, however, he didn’t understand the significance of what he had done and failed to characterize the set as a “trilogy.” Rather, he referred to them collectively as a “cycle” of plays, prompting his rival, Euripides, who reviewed the dramas in the

*Athens Gazette*, to deride them as a sort of “tricycle,” having no more theatrical value than a child’s three-wheeler. Not content to abandon the juvenile reference, he then mocked Sophocles repeatedly, saying that the plays should really be called “Toy Stories 3.”

All of this is by way of saying that this article is the third and final installment of my long-anticipated financial trilogy. Having fully explicated the State Bar’s revenues in Part One, and told all in regard to matters of expenditure in Part Two, I now feel constrained by ancient literary convention to come up with a third helping of fiscal revelation. After all, what good is a two-part trilogy? It is propitious, then, that a tertiary topic of monetary interest is yet to be explored. I refer, of course, to the wheelings and dealings of the State Bar’s various quasi-independent boards.

Since I joined the staff in the waning days of the Carter administration, the State Bar has spawned six entities somewhat external to itself to superintend particular regulatory programs. Although they are no doubt familiar to you, I dare say that few among us could name them all from memory. Fortunately, I have a list handy and choose not to put myself to the test. They are, in no particular order: the Board of Continuing Legal Education, the Board of Legal Specialization, the Board of Paralegal Certification, the IOLTA Board of Trustees, the Client Security Fund Board of Trustees, and the Lawyer Assistance Program Board. Each of the programs for which a board was created, save one, has its own dedicated income stream and is financially self-sufficient. The exception is the Lawyer Assistance Program (LAP), which has no regular sources of funding beyond the State Bar’s budget and a reliable, but not guaranteed, annual subsidy from the Board of Continuing Legal Education.



To fully understand this subject, it is necessary to accurately conceptualize the relationship of the State Bar to the boards. The rules that govern the boards are helpful in that regard, but they are not entirely consistent, at least where money is concerned. Each of the boards is governed by rules that were promulgated by the State Bar Council in accordance with established rulemaking procedures, and then approved by the North Carolina Supreme Court. They are collectively codified in Title 27 of the North Carolina Administrative Code and officially published in the Supreme Court Reports. In these rules, each board is characterized as a “standing committee” of the council, subject to its authority. It is further provided that the members of each board are appointees of the council and subject to removal by the council. And if that weren’t enough to establish consanguinity, the rules governing each board (except LAP) clearly say that the money being administered belongs to the State Bar. One might well conclude on the basis of such provisions that said money would be generally available to pay the mortgage on our building or hefty bonuses to deserving members of the State Bar’s executive staff. It appears, nevertheless, that one would be wrong. How can this be?

Where the funds of IOLTA and the Client Security Fund are concerned, the rules quite plainly restrict the use of the money to certain specified purposes. Aside from the payment of its own administrative expenses, IOLTA’s money is available only to fund grants, mainly to programs that provide civil legal services to indigents. And the Client Security Fund’s funds are similarly available only to reimburse the victims of dishonest lawyers. The rules governing the other boards are a bit less explicit in this regard but, given the very specific purposes for which each was created, it is unquestionable that their money must be used first, if not exclusively, to discharge programmatic obligations.

Given that all the programs, except LAP, are solvent, going concerns whose money is



generally understood to be beyond the reach of the council and its deserving executives, we have long been inclined to consider them as separate entities financially, distinct from each other and from the State Bar. Up until this year, that notion underpinned our contracts annually for discrete, independent audits of each of the boards. And so we were surprised to learn midway through his year's audit process that the financial statements of all of the programs needed to be consolidated with those of the State Bar Council. Our independent auditors, newly engaged for the purposes of the 2015 audit(s), had reached the unexpected and unprecedented conclusion that the applicable accounting standards required a single consolidated audit. As far as the auditors were concerned, this conclusion followed ineluctably from the plain language of the rules referenced above. Although the restricted character of the money was acknowledged, those conditions couldn't trump (or Clinton) the unambiguous declarations of State Bar ownership and control. The rules were thus the petards upon which we, and our understanding of reality, were hoisted—and changed. The State Bar's leadership initially questioned the basis for the auditor's conclusion because it seemed to deny the restricted character of the boards' money and to suggest its availability to the State Bar. Ultimately, however, the Bar's management accepted the necessity of consolidating the financial statements, trusting that footnotes would be sufficient to alert readers to the restricted character of the funds administered by the boards and the fact that I am unlikely ever to benefit personally from any of that money.

Be that as it may, the boards can best be understood as entities distinct from the State Bar and each other. Accordingly, I will now put their finances in six different nutshells.

**The Client Security Fund**—The Client Security Fund (CSF) exists as a means of reimbursing victims of dishonest lawyers. It is an expression of our collective responsibility to members of the public who, having been induced to trust licensed attorneys by a profession that has implicitly certified their character and fitness, find that their confidence was misplaced. In regard to such cases we, the presumptively ethical lawyers of North Carolina who are privileged to regulate ourselves, have chosen through the CSF to stand behind each other, effectively assuring members of the public that they can confidently entrust their property—and the regulatory prerogative—to

lawyers. The CSF is the very essence of credible self-regulation and a great credit to us all. And it costs each of us a mere pittance.

The CSF is funded almost exclusively by assessments imposed upon the active membership by order of the Supreme Court. For the past several years, the annual assessment has been \$25. This amount, when multiplied by the number of active members—around 28,000 these days—has until recently been sufficient to pay claims averaging about \$650,000 annually, and the costs of administration, about \$200,000 a year, while maintaining the minimum cash reserve required by the Supreme Court of \$1,000,000. Unfortunately, claims approved for payment in 2016 exceeded the average by nearly \$470,000, necessitating the invasion of the fund's cash reserves. In order to restore the required minimum balance and provide for the continuing operation of the CSF, the council and the board have recommended an increased assessment for 2017 only of \$50 per active member. At this writing, we await the Court's decision, which will be reflected on the face of the State Bar's forthcoming invoice for the annual membership fee (dues).

**IOLTA**—IOLTA is a program whereby the income from lawyers' general, pooled trust accounts is aggregated and distributed in the form of grants to organizations facilitating or providing legal services to the economically disadvantaged, and to programs that further the administration of justice. The interest paid to IOLTA is derived from entrusted funds that ordinarily would not be invested, being so small in amount or held for so short a time that a prudent fiduciary would have no such obligation. In the days before IOLTA, the benefit of such deposits accrued only to the banks. Since the program's inception in 1984, poor people have benefited mightily. More than \$81 million has been disbursed in grants, mostly to legal aid programs, from income totaling more than \$98 million. And this has been accomplished at no cost to the lawyers of North Carolina. Virtually all of the program's expenses have been paid from the accrued interest. More impressively, IOLTA's notoriously frugal management has limited the cost of administering the program throughout its life to only 7.84% of the income received.

Of course, times have been tough recently for IOLTA and its grantees. Before the economic downturn, grants were annually exceeding \$4 million. In both 2015 and 2016,

grants have been slightly less than \$2 million. There is good news, however. The IOLTA program occasionally shares in class action cy pres awards and other court-ordered distributions. In 2015 the program received \$842,896 from a settlement with the Bank of America. This year, incredibly enough, IOLTA garnered an additional distribution from the same settlement of \$12,071,404! The only disappointing aspect of the situation is that the funds are heavily restricted and not available to pay bonuses to the State Bar's senior staff. The money must be used only for foreclosure prevention and community redevelopment legal services. The IOLTA Board has already approved grants totaling approximately \$5,700,000 from these funds to be disbursed over a three-year period. Meanwhile, it must be noted that the entire amount continues to reside on my "consolidated" financial statements, making it appear that the State Bar is much richer than it actually is. Apparent wealth is, I'm bound to say, a fine thing. But, at the end of the day, it don't spend too good.

**Continuing Legal Education**—The Board of Continuing Legal Education keeps score regarding compliance of the State Bar's active members with the minimum continuing legal education requirements. This undertaking is possible only through the use, care, and feeding of an enormously complicated piece of software that monitors everyone's attendance at approved CLE courses and magically determines where each of us stands from moment to moment. Thus digitally empowered, the board and its staff are able to provide lawyers with reliable information concerning courses and attendance, to invoke procedures to enforce compliance, and to recognize when members are or should be treated as exempt from the requirements. Mandatory CLE was quite unpopular when it was imposed in 1988. Since then it appears that lawyers have come to terms with its burdens and accepted its benefits. Indeed, our statistics show that on average, North Carolina's lawyers take about 25% more CLE than is required each year. In 2015, for instance, we each took about 15 hours of credit, as opposed to the 12 hours that are mandated. But, what about the money?

The fact that lawyers tend to take more instruction than is absolutely necessary tends to increase not only the overall competence of the Bar, but also the "bottom line." This is so because the program's primary funding mechanism, the sponsor fee, generates income as a

function of attendance. For each hour of instruction that a member obtains, the sponsor of that instruction must remit to the board the sum of \$3.50. Of that sum, \$1.25 goes to support the operation of the CLE program. (The rest of the money goes elsewhere, as noted below.) Obviously, the more CLE that is taken, the more money that is paid to the board in consequence thereof. Augmenting this income stream is an ever flowing tributary that rises high in the Penalty Mountains. As some of you are doubtless aware, substantial penalties are incurred for noncompliance with the CLE rules. Although the penalties were devised initially as a means of incentivizing compliance, they seem to have been more successful a means of raising money.

These funding devices, in combination with management's careful stewardship, have perennially yielded much more money than is required to sustain the CLE program's administration. The surpluses have been used to subsidize the State Bar's Lawyers Assistance Program, a very good cause, indeed. Pursuant to an agreement negotiated with the CLE Board and a rule allowing excess funds to be used to support "lawyer competency programs," the LAP receives an annual subsidy equal to the amount by which the CLE Board's cash reserves at year-end exceed \$200,000. In 2015 the LAP subsidy was just shy of \$160,000. Query whether executive bonuses might properly be characterized as a "lawyer competency program?"

The sponsor fee has also proven useful for ginning up funds for other worthy endeavors. A few years back it was increased by a buck to provide a revenue source for the Chief Justice's Commission on Professionalism. Subsequently, it was raised by a like amount to support the good work of the Equal Access to Justice Commission. This year, each of those entities are expected to receive close to \$300,000 from CLE fees. Happily enough, a small fraction of this money also accrues to the State Bar's benefit. We get \$0.25 for each hour of CLE reported to the board for handling the money earmarked for the two commissions, about \$75,000 in a good year. Not enough for a good executive bonus, but something.

**Legal Specialization**—The Board of Legal Specialization operates a program whereby lawyers of demonstrated competence in one of 12 discrete areas of the law can be certified as "specialists" by satisfying certain prescribed criteria. The program was founded in the

mid-1980s to encourage lawyers to aspire to be particularly competent in their chosen areas of practice, and to identify for consumers lawyers who have attained high levels of expertise and professionalism in those areas of practice. Interest in the program was rather slow in developing, and for many years it was subsidized from the State Bar's treasury, the application fees upon which the program depended being insufficient to pay the bills. Gradually, however, the program grew in terms of the number of areas of law for which certification was offered and the number of lawyers seeking the credential, and solvency followed. Then, in the mid-1990s the program's financial situation was stabilized once and for all by the imposition of an annual fee of \$50 upon each certified attorney. This fee, which has since been increased to \$150, is now paid by more than 1,000 board certified lawyers—1,006, to be precise—and sustains one of the finest specialization programs in the country.

Unlike CLE, specialization doesn't generate much in the way of surplus revenue. There's just enough money available from year to year to process around 100 new applicants, to recertify about 150 people, to test about 70 indefatigable souls, and to pay the expenses incurred by exactly 115 volunteers, virtually all of whom are extremely proud to be board certified.

**Paralegal Certification**—While it took many years for lawyer certification to hit its financial stride, paralegal certification was a going concern almost from its inception. The program, which was and is intended to promote the proper utilization of paralegals, to standardize their qualifications, and to enhance their professional standing, attracted enormous interest instantly. The Board of Paralegal Certification initially borrowed \$50,000 from the State Bar in 2005 to finance "start-up" costs. That not inconsiderable sum was repaid within a couple of years as vast numbers of paralegals applied for certification as soon as it was offered. Each of the applicants paid an application fee of \$125, and the program cleared more than \$67,000 in its first year—after discharging the debt. Since then, strong interest in certification and a steady revenue stream flowing from the \$50 annual renewal fee (paid by each of the more than 4,000 paralegals who have been certified), have generated substantially more income than is required to run the program. This happy circumstance has

allowed the board to behave philanthropically on behalf of its paralegal constituency and at the behest of its paralegal members from time to time. In 2009 the board primed the North Carolina State Bar Foundation's fundraising pump by donating the staggering sum of \$500,000 for the construction of the State Bar's new headquarters building, symbolizing in bricks and mortar the vital partnership between lawyers and paralegals in the provision of legal services. In 2011 the board again responded generously by making an unrestricted donation to IOLTA of \$100,000, which surely enabled the provision of legal services to many disadvantaged people who would not otherwise have been represented. And there have been several other smaller grants to organizations such as the North Carolina Bar Association's Paralegal Division and the North Carolina Paralegal Association, mainly to support the development of inexpensive and accessible CPE programs for paralegals inside and outside of the certification tent. About the only thing the board can be faulted for is its failure to provide cash awards to the State Bar's executive staff. That oversight could yet be remedied, of course, given that the board's cash reserves currently exceed \$450,000. This seems unlikely, though, given that the council has quite recently adopted a policy regulating the distribution of "excess funds of a State Bar board or program" that shockingly fails to authorize or encourage such largess. Rather, it seems to contemplate only, in strict order of preference, contributions to another "State Bar board or program;" or an "organization affiliated with the State Bar but not a part of the State Bar;" or a "law-related, non-profit organization," and expresses a presumption that such contributions should go only to entities that will advance "the mission or interest of the board donating the funds." Go figure.

**The Lawyer Assistance Program**—The Lawyer Assistance Program, as noted above, doesn't really generate any income. And it doesn't give away any money. It does, however, dispense something more precious than gold—hope. Through its professional staff and a large network of dedicated volunteers, the LAP provides free confidential assistance to lawyers, judges, and law students in addressing substance abuse, mental health problems, and other stressors that impair or may impair

CONTINUED ON PAGE 37



# An Interview with New President Mark W. Merritt

**Q: What can you tell us about your upbringing?**

I was born in Upstate New York and lived there until I was nine. My father's family was from eastern North Carolina, and he was not a fan of northern winters, so we moved to Charlotte in 1966. I had three brothers and a sister. We grew up at a time when kids played outside, rode bikes, and entertained themselves. I cut grass and delivered papers to make my spending money until I was old enough to get a job working on Saturdays. My memories as a child are pretty fond ones. My parents stressed the importance of getting a good education, but let each of their kids find his or her own way.

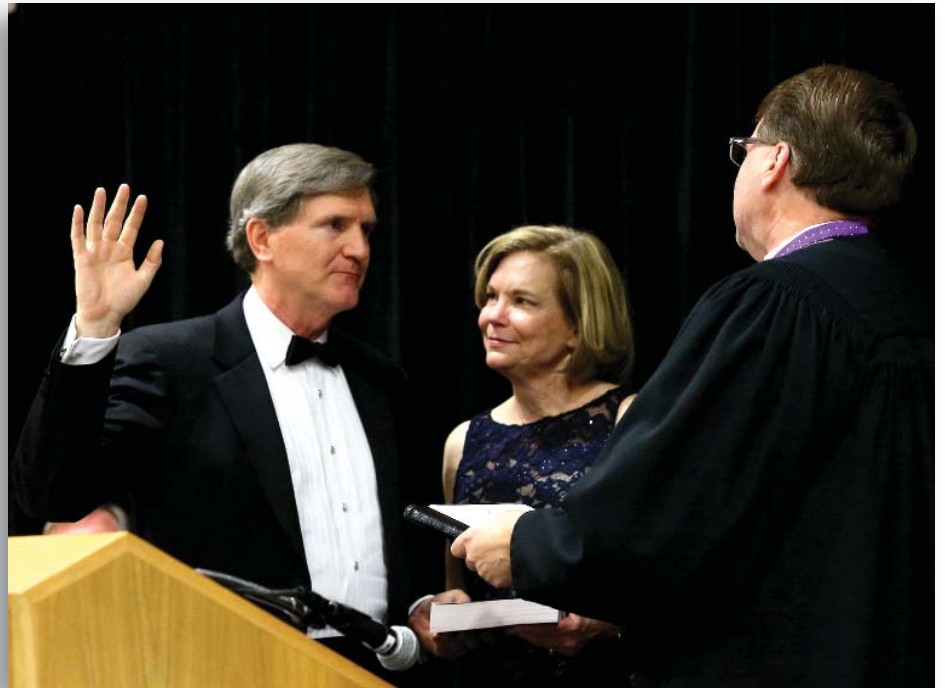
**Q: When and how did you decide to become a lawyer?**

That is hard to say. In college I was a double major in political science and economics, and I thought about going to graduate school in economics. I ultimately decided law would be a more interesting path, so in my senior year I applied to law school and ended up at the University of Virginia School of Law.

**Q: You recently accepted a position as general counsel to the University of North Carolina at Chapel Hill. Prior to that, you were engaged in private practice in Charlotte for 33 years. Tell us how your career as a lawyer has evolved and why you've chosen to continue on a different path.**

When I started practicing law in 1983, Robinson Bradshaw & Hinson had just crossed the 30 lawyer mark. As a new associate I did a little of everything. Over time I started to do more and more litigation, and I enjoyed it. In the early days I litigated all manner of cases. By the end of my time, I was principally doing antitrust work and complex litigation. I really enjoyed it.

My decision to go to UNC was difficult because Robinson Bradshaw had been so good to me. I had a real desire to do some



*Mark W. Merritt is sworn in as president by Supreme Court Justice Mark Martin, with his wife, Lindsay, looking on.*

work during my legal career that had a public service component, and when UNC approached me about becoming general counsel, the job clearly had that component. I am devoted to UNC, and I knew of no other platform that does a better job of promoting the interests of our state. It was an opportunity to give back that I could not pass up.

**Q: How and why did you become involved in State Bar work?**

I got involved because Hank Hankins, Ed Hinson, and Jerry Parnell asked me to do so. They knew that I had been very active in the Mecklenburg County Bar and the NCBA, so I was probably an easy target.

**Q: What has your experience on the State Bar Council been like, and how has it differed from what you anticipated?**

The work is substantive legal work. For example, the issues before the Ethics Committee involve the reconciliation of important principles under the Rules of Professional Conduct. You have to do your reading and your research to get to the right answer. The work has involved more writing than I thought it would.

**Q: How has the work of the State Bar changed since you first became involved?**

The day to day work of the main committees has not changed all that much if you look at how we generate ethics opinions or handle grievances. What has changed pretty dramatically is the landscape in which we practice law and how technology is affecting all aspects of the legal profession. As time has gone on, it seems that more and more issues before the

Ethics Committee relate to advancements in technology and how we respond from a regulatory standpoint.

**Q: Can you tell us about the most difficult issue you've faced as an officer or member of the council?**

The issues related to the provision of interactive legal forms over the Internet have been challenging. The definition of the practice of law in Chapter 84 was written long before anyone knew what a computer was. The State Bar worked to enforce the intent of the statute while trying to reach out to find common ground with the companies providing these services so that they are properly regulated. The statute that was ultimately passed was a good one that balances disclosure, consumer protection, and makes available a service that citizens want.

**Q: During your tenure as a councilor you chaired two very important entities, the council's Ethics Committee and the Lawyer Assistance Program Board. What do think your fellow lawyers most need to know about those very significant programs?**

For the Ethics Committee, I would want lawyers to know that their input matters. The comments that lawyers provide about proposed ethics opinions provide valuable insights to the State Bar and often change our view. We really do read and pay attention to comments.

For the Lawyers Assistance Program, I want lawyers to know that it saves lives. Statistics show that lawyers suffer from high rates of mental illness and substance abuse. The Lawyers Assistance Program is an unbelievably good resource with an extraordinary staff and dedicated volunteers who can help lawyers through times of distress. I would also emphasize the confidential nature of the Lawyers Assistance Program. Fundamentally, it is there to help.

**Q: What do you think are the biggest issues currently facing the council?**

The biggest issue facing the council is how it is going to evolve with the changing times. I believe that self-regulation by lawyers under the supervision of our Supreme Court, who must approve our rules and regulations, is a worthy model to preserve. In the past, the State Bar was largely left along to do its job. There were a significant number of lawyers in the General Assembly who understood the State Bar's role and significance. There were not as many outside economic and political forces challenging the role of lawyers and the

value of self-regulation. Political changes have led to questions about the appropriate amount of regulation. It is now far more incumbent than ever for the State Bar to engage our key stakeholders—the General Assembly, our judiciary, our Bar leaders, and the citizens of North Carolina—to explain how the State Bar regulates the profession in the public interest. With the public's demand for transparency and with claims that professional boards regulate to protect their professions, the State Bar needs to do a better job of educating these stakeholders on what we do, why we do it, and how we do it.

**Q: The litigation against LegalZoom settled last year and resulted in some very important legislation. Can you remind our readers what that litigation was about, describe the outcome, and tell us whether you believe the legislation will have long-term significance?**

The fundamental issue was whether providing interactive legal forms online that used decision-tree software or algorithms constituted the practice of law. LegalZoom sued the State Bar over that issue even though the State Bar had never sought to enjoin LegalZoom's activity in this state. We ultimately settled with encouragement from members of the General Assembly, who favored making the product available in a manner that protected the public. The result was a statute that requires a licensed North Carolina lawyer to examine the form documents, that requires disclosure that the form is not a substitute for a lawyer, that prevents the limitation of liabilities, and that requires disputes to be resolved in North Carolina. Other states are now looking at this statute as a model.

**Q: While a member of the State Bar Council, you actually represented the State Bar as an amicus in support of the North Carolina Dental Board in an antitrust case brought against that body by the Federal Trade Commission. The case, which ultimately ended up in the United States Supreme Court, was finally decided against the Dental Board. Remind us what that case was about.**

Historically, the Supreme Court had not interpreted the federal antitrust laws to apply to the states. Over time, the issue that the Supreme Court has wrestled with is what exactly constitutes a "sovereign state actor" that is entitled to immunity from the federal antitrust laws. Fundamentally, the issue is one of separation of powers. In the Dental Board case, the Dental Board argued that it was a

sovereign state actor that was immune from the application of the antitrust laws. The Supreme Court rejected that argument and held that, as a board made up of dentists elected by dentists, the Dental Board was not a sovereign state actor and that it required active supervision by a sovereign state actor in order to be entitled to immunity. It noted that the Dental Board had acted inconsistently with its statutory authority and in a manner that protected the economic interests of dentists and not the health and well-being of the public. I still regard this case as one where bad facts made bad law.

**Q: The Dental Board case seemed to call into question the propriety of regulation by agencies governed by elected practitioners of the profession being regulated. Do you anticipate that the State Bar will have to change any of its procedures, policies, or programs to accommodate the Dental Board decision?**

The State Bar policies, programs, and procedures are on sound antitrust ground. The North Carolina Supreme Court reviews all changes to our rules and regulations, which is the kind of supervision that the Dental Board lacked. There is no doubt that the Supreme Court is a sovereign state actor. Moreover, the process by which the State Bar regulates lacks the flaws that led the Federal Trade Commission to sue the Dental Board. There is also a clear process for any decision made through our grievance process to be reviewed in the court system. These are substantial and important distinctions from the Dental Board case. If you read the guidance that the Federal Trade Commission put out about the Dental Board decision, the State Bar acts well within its safe harbors.

**Q: Are there any other cases in which the State Bar is involved that could have far-reaching consequences?**

The State Bar intervened in a federal lawsuit brought by a trade association named Capital Associated Industries. That company has attacked the constitutionality of N.C. General Stat. §§84-4 and 84-5 as violating the associational rights of its members to have the trade association directly hire attorneys who can provide services to its members. Essentially, the lawsuit is an attack on N.C. Gen. Stat. § 84-5 and its prohibition on the corporate practice of law.

**Q: In your opinion, does it make sense for lawyers to be regulating themselves? Is it good public policy? Do we deserve the public's trust?**

I believe that self-regulation by lawyers is in the public interest and that lawyers are in the best position to uphold the high ethical standards of the profession. The proof of that is in the results of our self-regulation. The State Bar is at the forefront of providing cutting edge ethical guidance to our members. Our grievance process handles a high volume of cases with efficiency and fairness. The percentage of our grievance cases that present any controversy whatsoever is truly small. Our results are routinely upheld in the court of appeals. The State Bar protects the public well and serves the highest ideals of our profession.

**Q: This past year the State Bar appointed a member of its staff to act as “legislative liaison.” Does this foreshadow the agency’s increased involvement in legislative matters? If so, how can the State Bar and its membership be most effective in promoting its agenda?**

The State Bar intends to be more involved in legislative matters. For many years there were many lawyers in the General Assembly who had a well-developed understanding of the State Bar and its role. As fewer lawyers now serve in the General Assembly and the nonlawyers who do serve often do not have a well-developed understanding of what the State Bar does, it will be important for the State Bar to be present in the General Assembly to help educate its members, answer their questions, and serve as a resource. We will be most effective with our legislators when our officers, councilors, staff, and local bar leaders engage with our legislators in their home districts about issues that affect the regulation of the legal profession and the provision of legal services. Once the session starts, our legislators are extraordinarily busy, and it is more of a challenge to find time with them.

**Q: Last year the chief justice convened the North Carolina Commission on the Administration of Law and Justice for the purpose of undertaking a comprehensive evaluation of the state’s justice system. You served on one of the commission’s five committees, the Legal Professionalism Committee. What was the experience like and what do you believe is likely to be the result of the commission’s work?**

I have enjoyed my time on the commission. The commission is taking a comprehensive look at how we can improve the judicial system in North Carolina with better use of

technology, with better practice, and with new and better ways to deploy our resources. This is exciting work that holds out great possibilities for our state. The commissioners have reviewed a lot of information, heard from a lot of stakeholders, and are generating good ideas on how to attack the challenges that we face. It has been a wonderful opportunity, and I am grateful to be a part of it.

**Q: Are any of the commission’s findings or recommendations of particular relevance to the State Bar in the execution of its regulatory responsibilities?**

There has been some discussion of the State Bar in the Legal Professionalism Committee as to whether it should be more clearly under the authority of the Supreme Court. The State Bar in North Carolina is created by statute, and its powers are statutory. In some states, the State Bars are created by the authority of the Supreme Court. In reality, all of the rules and regulations promulgated by the State Bar are reviewed and approved by the Supreme Court, and the State Bar works with the Supreme Court in administering programs like IOLTA and the Client Security Fund. It has been an interesting and worthwhile discussion, but my sense is that it is not an issue that will be a priority of the commission as there are other issues that are more critical to addressing some of the challenges that our legal system faces.

**Q: In various public statements you have emphasized the importance of “engaging” the lawyers of North Carolina in the effort to improve the administration of justice in our state and to ensure that our self-regulation is as good as it can possibly be. You obviously intend for the State Bar to facilitate that engagement. What do you believe we ought to be doing better or differently to more thoroughly engage our members?**

For many years the State Bar was able to do its work relatively free from outside scrutiny and without a lot of question. We had many lawyers in the General Assembly who understood what we did and why it is important. We were not having our regulatory role questioned by alternative legal service providers who are both well-financed and savvy from a public relations and political standpoint. Most lawyers from the so called Greatest Generation and the Baby Boom generation were supportive of the role of self-regulation.

All of those factors have changed. There has been a marked decline of the number of

lawyers in the General Assembly. Legislators are far more questioning of regulation in general, and self-regulation by professionals in particular. There are a number of well-financed and well-connected alternative legal providers who attack self-regulation for their own economic advantage. Members of Generation X and Millennials are far more likely to question authority and the legitimacy of government institutions.

With these changing times, the State Bar simply needs to engage with its key stakeholders to educate them on the importance of what we do, why we do it, and how we do it. Those stakeholders include our legislators, our judges, the North Carolina Bar Association, our local bar leaders, and the leaders of our various bar organizations. The State Bar needs to be a resource to our legislators. The State Bar needs to be more proactive in making sure that our judges and bar leaders understand the value of self-regulation and the role of the State Bar. Engagement also provides for an important feedback loop so that the State Bar can learn from its various stakeholders and be in a mindset of continuous self-examination and improvement. The best way to do that is to talk to people, to listen to what they have to say, and to be committed to improvement.

**Q: What else you would like to accomplish during your year as president?**

The work of the North Carolina Commission on the Administration of Law and Justice will be critically important to our state. I want to do everything possible to support its important work and to engage lawyers in helping to bring its recommendations into reality.

**Q: In your opinion are there too many lawyers? Is this something that ought to be of concern to the State Bar?**

The State Bar is a regulator of the conduct of lawyers. It is up to the market to decide if there are too many lawyers, not the State Bar.

**Q: Recently, the Board of Law Examiners decided to plan for the implementation of the Uniform Bar Examination (UBE). What is the UBE? Do you have an opinion as to whether it ought to supplant the bar examination as we now know it? What role, if any, will the State Bar play in determining how applicants to the Bar will be tested in the future?**

CONTINUED ON PAGE 35



# NCBA Ushers In New Era of Leadership

BY RUSSELL RAWLINGS

The upcoming holiday season will mark the end of one era and the beginning of another for the North Carolina Bar Association. Effective January 1, 2017,

Jason Hensley of Morganton will assume the duties of executive director following an exhaustive search to choose a successor to Allan



*Allan Head, right, congratulates his successor, Jason Hensley.*

Head, who is retiring after 43 years of service to the NCBA including the past 35 years as its executive director.

Changes in staff leadership have been rare within the NCBA. Established in 1899, only nine individuals have served as executive director or previous iterations of that title in the NCBA's 117-year history.

Head's predecessor, William M. "Bill" Storey, led the NCBA from 1955 until 1981. Hensley, therefore, will be just the third person in 61 years to hold the reins of the state's oldest and largest voluntary bar organization.

His appointment was confirmed by the NCBA Board of Governors in July.

Hensley is a 1996 graduate of East Burke High School and a 1999 graduate of Appalachian State University in production and operations management, where he was the top overall graduate from the Walker College of Business. He graduated in 2002

from the University of North Carolina School of Law, where he served as class president from 1999-2001 and as president of the Student Bar Association in 2001-02. Upon graduation from law school, Hensley was inducted into the James and Carolyn B. Davis Society. He earned an MBA from UNC-Chapel Hill in 2014 and the UNC Kenan-Flagler Leadership Initiative designation.

Hensley has served Bernhardt Furniture Company in Lenoir both before and throughout his legal career. He began his service with Bernhardt during his undergraduate studies at Appalachian and continued to work with the company during his time in law school. Hensley began his legal career as the company's first corporate counsel in 2002 and progressed to hold positions

with increasing responsibility for both legal matters and functional areas of the company and its subsidiaries, advancing to the position of corporate secretary, senior counsel, and director of real estate.

"I'm excited to have this opportunity to serve the members of the NCBA and to support the important work of the NCBA's leadership, volunteers, and talented staff in advancing the legal profession and serving the public," Hensley said. "It's a true honor to be chosen to serve in this capacity for an organization to which so many individuals freely give their time and abilities to improve the profession and the lives of others."

Hensley is certainly no stranger to the NCBA. He is a former chair of the NCBA Corporate Counsel Section and was elected to a three-year term on the NCBA Board of



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Governors in June 2015. (Hensley did not participate in the board's consideration of his candidacy.)

He has served on numerous NCBA committees including the Open Courts Initiative, the Legislative Advisory Committee, and the Continuing Legal Education Committee.

Hensley is also a member of the North Carolina Commission on the Administration of Law and Justice and serves on its Technology Committee. For the past 12 years he has served on the Board of Directors of Communities in Schools of Caldwell County, chairing its Bylaws, Policy and Procedure, and Audit Committees.

"Jason Hensley is an experienced, proven leader in both his company and the Bar Association," said NCBA President Kearns Davis. "Allan Head has devoted his career to the NCBA's mission—seeking liberty and justice in North Carolina's legal system—and Jason has the skill, judgment, and dedication to pursue those aims into the future."

Head joined the staff of the NCBA as executive secretary on December 1, 1973, following four years of military service as a lawyer assigned to the US Army Security

Agency in Kassel and Augsburg, Germany. A graduate of Wake Forest University and the Wake Forest University School of Law, he became executive director following Storey's death in 1981.

Among numerous honors and recognitions bestowed upon Head during his remarkable career is the State Bar's John B. McMillan Distinguished Service Award, presented in January 2015 at the annual State Bar-NCBA dinner held in conjunction with their respective winter board meetings.

The event symbolizes the bond that is woven inextricably into the lifeblood of the two organizations. Hensley is keenly aware of the importance of that relationship, which has existed since the NCBA initiated the creation of the State Bar in the 1920s.

The State Bar was ultimately incorporated on July 1, 1933.

"The two organizations have a common origin," Hensley said, "and I think it has been the relationship between the organizations and our ability to work together and independently as needed that has greatly benefitted our profession and the citizens and businesses of this state."

Although, by design, they are separate

organizations, the NCBA and the State Bar will continue to work closely together whenever appropriate to advance common causes.

"One of the first things that comes to mind when I think of the relationship between the State Bar and the NCBA is the commonality of purpose the organizations share in serving and advancing our profession and serving the public," Hensley said.

"There is a great deal of change occurring in our profession which has been brought on by changes and advances in technology, a growing and aging population, and by the shifting expectations of the public, businesses, and the clients that we serve. I believe that both organizations will work diligently to help our profession adapt to those changes and to the challenges we face as we seek to serve the public well today and in the future."

Elizabeth Quick of Winston-Salem, a past president of the NCBA, chaired the search committee which unanimously recommended Hensley.

"The search committee received applications from all over the country, and personally

CONTINUED ON PAGE 21

# Interstate Law Firms: Compliance and Suggestions

BY JOSHUA WALTHALL

In recent years the Grievance and Authorized Practice Committees of the State Bar have noticed an increase in the number of cases originating from multijurisdictional law firms.

In North Carolina, 27 N.C.A.C. 1E, § .0200 contains the rules governing what are, in this state, known as “interstate law firms.” The rules indicate, generally, that no law firm that maintains offices in North Carolina and one or more other jurisdictions, or that is organized under the laws of another state and has filed an application with the secretary of state for a certificate of authority to transact business in North Carolina, may do business in this state without first obtaining a certificate of registration from the North Carolina State Bar.<sup>1</sup>

While some multistate law firms get into trouble by failing to appropriately register as an interstate law firm despite practicing in North Carolina and in at least one other state, the provision that seemingly generates the most trouble is found in 27 N.C.A.C. 1E, § .0205: “This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.” Thus, even within a registered interstate law firm, attorneys not licensed in North Carolina cannot practice law in this state. Individuals hold law licenses, law firms do not. Therefore, registration as an interstate law firm does not override the prohibition, set forth in Chapter 84 of the General Statutes, on the unauthorized practice of law by persons not holding a North Carolina law license. The analysis here is not difficult. However, based upon grievance and authorized practice files recently opened at the State Bar, the implications of this provision of the

rule are either misunderstood or just simply not followed.

The following scenario has become all too common. A North Carolina attorney—usually a relatively new, inexperienced attorney—sees an advertisement on Craigslist by an out-of-state firm or attorney who wants to hire a North Carolina “partner” to head up the firm’s North Carolina office. There is no actual North Carolina office, of course; the firm claims to save money by using a mail-store mailbox or virtual office space. The firm provides legal representation in bankruptcy, post-conviction matters, foreclosure issues, family law, or debtor matters. The firm drafts documents for its clients to use in court and negotiates with lenders or creditors on behalf of clients. The North Carolina attorney is told that the firm will do most of the work, the local attorney will just need to review and/or file some documents and possibly make an appearance or two. The local attorney signs an “of counsel” or “class b partner” agreement, and the firm begins representing North Carolina clients. The local attorney is paid a portion of the fee the firm charges to the client and does not have to participate in advertising or retaining the clients on behalf of the firm—the firm handles those services through a website and “intake paralegals.” The firm tells the local attorney that it is registered as an interstate law firm with the North Carolina State Bar so the local attorney “doesn’t need to worry about any compliance issues.”

Employees of the out-of-state firm handle advertising for legal services in North Carolina, initial client counseling, retaining the clients, answering client questions, and even drafting legal documents for the client. All the local attorney has to do is review the legal documents for accuracy and file them in



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North Carolina. The local attorney doesn’t mind the work because he gets some extra money on the side and is able to maintain his own separate firm. He hardly—if ever—speaks to the clients, and he takes all of his instructions from the out-of-state firm. The firm’s paralegals, working in the firm’s home office, are very efficient, and the local attorney is pleased with the work they’ve produced. He doesn’t have supervisory authority over them, but he does have access to a call log or remote desktop where he can see their notes and emails. He thinks the clients are being served, and the firm is, after all, registered with the State Bar as an interstate law firm.

Is there a problem? Yes. In the scenario just described, nearly all of the legal services are being provided by individuals who are not licensed to practice law in North Carolina. The local, North Carolina attorney is not answering the clients’ questions, deciding which clients have a case and need representa-



tion, drafting the legal documents, negotiating with the opposing parties, or determining the course of the representation. Remember the rule? Registration as an interstate law firm does not “confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.” There is no exception to this rule, nothing that allows attorneys licensed in other jurisdictions—or nonattorneys in any state—to provide legal services in North Carolina, even if they are nominally supervised by a North Carolina attorney or their work is perfunctorily reviewed by a North Carolina attorney. Even if a firm is registered as an interstate law firm, all of the legal services that the firm provides to North Carolina residents must be provided by licensed, North Carolina attorneys. This does not mean, however, that a North Carolina attorney cannot work in conjunction with out-of-state attorneys and properly supervised nonlawyers to provide legal services in North Carolina matters, nor does it mean that the North Carolina attorney cannot utilize the services of a paralegal in the representation of clients or obtain assistance from nonlawyers with nonlegal aspects of a law practice such as marketing. It just means that, if clients are receiving legal services relative to a North Carolina legal matter, those services need to be provided by an attorney licensed in this state.

So how can North Carolina attorneys ensure that they comply with the rules? What does compliance in this arena look like? Here are some suggestions:

1. The North Carolina lawyer should have a bona fide business relationship with the out-of-state firm for the practice of law, and if she is held out to the public as having an ownership interest in the firm or having authority within the firm to make decisions, she should actually have that interest or authority. Nearly all of the problematic relationships reviewed by the State Bar are designed so that the local North Carolina attorney is a “partner” in name only with no actual authority or ownership in the firm.<sup>2</sup>

2. The North Carolina attorney should participate in the decision to provide representation to a prospective client relative to a North Carolina legal matter and in the initial consultation with the client. If an individual calls the firm and is (a) accepted as a client by the firm or (b) advised as to the legal course of action the firm will take for the client prior to the involvement of a North Carolina

attorney, it is the unauthorized practice of law and violates the interstate law firm rule because the client has been provided legal advice by someone other than a North Carolina attorney. Accordingly, the North Carolina attorney should be the first point of contact for all North Carolina matters and should have decision making authority regarding the firm’s acceptance of North Carolina clients.

3. The North Carolina attorney must be the one ultimately deciding what legal services will be provided to clients in this state. To be truly providing all of the legal services relative to a North Carolina legal matter, the North Carolina attorney cannot take directions from out-of-state individuals not licensed in North Carolina about what legal services to provide to North Carolina clients.

4. Legal services provided to North Carolina residents should be provided by North Carolina attorneys, or by nonlawyer assistants under their direct supervision, and, with regard to the following services, may only be provided by North Carolina lawyers: giving legal advice, answering client questions, explaining legal options, drafting legal documents, negotiating with opposing parties, making court appearances, et cetera.

5. If the North Carolina attorney utilizes the assistance of a paralegal, the supervision of the paralegal should encompass more than the paralegal or attorney “being available by phone” or reviewing of the paralegal’s emails or having access to the paralegal’s remote desktop. The supervision should be such that the North Carolina attorney is fully responsible for the actions of the nonlawyers she is supervising—she should be fully directing the representation, including overseeing what the client is told and how the client is advised.

6. All advertisements and websites should make the nature of the relationship very clear to the clients and potential clients of the firm. The North Carolina attorney should not be held out as a “partner” or “supervising attorney” if those titles are not indicative of the attorney’s level of authority or involvement, nor should the firm hold out having “offices” in various states unless that is actually the case—a mailbox is not an office.

Multistate law firms are welcome to establish a North Carolina practice utilizing North Carolina licensed attorneys to deliver legal services in this state. But there are some out-of-state firms that misuse multistate registration, and they do so by taking advantage

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of naïve North Carolina lawyers. To remain in compliance, be discerning, ask questions, and carefully read the rules. When in doubt, contact the State Bar at 919-828-4620. ■

*Joshua Walball is a deputy counsel at the State Bar where he handles authorized practice, grievance, DHC, and disbursement cases. He also teaches at Wake Tech Community College and Campbell Law School.*

*This article has been reviewed and approved by the chairs of the Grievance and Authorized Practice Committees.*

### Endnotes

1. There is an exception, however, that notes that such registration is not required “if all attorneys associated with the law firm...are licensed to practice law in North Carolina.” Moreover, interstate law firm registration would only apply to firms and attorneys practicing North Carolina law, and thus would not apply to attorneys practicing exclusively before federal courts, like immigration courts.
2. Cf. Proposed 2015 FEO 5 (2016), ruling that a lawyer who does not own equity in a law firm may be held out to the public by the designation “partner,” “income partner,” or “non-equity partner,” provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.

# Judge Marion Warren Delivers Vision for NC Judicial Branch

BY SHARON GLADWELL

**N**orth Carolina's three branches of government recently completed another legislative session. Unlike the past seven years, due to the recession and resulting budget deficits, the judicial branch fared well with the following successes:

- a current fiscal year budget of \$511 million, the highest budget in the history of the courts;
- an increased certified general fund budget by 12% over the last two biennium (fiscal year 2014 compared to fiscal year 2017);
- a historical legislative increase for judicial employees, the largest increase in nearly ten years;
- operational budget needs addressed, such as increasing funding levels for interpreters, expert witnesses, and juries by more than 31%;
- more than 16% of previous shortfalls in the operating budget was restored to expand training opportunities for employees, provide essential supplies and equipment to courts throughout the state, and lift travel restrictions;
- additional business court sites are underway to address the state's complex business cases; and
- restored technology dollars have been utilized toward expanding the courts' data bandwidth tenfold to support a foundational network platform essential for electronic court processes.

At the helm of this success is Judge Marion Warren, director of the North Carolina Administrative Office of the Courts (NCAOC), to fulfill the administrative vision and plan of Chief Justice Mark

Martin, head of North Carolina's judicial branch.

Coming up on his first anniversary in November as NCAOC's permanent director, Judge Marion Warren has come a long way from his upbringing on a farm in Brunswick County. After serving as a judge for the past 15 years, Warren was selected out of a nationwide search as the new director of the NCAOC by Chief Justice Mark Martin this past fall.

Warren grew up working on the family farm and went on to earn his bachelor's degree in business administration and trust management certification from Campbell University. After initially considering a career in banking, Warren felt drawn to the practice of law.

He enrolled in Campbell's Law School and spent the next three summers working as a law clerk and as an assistant to the county manager and county attorney. After graduating, he joined a small firm specializing in the booming real estate development industry, but he soon realized that the courtroom held the greatest appeal for him. "I was always interested in law and dreamed of becoming a lawyer," said Warren. "I found that being a trial lawyer was my true calling. In 1993 he was offered the opportunity to join the district attorney's office, prosecuting cases in Brunswick, Columbus, and Bladen Counties, and trying every type of case ranging from juvenile homicide to nuisance abatement. "With each new case, I found the law to be more fascinating and engaging," said Warren. "As my time at the DA's office continued, I became interested in the administration of justice and the operation of the courts—I found myself wanting to become a judge."

In 2000 the opportunity presented itself,



and he turned his attention to becoming a district court judge. He was appointed to the district court bench in August 2000, winning the subsequent election the following November, and staying on that bench until November 2015.

During his nearly 15-year term as a district court judge, he was able to serve the community in various ways, taking on the role of chair of Brunswick County Hospital Authority, serving on the executive committee of the local Boy Scouts, moderating for the Brunswick Baptist Association, volunteering for nonprofits that dealt with homelessness and hunger, and even helping with the founding of a private school.

Warren was asked to serve as interim director of the NCAOC in April 2015, following the retirement of Judge John W. Smith. He served at the helm of an integral team the chief justice was putting together to run the courts administratively until a

permanent director could be found. After a nationwide search, a selection committee recommended Warren and Chief Justice Mark Martin agreed that he had the ideal person for the job. Warren's title became official after being appointed in November 2015.

NCAOC is a statewide organization that was created with the unification of the courts and established in 1965. The purpose of NCAOC is to provide services to help North Carolina's unified court system operate more efficiently and effectively, taking into account each courthouse's diverse needs, caseloads, and available resources. The NCAOC director is the outward facing representative of what many refer to as the quiet co-equal branch of government—the judicial branch. “The role of the director is to speak with one voice for the benefit of the judicial branch, execute policies statewide for the chief justice and the Supreme Court as directed, and ensure an orderly and fair administration of justice for all of the people of North Carolina,” said Warren. “This is an exciting time to be a part of the NCAOC as North Carolina is emerging as the ninth most populated state with a robust judicial infrastructure.”

Warren's responsibilities include speaking and meeting with the court's magistrates, judges, and support staff about their day-to-day operations, and learning how the NCAOC can improve its services. “Because of my many and recent years of work in court, I can understand and relate to what they are going through,” said Judge Warren. “My background in North Carolina's judicial branch helps me understand the diverse needs and caseloads of our various courts so that I can plan for and provide the services that our unified court system needs to operate more efficiently and effectively.”

“A great part of my day is focused on assisting others in understanding what the judicial branch does for the state and how it accomplishes its goals and executes its vision,” said Warren. This includes working through budgetary and HR issues that allow more than 6,000 employees with about 550 elected officials in the judicial branch the ability to execute their particular job that day.

Keeping track of that many officials and staff members is no easy task. There is a constant demand for resources, while Warren has also been tasked to lead the evolution of

the judicial branch, and its systems, technology, and records. “The judicial branch has many diverse stakeholders with varied interests,” Warren said. “Keeping everyone on the same set of goals while they execute their specific role in the branch, and getting them to think as an enterprise instead of as an individual, is what I aim to do when I go to work every day.”

One of the first big projects on Warren's to do list is bringing the judicial branch into the 21st century by reinventing what it means to go to court in North Carolina. “We have about three million filings in the judicial branch every year,” said Warren. “That's one out of every three people. If we can modernize how we do business, we can bend the cost curve and reallocate those resources in different ways, such as hiring a highly skilled and highly trained workforce.”

In this vein, the chief justice has convened the North Carolina Commission on the Administration of Law and Justice (NCCALJ), an independent, multidisciplinary commission that is undertaking a comprehensive evaluation of the judicial system and will make recommendations for strengthening North Carolina's courts within the existing administrative framework. The commission will finalize its findings and recommendations in a series of reports that will be presented to the chief justice and made available to the public in early 2017.

A strategic plan for incorporating technology into North Carolina's court system is expected to be included in the commission's final report. “It's my genuine hope that the chief justice's vision of North Carolinians getting the chance to resolve disputes through virtual clerk's offices and electronic courthouses will come to fruition during my time as director at the NCAOC,” said Warren. “Technology is an important component of improvement and our goal is to offer greater access to justice by providing better service across the state no matter where you're located.”

Part of Chief Justice Martin's vision is strengthening relationships with various stakeholders of the judicial branch, as is demonstrated in his creation of NCCALJ. “The judicial branch's legislative successes can be shared with our stakeholders,” Warren said. “As I work more with our stakeholder groups, I am learning about the many common goals that we have in providing justice for North Carolina citizens. I am



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eager about the opportunity to grow these relationships and turn opportunities into realities.”

For now, Warren is hard at work running the NCAOC in an efficient yet meaningful way. “It's an incredibly fulfilling job. I look forward to further assisting the chief justice in the execution of his vision of what the judicial branch can become as we move into the future of the North Carolina court system.” ■

*Sharon Gladwell is the communications officer for the NC judicial branch. She began working with the NCAOC in June 2007 and oversees brand and identity, media relations, publications, the speakers bureau, websites, and web applications.*



# What is Collaborative Law?

BY JOHN SARRATT AND MARK SPRINGFIELD

**L**awyers throughout the country have been practicing collaborative law in family matters for over 25 years. In North Carolina, family law attorneys like Mark Springfield have been using the collaborative law process for at least 15 years. The North Carolina legislature



enacted a statute defining and codifying collaborative family law proceedings over ten years ago.

Now John Sarratt is chairing a committee of the NCBA Dispute Resolution Section working to expand the use of collaborative law beyond domestic disputes to civil legal disputes, and John and Mark both recently worked with that committee to provide a two-day training session at the North Carolina Bar Center on using collaborative law in civil commercial disputes. A second training session is scheduled for December 8-9 at the Harris Center of Central Piedmont Community College in Charlotte,<sup>1</sup> and additional training sessions are in the planning stages.

What is behind this expansion and why is it gaining traction?

## A Tale of Two Cases<sup>2</sup>

Perhaps it would be helpful to describe two recent collaborative law cases in which Mark was involved. In the first case, the husband and wife were divorcing and had

been equal partners in a small business together for 25 years. The company was worth about \$1.75 million. The couple also owned undeveloped land in a rapidly growing area worth three or four million dollars, as well as other developed real estate worth about two million dollars. They had teenage children.

The wife had come to the agonizing conclusion that she wanted a divorce, and she was initially referred to Mark. Mark explained the collaborative process along with other options for divorce, including litigation, arbitration, and mediation. The wife wanted to avoid court and was interested in using the collaborative process. Mark suggested to the wife that she talk with her husband about interviewing attorneys who had experience in collaborative law proceedings. Her husband met with an attorney who had training in collaborative law and, after learning about the various court and

noncourt options, he also opted for the collaborative process.

In the second case, the couple had been in business together for 15 years and the business was worth about \$1.25 million. They had a teenage son. After a long effort at marital therapy, the husband had decided he wanted a divorce. When his wife learned this, she got a referral to an attorney who includes collaborative law in her practice. After hearing about the court and noncourt options, the wife was interested in the collaborative process. At her request, her husband agreed to talk to an attorney who had experience in the collaborative process. He came to Mark, and the husband also opted for the collaborative process.

## How is Collaborative Law Defined?

The couples in these two cases agreed to a process that has at heart seven necessary elements:

(1) a written agreement to participate in the collaborative process;

(2) a commitment to resolve any disagreements through the use of “interest-based” negotiations and without litigation or the threat of litigation;

(3) an open and transparent exchange of relevant information;

(4) privacy and confidentiality;

(5) a series of conferences (often called four-way conferences) in which the parties themselves are present with their attorneys in the same room, and at which all of the substantive discussions and negotiations take place;

(6) the shared use of truly neutral experts to provide information; and

(7) limited representation by the lawyers—the lawyers and their clients agree that the scope of the representation is limited to the collaborative process; neither attorney or their firms will represent the client in any subsequent litigation against the other party.

Mark and his attorney-counterpart in each of the cases, having agreed to be in the collaborative process, were agreeing to change their mindsets for these cases from the traditional adversarial mindset (anticipating the possibility of a trial) to a “collaborative” mindset (in which the attorneys work toward a resolution without the threat of court).

### What Does it Mean for Attorneys to Change to a Collaborative Mindset?

A case is “collaborative” when the mindset and behaviors of the attorneys and professionals in the case are consistent with the following:

(1) a shared common purpose by the attorneys to use the combined intelligence, creativity, compassion, experience, spirit, and energy of everyone in the room—including the parties in dispute—to listen, exchange ideas, and build on each other’s thoughts in order to accomplish a communal objective;

(2) a focus on considering and then trying to address each party’s needs and interests;

(3) self-determination by the individuals who are having the disagreements;

(4) creating a space in which the individuals in conflict can feel relatively safe as they search for resolution;

(5) affording all parties the dignity of the benefit of the doubt, while at the same time finding ways to assure the integrity of the

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process;

(6) a mindset of genuine and open curiosity about what the parties are experiencing and what they are needing in order to reach resolution; and

(7) self-awareness on the part of the professionals, and the ability to recognize and avoid projecting their own needs, interests, opinions, prejudices, and impulses into the conflict resolution effort.

### The Limited Representation Provision

At the heart of the collaborative process is the agreement among all the participants that the attorneys will never be involved in litigation between the parties over the matters at issue. If a case fails to reach resolution by settlement in the collaborative process, then different attorneys and law firms are hired to pursue a dispute resolution process where a result can be mandated, such as in litigation. The limited scope of the representation in the collaborative process is what allows the attorneys to focus on the particular needs and interests of the parties, and removes the constraint of driving the decisions to match what the attorneys believe a

court would do. It allows the attorneys to create a relatively safe space in which to have difficult conversations and to problem-solve, rather than engage in a contest of wills over positions. And it allows for a different type of advocacy in which attorneys work to protect and preserve their client’s needs and interests while at the same time being cognizant of the legitimate needs and interests of the other party or parties.

### The Negotiation Model

Another pillar of the collaborative process is the intentional adoption by the attorneys of an integrative—rather than a distributive—model of negotiation. The classic example from negotiation theory to illustrate the difference between distributive and integrative negotiation is the story of two students in the library. They are arguing over whether to open a window next to the table where they are studying or leave it shut. In a distributive negotiation, one of the students wins and one of the students loses. The window is either opened or left shut, or there is some compromise between all the way open and all the way shut such that neither stu-

dent is fully satisfied. Most of us were trained in and operate within a distributive model of negotiation.

In an integrative model of negotiation, one seeks to understand the underlying needs and interests of the students that are driving each of them to take their respective positions on whether the window gets opened or remains shut. We come to understand that one of the students is preparing a research paper that requires spreading research notes across the table, and his concern is that the breeze created by an open window will disturb his organization. We find that the other student is studying for an exam and is uncomfortably warm, and it is making it difficult for her to concentrate. Fundamentally, their needs are very similar. They want to learn, to demonstrate competence in their studies, to have the respect of their professors, and to graduate and begin successful careers. Their interests are not in conflict. Only their respective strategies for addressing their interests, by opening or closing the window, are in conflict. Once the underlying needs and interests are understood, it becomes easier for each student to respond to the other in a more helpful way, and there can be a joint problem-solving effort to see if there is a creative way to address both sets of legitimate needs and interests. In this classic example, the students agree to open windows in an adjoining room to lower the temperature where they are studying without creating a breeze across the table.

### Back to the Cases...

Once they had chosen a collaborative approach, the divorcing couples each focused first on their children, and with the help of a neutral child specialist agreed on a custody schedule rather than having that decision made by an outside custody evaluator or judge. They then began work on how to divide the marital estate. With respect to the family businesses in our cases, the wife in the first case wished to be bought out of the business. Her interest was in having her autonomy, and her husband was willing to search for strategies that would allow that to happen so long as it did not sacrifice his interests. There were sufficient assets in the marital estate to allow for a buyout, but the assets were in the form of non-income producing real estate. The husband believed that it would be optimal to hold the properties for future development, rather than sell the properties immediately as part of the divorce settlement. But without the proceeds of the sale of the properties, the wife would have no investment income to replace the income she had been receiving from the business.

The couple jointly retained a financial neutral in the collaborative process to provide a valuation of the business and to help them develop possible financial strategies for dividing the assets and providing for the cash flow needs of the separated households. After several conferences with the attorneys and the financial neutral, the couple agreed to a buy-out price and on a structure for the buy-out. They also agreed to delay the sale of the real estate holdings to maximize the sales

price. They structured the buyout so that immediate monthly payments were to be paid by the husband to the wife to replace her lost income from the business until they sold the real properties.

The amount of the monthly payments was determined with the help of the financial neutral. The financial neutral worked with each of the parties to project their living expenses in separate households. They then looked at what they could reasonably expect the business to generate in revenues after the wife left the business. The parties then struck a balance in looking at what amount would reasonably cover the wife's living expenses while still leaving enough from the business revenues to cover the husband's living expenses. The payments were structured as a short-term note so that the bulk of the husband's payments were reducing the balance of the buyout amount.

Once the real estate holdings were liquidated, the balance of the buyout would come due. After the parties each received half of the net proceeds from the sale, the husband would pay to his wife the balance of the buyout amount from his share.

In the second case, neither party wanted to be bought out. They both shared an interest in continuing in work that was meaningful to them and that provided for their financial needs. The couple decided to explore the option of remaining in the business together despite the divorce. While the wife was ambivalent about being divorced and still working at the same company with her former husband, a neutral business attorney was retained on behalf of the company to help explore what a comprehensive shareholder agreement in this situation might look like. With the help of the business attorney and their collaborative attorneys, the couple negotiated revisions to the shareholder agreement to formalize and better establish their roles, to clarify decision-making responsibilities, to incorporate strategies for dealing with disagreement, and to have an ultimate exit strategy should either spouse choose to withdraw from the corporation. They also agreed to periodic sessions with a counselor to facilitate good communication as ongoing business partners.

### What Would Have Happened in Court?

A family court in North Carolina would not have ordered the division of assets in the same way that the couples in these two cases

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decided to do. Yet, for these couples, the agreed division of assets was far more optimal than what would have happened in court, both in terms of maximizing the net worth of the separate estates and preserving the working relationships as parents and as former or present business partners.

Negotiated settlements outside the collaborative process would also likely have led to less optimal results. When attorneys have the dual responsibility of working to reach a settlement while at the same time preparing for the possibility of litigation, it immediately narrows the range of potential outcomes to more closely reflect what would happen in court. The dual responsibility also seems to inevitably lead to a more adversarial and distributive mode of negotiation than is the norm in the collaborative process. The possibility of creativity and customized solutions in an integrative model of negotiation is simply less available.

Moreover, in each of these cases the entire dispute was resolved in face-to-face meetings in a fraction of the time it usually takes to move domestic claims through the court system. There was no cost of pleadings, discovery, motions, or trial; and the use of neutral consultants rather than dueling experts not only cut costs, but provided both parties with more useful and reliable information. Without court filings, the entire process was completely private and confidential.

### Expanding Collaborative Law to Other Civil Matters

We chose the cases we highlighted because, while they are family law cases dealing with divorce, there is a significant overlap with business law and with the types of conflicts that arise in that arena. For the couples in these cases, the experience of reaching a marital settlement agreement was drastically different in the collaborative law process than it would have been in court, in arbitration, or in mediation. Instead of increasing distrust, magnifying fears, and making accusations that can never be reeled back, the collaborative process provided a safe place to problem-solve and search for solutions that addressed everyone's interests. As a result, the ongoing relationships as parents, joint investors, and, in the one case, as ongoing business partners, will be significantly healthier and more functional.

We believe that the same benefits that divorcing couples experience in the collabo-

rative process can be enjoyed by disputants in business and other contexts. When you combine the seven "process" elements of collaborative law with the seven elements that make the process truly "collaborative," the possibilities for an optimal agreement that satisfies everyone's interests increase significantly over more adversarial forms of conflict resolution. And when, as an attorney, you are able to participate in this type of conflict resolution, there comes a profound professional satisfaction from guiding clients through the confusion, apprehension, and anguish of seemingly intractable conflict to an agreement in which both parties feel they "won."

### You are Welcome to Join Us

The Collaborative Law Committee is continuing its efforts to train lawyers in collaborative procedures, and will also be reaching out to client groups to let them know that this efficient method of resolving disputes is available. If you would like to learn more, contact either of us. ■

*John Sarratt is a partner in Harris Sarratt & Hodges, LLP in Raleigh, and is co-chair of the Collaborative Law Committee of the Dispute Resolution Section of the North Carolina Bar Association. He is also a certified mediator and has served as an American Arbitration Association panel arbitrator. John is a past member of the NCBA Board of Governors, LANC Board of Governors, General Statutes Commission, and Chief Justice's Commission on Professionalism.*

*Mark A. Springfield is a partner in the Raleigh law firm of Springfield Collaborative Divorce. Since 2005 Mark has focused his law practice exclusively on using collaborative law proceedings to help couples settle their divorce issues out of court. He is an expert in North Carolina collaborative law proceedings and is a Board Certified Specialist in family law.*

### Endnote

1. To register for the next training in collaborative practice, go to [ncbar.org](http://ncbar.org), click on "CLE," then "Calendar" and go to December 8. You should find the course on Civil Collaborative Practice Training, and can register online.
2. The authors have "fictionalized" these cases to protect the couples involved. Many of the personal details around the reasons for the divorce and the more acrimonious or sensitive aspects of the cases have been omitted. But like most divorces, the real cases involved significant conflict and bad feelings. The authors want to emphasize that the collaborative process is intended to and is able to deal with difficult disputes and with

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frequently angry or mistrustful people locked in disagreement. "Collaborative" refers to the attorneys and other professionals, not the people in conflict.

## New NCBA Leadership (cont.)

interviewed nine impressive candidates," Quick said. "Our committee is confident that we chose the right person to lead the NCBA after Allan's retirement." ■

*Russell Rawlings serves as communications director for the North Carolina Bar Association. He is a native of Wilson and graduate of Barton College.*

# “12 in the Box”

BY CHERYL DENISE ANDREWS

**F**or trial lawyers, the expression “12 in the box” has long been synonymous with superior

court criminal trials. This phrase refers to seating 12 citizens in a jury box to hear the evidence and determine the facts of a case.

However, due to a recent amendment, this catch phrase may now be relegated to simple donut and deli discussions.



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In December 2014, NC became the final holdout state to amend its constitution to allow for bench trials (trials where the outcome is decided by a judge and not a jury) in superior court criminal cases.<sup>1</sup> Bench trials are not a new concept to North Carolina courts. All misdemeanor criminal trials in our district courts are heard and decided by a judge, and not by a jury. However, if the defendant is dissatisfied, for whatever reason, with the district court judge’s decision, they have the right to appeal the case to superior court where they may have a new trial before a jury of 12. Prior to the amendment, all felony trials or trials on a misdemeanor appeal in North Carolina were before a jury of 12 citizens. In each case a jury was chosen, empanelled, heard the evidence in the matter, and after deliberation, the jury made a deci-

sion regarding the ultimate issues in the case. Prior to December 2014 in North Carolina, no alternative to a jury trial existed for criminal cases going to trial in superior court.

The recent change to the superior court criminal arena, while not raising many eyebrows outside the criminal court system, managed to evoke strong emotions within the legal community. The right to a trial by jury is a fundamental part of the American justice system.<sup>2</sup> The North Carolina amendment does not directly interfere with that right. However, the North Carolina change provides an alternate path for criminal cases in the event the defendant chooses to waive a jury trial and have the trial of the case heard by a judge instead.

Amended N.C. Gen. Stat. § 15A-1201 reads:

(a) In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial *de novo* in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section.

(b) A defendant accused of any criminal offense for which the state is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right

to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact shall be heard and judgment given by the court.

Arguments against the amendment focus on a few key issues. The objections are often based upon the fear that waiver of a jury trial could be a bargaining tool for district attorneys rather than a decision left entirely to the defense attorneys and their clients. For example, the worry is that a district attorney could say, "If you will agree to a bench trial, we won't indict your client as a habitual felon or seek aggravating factors." The imagination can run wild with possibilities of misuse. Other arguments against the amendment involve fear of preferential treatment for well known lawyers among local judges, cases being prolonged due to "judge shopping,"<sup>3</sup> and an increase in appeals resulting from defendants who waive their right to a jury trial and later claim the waiver wasn't voluntary. None of these arguments are new to the courthouse rotation, and many are rooted somewhere in fact and experience. Certainly the concepts of preferential treatment and "judge shopping" are problematic consequences of any politically driven system. Neither does the possibility of increased frivolous (or indeed meritorious) appeals based upon the waiver add a new line item to the list of issues within the court system. Many defendants who find themselves on the wrong end of a jury verdict choose to appeal any and all issues that didn't go their way during the trial. The waiver of a jury simply becomes another matter for the court of appeals to monitor.

Our court system has procedural safeguards to ensure that a waiver of a jury trial is knowing and voluntary. The administrative office of the courts (AOC) has a "forms committee" that develops forms for the most common procedures in court. For example, there is a transcript of plea form used to waive any type of trial and to enter a plea of guilty to a criminal charge. This form has evolved over the years to conform with law and procedure. In response to the jury trial waiver, the AOC has already developed a form for this new purpose.<sup>4</sup>

Despite the arguments against the change, there are many arguments in support of the amendment. Jury trials are costly in terms of time and money. The *voir dire*

process can take hours to the better part of a few days or weeks to complete. In a typical superior court trial week in Forsyth County, 20 cases may be calendared and only two or three actually heard because of time and personnel constraints. If even only a few of those defendants elected to have a bench trial, this could double the efficiency of the court. "Twelve in the box" doesn't come for free. The state must compensate the jurors, courtroom personnel, and the judge who presides (even when he or she doesn't decide the ultimate facts in a jury trial).

Additionally, in high conflict cases receiving much pre-trial publicity, some defendants and attorneys choose to have the cooler temperament of the bench decide the issues. Recently, two Baltimore police officers charged in the death of a person in their care chose to have a bench trial rather than a jury trial. With the high social tensions and community interest in the case, those officers believed that a judge would be more appropriately situated to hear the matters. Apparently they chose wisely as both officers were acquitted, and charges against their fellow officers were then dismissed.<sup>5</sup>

Despite these arguments for and against the change, my personal feelings about the jury trial waiver are a bit more esoteric. I worry that it is another step toward the erosion of the art of being a trial lawyer. I consider a trial lawyer to be a lawyer who speaks to a jury. A trial lawyer must have the ability to be a citizen speaking to fellow citizens about a situation. A wise attorney friend of mine says that in order to make a case palatable for a panel of jurors in the time allotted in a trial, you need to phrase it so that a third grade class could understand the story. This is not intended to offend jurors or third-graders, but only to highlight the importance of making the law and facts clearly understandable to everyone involved in seeking justice. Citizen involvement is the most important factor in that process.

As a defense attorney, I am ultimately speaking for my client. Generally, my client's story is not a complicated legal concept, but is rather a tale of humanity. Juries are made up of people who have stories too, and a good jury is an entity possessed with common sense. Common sense is often lacking in a debate between legal theorists. The jury system keeps the legal profession rooted in reality. Lawyers will debate for hours about what slight movement or word can consti-

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tute an assault. A jury can look at a set of circumstances with "normal folk" eyes and hopefully reach a "just" verdict rather than merely a theoretically possible solution.

Like most of the other facets of this profession that I have wed, I will take this change for better or for worse. It appears I am not alone in my belief in or reliance on the jury trial process. Statistics from other states and the federal courts show that in the jurisdictions that have long had jury trial waivers in criminal cases, only a few defendants elect to waive their right to a jury trial.<sup>6</sup> There may be cases and situations where the jury waiver is another handy tool to carry in my briefcase. For now, I will keep my faith in those "12 in the box" to hear and speak the truth. ■

*Cheryl D. Andrews is a criminal defense attorney with the Holton Law Firm in Winston-Salem. She practices in both state and federal courts doing trial, post-conviction, and appellate work.*

#### Endnotes

1. Excluding cases where the state is seeking the death penalty.
2. The right to trial by jury in a criminal case is stated in Article III, Section 2 of the federal Constitution ("The trial of all crimes, except in cases of impeachment, shall be by jury") and the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").
3. Delaying or rescheduling a trial or hearing to put it in front of a more favorable judge.
4. AOC-CR-405
5. Rector, Kevin (July, 2016), *Charges Dropped, Freddie Gray case concludes with zero convictions against officers*, The Baltimore Sun, Retrieved July 29, 2016.
6. Mark Motivans, US Dept. of Justice, Federal Justice Statistics 2010 – Statistical Tables (Dec. 2013), [bjs.gov/content/pub/pdf/fjs10st.pdf](http://bjs.gov/content/pub/pdf/fjs10st.pdf); *National Center for State Courts Bench v. Jury Trial Data*, cited in T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 Cal. L. Rev. 183 (2012).



# Civil Legal Aid Community in North Carolina Celebrates Work this Fall

BY MARY IRVINE

**A**nita Earls shared inspiring remarks with legal aid

advocates from across the state at a lunch reception at the 2016 North Carolina Legal Services Conference held last month. Earls, who is co-founder and executive director of



*Anita Earls, executive director of the Southern Coalition for Social Justice, delivered the keynote address of the 2016 NC Legal Services Conference on Thursday, October 27, in Greensboro.*

the Southern Coalition for Social Justice, called on advocates to be bold in their work and aggressively advocate for the rights of low-income and marginalized clients.

The Southern Coalition for Social Justice (SCSJ) is a nonprofit organization that partners with communities of color and economically disadvantaged communities to defend and advance their rights through legal advocacy, research, organizing, and communications. Most recently, SCSJ led challenges to voting rights

changes passed in 2013.

The 2016 North Carolina Legal Services Conference, held October 26-27, 2016, in Greensboro, was hosted by the Equal Justice Alliance, a coalition of civil legal aid providers that provides central coordination of a sustained statewide system of legal services to people in poverty in North Carolina.

The two-day event brought together nearly 250 legal aid advocates from across the state, including attorneys, paralegals, support staff, administrators, volunteers, and supporters. The first of its kind since 2008, the conference celebrated the work of legal aid to serve the civil legal needs of low-income individuals across the state, and provided

opportunities for advocates to learn and strategize together. Following are some highlights of the event.

Preceding remarks from Ms. Earls, a number of long-time legal services advocates were honored for their commitment to legal aid. Kenneth Schorr, executive director of Legal Services of Southern Piedmont (LSSP) since 1988, received the Julian Pierce Award honoring an attorney who has devoted his or her career to providing legal services to the poor. In the nomination, LSSP Board President Todd Stillerman, Bank of America assistant general counsel, described Ken's leadership and service to Mecklenburg County's most vulnerable residents: "Ken's commitment to providing legal services constantly motivates LSSP's staff and volunteers to action. He both encourages us to increase our efforts, and sets an example for service with his own actions."

Pam Hemphill received the John Lea Support Staff Award recognizing a non-lawyer advocate working at a legal services organization that has made outstanding contributions to their organization and community. Hemphill, private attorney involvement coordinator at Legal Aid of North Carolina, has been an invaluable member of the Morganton office since she joined their staff 37 years ago. She initially served as a legal secretary and later became a certified paralegal. In 2000 she became the office's coordinator for *pro bono* cases, establishing relationships with local social service agencies and private attorneys to refer *pro bono* cases to volunteer lawyers. Hemphill is also a committed public servant: founding board member of Habitat for Humanity of Burke County, chair and volunteer of the American Cancer Society's Relay for Life event, and dedicated member and volunteer for her church, St. Stephen's Episcopal.

The Willis Williams Client Award posthumously recognized Nancy Street, a former member of the Legal Aid of North Carolina Board of Directors and Clients Council. Street was a tireless advocate who worked to bring services and resources to those in need in her community, volunteering with the Community Kitchen in Canton and helping retired residents of the Mountainview Housing community. Prior to her death, Street coordinated a two-day event in western North Carolina to assist individuals with prior justice system involvement to access relief to barriers to employ-

ment and other services with expunctions or certificates of relief.

Celia Pistoris, chair of the Equal Justice Alliance and assistant director of litigation at Legal Aid of North Carolina, was thrilled that the alliance was able to host the statewide convening this year. "Lawyers and staff at legal aid organizations work in more than 30 offices statewide from Sylva to Ahoskie, often collaborating on cases remotely and communicating about issues of common interest electronically. Opportunities to come together as a whole community are rare but critical to sharing knowledge, building strategy, and developing our team of advocates with the shared goal of achieving justice for poor North Carolinians." Other conference highlights included an evening reception at the International Civil Rights Center and Museum with opening remarks from Chief Justice Henry Frye and the conference's closing plenary with Don Saunders, vice president of civil legal services at the National Legal Aid and Defender Association.

The 2016 North Carolina Legal Services Conference is just one of several events hosted by the legal aid community in North Carolina this fall.

On September 10 the North Carolina Justice Center celebrated the organization's 20th anniversary with an evening gala and awards ceremony at the Raleigh Convention Center. In response to federal restrictions on programs funded by the Legal Services Corporation, the Justice Center was founded in 1996 with the merger of two organizations. The Justice Center maintained the critical advocacy and research efforts of its predecessor organizations and took on the now-restricted activities of representation of immigrants and class action litigation. Using all tools available, leadership sought to create an anti-poverty organization more able to respond to the needs of the low-income community.

Executive Director Rick Glazier and Representative David Price opened the event, calling on advocates and supporters to continue pursuing the critical work of the Justice Center by providing policy advocacy, analysis, research, and community education. During the event, the North Carolina Justice Center introduced the Leslie Winner Fellowship, a post-graduate fellowship for newly minted lawyers to work alongside talented advocates at the center on high impact

## The Equal Justice Alliance

The mission of the Equal Justice Alliance is to provide central coordination of a sustained, comprehensive, integrated, statewide system to provide the most effective legal services to people in poverty in North Carolina.

The members of the Equal Justice Alliance are:

Disability Rights North Carolina

Financial Protection Law Center

IOLTA

Land Loss Prevention Project

Legal Aid of North Carolina

Legal Services of Southern Piedmont

NC Bar Association Foundation

NC Equal Access to Justice Commission

NC Justice Center

NC Legal Education Assistance Foundation

NC Prisoner Legal Services, Inc.

Pisgah Legal Services

litigation in an array of poverty law areas. Winner, one of the award recipients recognized that evening, described the need to provide a strong foundation of support, training, and mentorship for lawyers who are just starting out and want to devote their careers to civil rights and social justice.

The Honorable I. Beverly Lake Jr. received the Executive Director's Award for Service to North Carolina. Former Chief Justice Lake was a long-time public servant and advocate for an improved criminal justice system. During his tenure as chief justice, Justice Lake founded the North Carolina Actual Innocence Commission, a nationally-recognized entity organized to address wrongful convictions and common issues that lead to such convictions, including unreliable eyewitness identification and lack of DNA evidence and testing. Since leaving the bench, Chief Justice Lake has continued to advocate for justice system

## Pro Bono Reporting Comes to North Carolina

By Jennifer Lechner  
Executive Director  
NC Equal Access to Justice Commission

Rule 6.1 of the North Carolina Rules of Professional Conduct encourages attorneys to provide at least 50 hours of *pro bono* legal services annually, and to contribute financial support to organizations that provide legal services to persons of limited means. However, there has not been a statewide mechanism to track this volunteerism. To fill this void, the North Carolina Equal Access to Justice Commission adopted a resolution in June 2016, signed by Chief Justice Mark D. Martin, chair of the commission. This resolution outlines a commitment to developing a voluntary *pro bono* reporting and recognition program through the North Carolina *Pro Bono* Resource Center.

With the introduction of voluntary *pro bono* reporting, North Carolina will join a national trend of capturing this data. Twenty-two other states already track attorney *pro bono* participation: 13 states—including Georgia, Texas, and Virginia—have voluntary reporting, while nine states—including Florida, Maryland, and New York—require mandatory reporting of *pro bono* legal service.

Collecting information about *pro bono*

work will allow the *Pro Bono* Resource Center to quantify the level and types of *pro bono* service provided by attorneys. This information will help the center improve how attorneys find available *pro bono* opportunities, identify gaps in unmet legal needs, highlight best practices in *pro bono* work, and also enable the center to recognize attorneys for outstanding and sustained *pro bono* legal service.

North Carolina attorneys can begin sharing information about their *pro bono* work in January 2017 through an online form found at [ncprobono.org](http://ncprobono.org). The form can be completed—anononymously—in only ten minutes, and will collect information on the attorney's *pro bono* involvement during the 2016 calendar year.

The reporting form will collect information about all aspects of professional responsibility captured in Rule 6.1, which includes the following activities: providing *pro bono* legal services, participating in activities to improve the law, and contributing financial support to legal service providers. Respondents can also share information about their community service and non-legal volunteerism. This new initiative from the *Pro Bono* Resource Center will give a fuller picture of all the ways North Carolina attorneys support their communities. ■

highlighted a recent report published by the Children's Defense Fund demonstrating that additional federal investment in programs that increase employment and ensure that the basic needs of children are met could significantly reduce child poverty across the country. The report considered the impact of a variety of social programs, including those that provide job opportunities, improve wages, increase child care subsidies, and make housing vouchers and food programs available to families. The report estimates that with a modest 2% increase in support for these programs, 6.6 million children nationally would be lifted out of poverty.

In Pisgah Legal Service's six-county service area, 25% of children live in poverty. The free legal aid offered by Pisgah Legal Services improves the lives of children by ensuring safe, affordable housing, protecting benefits which help meet the basic needs of children and their families, and providing access to healthcare. Last year Pisgah Legal Services' work positively impacted more than 5,000 children in Western North Carolina.

Two of these children are teenage sons of Rebecca, a full-time student and single mother who also cleans offices in order to make ends meet. Rebecca receives a voucher to help her afford her rent while she pursues her education to become a mental health counselor.

As Rebecca approached the end of her three-year lease, her landlord informed her he would no longer accept her Section 8 voucher. Rebecca began to search for new housing and found nothing comparable that she could afford. With very low rental housing vacancy rates in the Asheville area, she simply had nowhere to go.

Faced with eviction and homelessness, Rebecca contacted Pisgah Legal Services. A staff attorney at Pisgah Legal Services was able to delay the eviction, keep the family off the street, and preserve their voucher, which would have been lost as a result of the eviction. The delay allowed Rebecca to find a three-bedroom, two-bath home that she could afford in her sons' current school district.

"If I had not received the help, I would have been homeless," shared Rebecca. "In turn, it's allowed me to pay it forward by starting a recovery center at my church. It's amazing!"

CONTINUED ON PAGE 41

reforms. Champion of Justice Awards were given to James Andrews, president of the North Carolina State AFL-CIO; former Governor Jim Hunt; Representative Henry "Mickey" Michaux Jr.; Tom Ross, former president of the UNC System; and Leslie Winner, former executive director of the Z. Smith Reynolds Foundation.

On October 5, Pisgah Legal Services hosted its annual Poverty Forum, an event that raises awareness about poverty and shines a light on the work of Pisgah Legal Services to alleviate poverty by providing free civil legal services to improve the lives of Western North Carolinians. This year Marian Wright Edelman, president and founder of the Children's Defense Fund, addressed the crowd of more than 1,000

attendees. A social justice champion, Edelman spoke about the depth of child poverty and practical solutions shown to improve child and family wellbeing. "Now, America's poor children didn't ask to be born. They didn't choose their parents, they didn't choose their country, state, neighborhood, race, color, or fate" said Ms. Edelman, noting the vulnerable position of very poor children from families whose incomes are less than half of the poverty level. But the solutions to reducing child poverty are available, said Ms. Edelman. "We don't need to invent new things, we just need to implement what we know works and invest in them and make sure everybody who is eligible gets them."

In her keynote address, Ms. Edelman



# The Deliberation

BY LANDIS WADE

The door banged shut behind the six of us and we stood still, measuring the jury deliberation room with our eyes. There were no windows, just block walls with peeling paint. The centerpiece of the room was a rectangular table, bracketed by metal chairs along each of its two long sides. A credenza sat against one wall, with two pitchers of water and six glasses resting on top. A single door was cracked to our right, revealing a small bathroom. Fixed to the ceiling were two florescent light strips with a dusty plastic cover, making the light in the room look tired. The room was a depressing downgrade from the one we used during the trial, and there was only one way to escape. With our votes.

“Well, it ain’t exactly the Ritz, but I’ve seen worse,” Ricky Brewster said.

“And you want us to believe you’ve stayed at the Ritz?” Sylvia Trammel’s criticism was not surprising; she had been openly hostile to Ricky Brewster throughout the trial. “I wouldn’t dare friend that man on my Facebook,” she whispered to me one day, “and I friend just about everybody.” She seemed proud of her cyber social group and had no plans on expanding it to include Ricky Brewster. Now she was stuck with him in a dismal 15 by 20 foot room with no Internet access.

But Ricky just laughed. He tolerated Sylvia’s remarks, biting as they were, because of her looks. “Don’t you think Sylvia’s hot?” he asked me at one of our breaks. I resisted offering my opinion, hoping to remain neutral on the topic, but I did try to dissuade him from making a move by pointing out their age difference, him being 33 and she being 50 something. It didn’t work. He said “her experience” made the idea of “hooking up” exciting.

The other three persons in the room looked at Ricky, but they said nothing, prob-

ably because his constant optimism was draining. Ricky was not school smart, but he definitely was a common sense expert. When the judge said the trial would last two days longer than anticipated, everyone but Ricky complained. “You shouldn’t fret about what you can’t control,” he said.

Bill Baxter ignored Ricky and stepped forward to offer himself for the job of jury foreman. He did so by grabbing the closest chair available, sliding it to the head of the table and taking a seat. “Guess I’ve been around the longest,” he said.

All of us took a chair, except for Joan Rogers, the mid-40s human resources consultant, who went to the credenza to grab a pitcher of water and a tray of glasses for the table. “At least someone is being polite,” Sylvia said, looking hard at Bill.

Everyone filled their water glasses, took a drink, and then, for a few minutes, no one spoke. Lacy Ranier, a yoga teacher and the youngest in the room at 28, broke the silence. “I would like to nominate Ken as foreman.”

“Why?” Bill asked. “I’ve got 40 years’ experience owning my own construction company, and no offense to Ken, but that beats 15 years teaching elementary school. Besides, he hasn’t said a word about this case the whole trial.”

“Exactly,” Joan said, seconding the motion. “He knows how to follow directions. When the judge said not to talk about the case, he listened. Plus, we may need his classroom management skills before we’re done.” They were talking about me as if I weren’t in the room.

“What do you think Ken? Are you up for it?” Ricky asked.

I pushed the glasses back up my nose and responded: “I don’t really want to be foreman, but I will do it if everyone wants me to.”

## The Results Are In!

This year the Publications Committee of the State Bar sponsored its 13th Annual Fiction Writing Competition. Eight submissions were received and judged by the committee members. The submission that earned first prize is published in this edition of the *Journal*.

“See,” Lacy said. “He’s perfect. If he wanted to do it, we couldn’t trust him.”

“What is it with you and trusting people?” Bill growled. “You didn’t trust the restaurant owner because she’s a Republican, and you didn’t trust the policeman because he’s a cop.”

Lacy edged up in her seat ready to defend herself when Joan politely headed her off. “Let’s try to calm down. It’s been a long trial, and the sooner we get to work the sooner we can get home to our families. I suggest we vote on Ken as foreman.”

After the vote, Sylvia looked at Bill and said: “You’ve been demoted, sport. Better give up the head of the table.”

“It’s ok,” I said to Bill. “We can all sit where we are.” But Bill wouldn’t have it. Glaring at Sylvia, he got up and walked to my side of the table and sat next to me and directly across from her, staring her in the eyes. It was Ricky, Bill, and me on one side, facing Joan, Sylvia, and Lacy on the other. I didn’t like the way the men were facing off against the women.

“So how do you want to proceed?” I asked the group.

“Let’s take a vote. I know where I stand,” Bill said.

“Me too,” Sylvia said. “Let’s get this over with.”

The others said it was fine, so we took a secret ballot vote.

On the charge of criminal trespass against the three defendants, there were three guilty votes, two not guilty votes, and one undecided vote: mine.

"So, who thinks these people are innocent?" Bill said, raising his voice. "The law is clear; they were trespassing."

"But the law may be illegal," Lacy said.

"And where did you learn that?" Bill asked.

"It was in the papers," Ricky said.

Sylvia feigned surprise. "You can read?"

"You weren't supposed to be reading the papers," Joan offered. Ricky just shrugged.

Everyone paused and looked to me for guidance. "Maybe we should discuss the evidence," I suggested. "Who would like to go first?"

Sylvia didn't hesitate. Her ability to be judgmental appeared natural. Perhaps it had come from years of practice. "They were told to leave and they didn't. That's trespassing in my book."

"I agree," Bill said. "If the owner didn't want to serve them dinner, it was her right."

"The two of you seem to be getting along fine now," Lacy said. "Do you believe what you're saying, or do you just want to get home to your own dinner?"

"Is arrogance something they taught you in yoga school?" Bill shot back.

I silently held up one hand like I do with my second grade students to get their attention. "I have only one rule as foreman," I said. "When we disagree, we need to be respectful. Can we do that please?" Grudgingly, Bill and Lacy agreed, and the others nodded their approval.

Joan then offered her thoughts. "I believe there is more at stake here than the rights of the restaurant owner," she said. "What about the defendants? Don't they have rights?"

"I agree," Lacy said. "The judge said the owner must hold a firmly held religious conviction against serving homosexuals in her restaurant. I bet the owner is just prejudiced against gay people, and she's using religion as an excuse. And even if the owner is a religious fanatic, I don't agree with the law."

"The bathroom thing got to me," Ricky confided. "When the...what do you call him...the transvestite...decided to use the women's restroom, that was a good reason to tell him to leave."

"You mean transgender woman," Lacy

corrected.

"Whatever," Ricky said. "It's not natural, a man thinking he's a woman and dressing like one so he can use the women's bathroom."

Bill looked at me. "So you must be the undecided vote," he said. "Do you think men have the right to use the women's bathroom and lesbians have the right to hold hands and kiss in a public restaurant?"

I was starting to feel uncomfortable with the culture war playing out in front of me, so I deflected. "Bill, I'm undecided because I'm trying to understand the rights and feelings of the restaurant owner and the three defendants."

"Well I think it's wrong not to serve food to someone because they're gay," Lacy said. "It's the same thing restaurants did to black people before the Civil Rights law."

"That's different. Blacks have no choice but to be black," Bill said. "Gays choose to be gay, so it's not the same thing."

"That's not true," Lacy said.

"Agree to disagree," Bill responded.

Lacy leaned forward. "When did you agree to be heterosexual, Bill?"

"What do you mean?"

"If it's a choice, you must have made one. When did you do it?"

"Well, I -"

"OK," I said, "I think we understand the points. On both sides."

In a more pragmatic tone, Joan said, "I agree with Lacy. I don't believe that being gay is a lifestyle choice, like deciding how to dress or whether to get a tattoo."

"But the Bible says it's wrong," Ricky said. "A man shall not lay down with a man. It's common sense to me; men and women parts are the ones that fit together, simple as that." He looked at Sylvia as he said it.

"Can't believe what I'm hearing," Lacy said. "We have Bill playing doctor about what it means to be gay and Ricky citing biblical law like he's preaching on Sunday."

"Now wait a damn minute," Bill shouted. "Who the hell gave you the right to -"

I placed my hand gently on Bill's shoulder and asked him to please calm down. He stopped talking, but his face was a bright shade of red. "Let's everyone take a break," I suggested. "Get some more water, use the restroom, and let's start back in ten minutes."

During the break, the lobbying began. Joan and Lacy approached me first. "Their minds were made up before the trial start-

ed," Lacy said. "They do seem reluctant to accept people who are different," Joan added. I thanked them for their input and headed for the restroom, only to be intercepted by Ricky and Bill. "Are the women trying to butter you up?" Ricky asked. "More like sway his vote," Bill said; he was still mad. "I plan to stay open-minded," I said. Just then, Sylvia stepped out of the bathroom, bowed and waved me through. "Seems kind of odd, doesn't it," she said. "What's that?" I asked. "You and I using the same bathroom." She smiled.

When everyone was back at the table, I made a suggestion. "What if we divide up into teams and play a little game, just for fun, and see where it takes us?"

"Can we pick teams?" Ricky asked, looking at Sylvia.

"I was thinking, Ricky, that you and Bill can be a team, and Joan and Lacy can be a team."

"What about you and me?" Sylvia asked.

"I will be the moderator and you will judge the arguments."

"What are we arguing?" Joan asked.

"You and Lacy will argue why there should be a guilty verdict, and Ricky and Bill will argue why the verdict should be not guilty."

"But that is totally opposite of our positions," Bill said. "It's a waste of time."

"I'm not sure about this either," Lacy said.

"Have you ever played the devil's advocate?" I asked the group. "It's a great way to test your beliefs."

"You mean," Ricky asked, "we are arguing in favor of what the Devil wants?"

"Something like that," I said. "You are arguing the case from the other side's point of view. To do it, everyone needs to be open-minded, but I know you can do it. Each team needs to convince Sylvia the Devil is right."

"And then what?" Bill said.

"And then you will hear my verdict!" Sylvia seemed to like the idea of being the judge.

Ten minutes later, after the two teams had huddled and written down their arguments, I flipped a coin for the order of the presentations. Bill and Ricky won, but they elected to defer, "just like in the NFL," Ricky said.

"Anytime you're ready," I said, looking at Joan and Lacy. Joan went first.

"Being a business owner is hard," she said. "It's not a 9 to 5 job, especially if you own a

restaurant. You are there all the time, trying to make it work, which means trying to make enough money to take care of your employees and make a little for yourself. You face repeated local regulation, by the health department and the fire marshall. And if that's not enough, you have to deal with a long list of federal agencies like the Department of Labor and the Equal Employment Opportunity Commission, who want to criticize how you pay and treat your employees, even when you do your best to be fair. In fact, a business owner has very few rights in the eyes of the government, which is why the recent law is so important. Religion is a personal right, to be exercised freely. An owner of a restaurant, who has sweated and toiled to make her business a reality, should have a little freedom to run her business consistent with her religious beliefs." Joan nodded to Lacy, who picked it up for there.

"I'm not a very religious person," Lacy said, "but I respect the rights of all people to exercise their religious beliefs without government interference. A legitimately held religious conviction is a precious right, not to be trampled. In this case, the defendants could have gone to any restaurant. But they picked this one for their anniversary celebration. It's odd, because the owner is a well known supporter of Christian ministries, and an outspoken advocate of the new law. Why would they go somewhere they knew they weren't welcome? The defendants say they went for the food and drink. But I believe they went to make a point." Lacy looked a bit ill, but she finished strong. "The United States Supreme Court says that gays have the freedom to marry their same sex partners, but that doesn't give them the right to disrespect a property owner's religious beliefs. This law strikes a balance between competing rights. If the same sex couple doesn't leave when asked, and the request is genuine, it's trespassing. Not just on the owner's property, but on the owner's legitimate religious convictions."

About 30 seconds passed before anyone spoke. Sylvia looked up from her notes to see Ricky and Bill staring at Lacy with confused looks on their faces. "Your turn," Sylvia said. Ricky picked up his sheet of paper and went first.

"I'm a textile worker," Ricky said. "There aren't many of us left, but there's all kinds of us. Black. White. Hispanic. Asian. Too many

kinds to count. Yea, we look different, and we vote different, and we have different things we like to do after work, but we all want some of the same things in life." Ricky paused before he continued. "For one, we want to find a person we can love, who will love us back, and we want to be able to build a life with that person. I don't know any gay people, but I know this. If two lesbians decide to get married, it won't affect my life. More power to them. Why should my minister care about it or make me feel guilty for cutting them some slack? He's not God. Let God be the judge. And let's say I do own a restaurant. Why should I deny service to someone because they're gay? That doesn't sound very Christian to me. Plus, it's good business to be nice to all your customers. If the defendants were trespassing on anything, it was close-minded behavior. Kick people out for fighting. Don't kick them out for being in love."

Sylvia stopped taking notes about halfway through Ricky's speech. She and the other women in the room looked like they had seen a strange apparition wearing Ricky's clothes. I wondered if Bill would break the spell.

Bill looked around the room and then at his notes. Clearing his throat, he began. "I've been running a business most of my life and very few things surprise me, but the facts of this case do. I'm a conservative. I don't like government in my life. And I want to be able to exercise my religion as I see fit. But I also want to be able to go where I please. The idea that a restaurant can refuse food to me because the owner is religiously opposed to the kind of person I am should not be supported by any law. If you open your doors to do business, they should be open to all who have the ability to walk in. This law would allow a Catholic to refuse to serve a Protestant, or a Baptist to deny entry to a Methodist, or a Jew to bar a Buddhist from the buffet. It's just food, people. Come on." Bill wiped his mouth and looked at his notes again. "One of the best workers I ever had was a single man who never married. He was polite, honest, talented, and loyal. He died in the late 80s of AIDS. I guess he was gay. But it didn't matter to me. What does matter to me is that this law would allow a restaurant to deny him a meal if he were here today. I agree with Ricky. People deserve dignity and there is nothing dignified about this law. As for the transgender defendant, I don't under-

stand what makes him identify as a woman. Maybe it's a choice. Maybe it's medical. Doesn't matter to me. As long as you're in and out of the bathroom with a purpose, what difference does it make? So I say live and let live and open the restrooms to both sexes. Maybe it will cut down on the lines."

When Bill was finished, Lacy said, "Thank you, Bill. And you too Ricky. Regardless of how we vote, I appreciate what you said."

I turned to Sylvia. "What do you say judge?"

Sylvia looked at Bill first, then Ricky, and then at Joan and Lacy. She had two pages of notes in front of her, but she appeared lost for words. It was the first time her sharp tongue had failed her.

"Tell you what," I said, "you don't have to judge a winner. Just tell us how you feel."

"I feel like I neglected my responsibilities by not giving this case the attention it deserves. Everyone, and I mean everyone, showed me a side of this case I hadn't seen before."

"Like what?" I asked.

"The restaurant owner and the defendants all have legitimate concerns, and the answer to the question before us is not that simple. The far right and the far left say the answer is clear, but I think the answer lies somewhere in the middle. I don't know how I'm going to vote, but I want to thank everyone for opening my eyes. I guess this is what it feels like to be open-minded."

"Thank you Sylvia. That took courage," I said.

"So what do we do now?" Bill asked. His tone was more conciliatory than when we started.

"Let's talk some more," I said, "and then we can vote."

Joan raised her hand.

I laughed. "You don't have to raise your hand, Joan. We're not in class."

"Might as well be," Ricky said. "I'm learning something new."

Joan mentioned the judge's instruction about the need to find guilt beyond a reasonable doubt. "Does that mean the restaurant owner has to have a sincerely held religious conviction against serving homosexuals beyond a reasonable doubt?" Joan asked.

"Good question," I responded. "I don't know, but it seems logical. What does everyone else think?" Everyone thought it seemed logical, too.



“So,” Sylvia said, “who believes the owner’s religious conviction against homosexuality is sincere beyond a reasonable doubt? And who thinks it’s just prejudice disguised as religion?”

“Before anyone answers,” Lacy said, “remember that the answer could mean that two of the defendants are convicted simply for celebrating their anniversary.”

No one appeared anxious to vote.

“Perhaps we should take the bathroom issue first,” I said. “We have to decide whether the transgender defendant, who admitted he has male anatomy, used the women’s bathroom. The law says a person must use the bathroom of their biological sex, based on their birth certificate, and if he or she doesn’t, then it’s trespassing.”

“So where’s the birth certificate?” Ricky asked. “The state didn’t put it into evidence.”

“I’m with Ricky,” Bill said. “It’s up to the state to prove their case. They never showed us the birth certificate.”

“That sounds like a technicality,” Sylvia said, “but I’m willing to live with it.”

To my surprise, Joan pushed back. “I disagree with the bathroom law, and I don’t think there was any harm done,” she said,

“but don’t we have a duty to follow the law, even if the result is not what we want?”

“I respect you for that,” Bill said. “It doesn’t make this any easier, but I admire your integrity.”

“Maybe,” Ricky said, “the court will find the bathroom law to be illegal even if we convict. That’s what the newspaper said might happen.”

“No guarantees there,” Lacy said.

For the next 30 minutes we talked openly and without fear. We listened rather than debated. And we explored the issues from all sides. We did so without hostility or ill feeling. And we spoke without bias toward the parties or prejudice against their beliefs. I suppose we did what juries are supposed to do and what politicians and the media rarely do. But in the end, we had to make a decision.

After we had talked everything out, it only took one vote to reach our verdict. I folded the verdict sheet and knocked on the door to let the bailiff know we were ready.

The six of us made our way back into the courtroom and took our seats in the jury box. The three defendants, with anxious looks on their faces, sat with their attorney;

their family and friends sat in the pews behind them. The restaurant owner and his supporters filled the pews behind the prosecutor. There were three or four reporters in the back row.

“Would the foreman please rise,” the judge said. When I stood up she asked, “Has the jury reached a verdict?” I told her “yes” and she asked me to hand the verdict sheet to the bailiff. I did, and the bailiff took it to the judge who looked it over. When she finished, she looked up.

“Is this verdict unanimous?” the judge asked.

“It is, your honor,” I said. “It definitely is.” ■

*Landis Wade is a civil trial lawyer, arbitrator, and mediator with McGuireWoods LLP in Charlotte, NC. He is a graduate of Davidson College ('79) and Wake Forest Law School ('83), and the author of two works of fiction, The Christmas Heist, A Courtroom Adventure (published September 2015) and The Legally Binding Christmas, A Courtroom Adventure (published August 2016). For information about his writing, visit landiswade.com.*

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PS Form 3526, July 2014 (Page 2 of 4)

# New Specialty in Utilities Law

BY LANICE HEIDBRINK

**I**n Fall 2016 the specialization program offered a new specialty in utilities law. Peter Ledford, a member of the new Utilities Law Specialty Committee, sat down with staff to talk about the new specialty and how it encompasses so much more than what usually comes to mind when we think about utilities law.

**Q: Can you tell us a little about the role of utilities lawyers in North Carolina?**

The North Carolina Utilities Commission ([ncuc.commerce.state.nc.us](http://ncuc.commerce.state.nc.us)) is a quasi-judicial administrative agency with jurisdiction over utilities operating in the state. Utilities includes the standard things people think of—typically electricity and natural gas—but also other industries, such as moving trucks, buses, and ferries. The practice of utilities lawyers generally involves representing a regulated utility or consumers or groups that have an interest in the operation of the regulated utility.

**Q: Why did you become interested in creating a utilities specialty?**

The idea for creating the specialty really came to fruition at the retirement party for an attorney who spent her entire career representing consumer interests in utility matters (Giselle Rankin, another committee member).

**Q: What benefits would you like to come from the creation of the specialty?**

I think the specialty will benefit both consumers and businesses that are seeking to get involved in a matter before the Utilities Commission and need a lawyer, be it a complaint against a utility or a complex business deal that requires regulatory approval.

**Q: What makes utilities law special? What would you like the public and other lawyers to know about utilities law?**

Utilities are a highly regulated industry,

both at the state and the federal levels.

Issues are further complicated by the fact that many large utilities (particularly electric and natural gas utilities) operate in multiple states. Legal practice in the area requires knowledge of not only unique laws, regulations, procedures, and forums, but also of how those considerations interact with more traditional business, contract, and environmental law issues.

**Q: What has been the most interesting aspect of creating a specialty in utilities law?**

For me it was presenting the proposed specialty to my 1L legal research and writing professor, who was representing the Appellate Practice Specialty Committee at the Board of Legal Specialization meeting.

Beyond that, since my practice focuses on electricity regulation, it has been getting to know the attorneys who focus on other regulated utilities with whom I might not otherwise interact on a regular basis.

**Q: The Utilities Specialty Committee is a very diverse and experienced group. Can you tell us briefly about what type of experience each member brings to the committee?**

The committee has seven members plus a five member advisory committee. Combined, the membership includes one current member (TaNola Brown-Bland), a former member (Susan Rabon), and a former chair (Jo Anne Sanford) of the North Carolina Utilities Commission, as well as a

current staff attorney for the commission (Kim Duffley). The committee also includes an in-house attorney for Duke Energy (Alex Castle) and a private practice attorney whose practice focuses on representing natural gas companies (Jim Jeffries). The committee includes one current and one former member of the public staff, which is the state agency charged with representing consumer interests in matters before the commission: one who focused on electric issues (Giselle Rankin, now retired), and one who focuses on water issues (Bill Grantmyre). Two additional committee members work in private practice, one primarily representing renewable energy developers (Henry Campen, chair of the specialty committee), and one who represents both customer groups and energy project developers (Dan Higgins). Finally, the committee includes two members who advocate renewable energy issues (Michael Youth and Peter Ledford). ■

*For more information about becoming a board certified specialist, please visit [nclawspecialists.gov](http://nclawspecialists.gov) or call our office at 919-828-4620.*

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# NC LAP—Help is Out There

BY SUZANNE LEVER

“It’s a little Anxious,” Piglet said to himself, “to be a Very Small Animal Entirely Surrounded by Water. Christopher Robin and Pooh could escape by Climbing Trees, and Kanga could escape by Jumping, and Rabbit could escape by Burrowing, and Owl could escape by Flying, and Eeyore could escape by – by Making a Loud Noise Until Rescued, and here am I, surrounded by water and I can’t do anything.”

— A.A. Milne

“Good morning, Eeyore,” said Pooh.

“Good morning, Pooh Bear,” said Eeyore gloomily. “If it is a good morning,” he said. “Which I doubt,” said he.

“Why, what’s the matter?”

“Nothing, Pooh Bear, nothing. We can’t all, and some of us don’t. That’s all there is to it.”

“Can’t all what?” said Pooh, rubbing his nose.

“Gaiety. Song-and-dance. Here we go round the mulberry bush.”

— A.A. Milne

Anxiety and depression. Both conditions, as well as other mental health concerns, are prevalent in the legal profession. The same is unfortunately true of substance abuse. The American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation recently released a study entitled *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*.<sup>1</sup> The study of almost 13,000 employed attorneys confirmed that lawyers have significantly more drug, alcohol, or mental health problems than other professionals or the general population. Sadly, lawyers are not seeking the help they need.

As part of the study, participants were asked to identify the biggest barriers to seeking treatment or assistance. Fear of being “found out” or stigmatized was the overwhelming first choice response. The study

also revealed that while 84% of the lawyers indicated awareness and knowledge of lawyer assistance programs, only 40% indicated that they would be likely to utilize the services of such a program. Again, privacy and confidentiality concerns were cited as the major barrier to seeking help through a lawyer assistance program.

These concerns should *never* prevent a North Carolina lawyer from seeking support in addressing substance abuse, mental health issues, or other debilitating conditions.

The North Carolina Lawyer Assistance Program (“LAP”) provides free, confidential assistance to lawyers, judges, and law students. The LAP provides both formal and informal mental health and substance abuse assessments. The LAP refers lawyers to appropriate therapists and to the counselors, treatment centers, psychiatrists, career counselors, physicians, and other health care professionals who are best suited to assist each lawyer with his or her particular issue. The LAP also provides follow-up counseling.

**All communications with the LAP are strictly confidential.**

When a lawyer contacts the LAP, the information is never conveyed to anyone outside of the LAP program without a written release signed by the lawyer. All communications with the LAP are confidential. This means that the LAP does not speak to family members, law partners, friends, colleagues, or any State Bar staff.

The confidential nature of these communications is specifically recognized in our Rules of Professional Conduct. Pursuant to Rule 1.6(d):

The duty of confidentiality described in [Rule 1.6] encompasses information received by a lawyer then acting as an agent of a lawyers’ or judges’ assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this

Rule, “client” refers to lawyers seeking assistance from lawyers’ or judges’ assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

The deference that the North Carolina State Bar gives to these confidential communications is expressed in comment [22] to Rule 1.6:

Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer in the course of that lawyer’s participation in an approved lawyers’ or judges’ assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers’ or judges’ assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional client-lawyer relationship.

A formal ethics opinion, 2001 FEO 5, also affirms the confidential nature of communications between a lawyer and the LAP. To assist lawyers who are suffering from depression or another debilitating mental condition, the LAP organizes support groups for lawyers sometimes called “accountability groups.” At a meeting of one of these groups, lawyers share their experiences in an effort to support each other’s recovery. A designated representative of LAP is present and facilitates each meeting of a group. Pursuant to 2001 FEO 5, to promote the purposes of the LAP program, disclosures made during a LAP support group meeting are confidential and not reportable to the State Bar under Rule 8.3.<sup>2</sup>



**The LAP is separate from the disciplinary arm of the State Bar.**

The LAP is not in cahoots with the bar's Grievance Committee. They have entirely different functions. The LAP seeks to provide assistance for personal problems a lawyer may have that, if not addressed, could lead to professional discipline for misconduct. The LAP does not communicate any information to any other department of the Bar, including the Office of Counsel (which handles all disciplinary matters), and the Office of Counsel has no access to LAP files or communications. If a lawyer discloses to the LAP staff or to a LAP volunteer any misconduct or ethical violations, it is confidential and cannot be disclosed.

If a lawyer later becomes involved in the discipline process, the lawyer may choose to disclose his or her LAP participation. If the lawyer is the subject of a grievance that the Grievance Committee determines is "primarily attributable to the respondent's substance abuse or mental health problem, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of [the LAP] before the committee considers discipline." 27 N.C.A.C. 1B, Section .0112(j)(1). If the lawyer accepts that offer, he or she signs a written waiver authorizing the LAP to report compliance with clinical recommendations to the Grievance Committee. If the lawyer 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.

I have worked in the ethics department of the North Carolina State Bar for over ten years and I have never learned so much as the name of a lawyer participating in the LAP, unless it was given to me by, or with the written consent of, the participating lawyer.

**The LAP website contains a treasure trove of information.**

I urge you to take a moment to check out the LAP website for a complete description of the program and the extensive services available to all North Carolina lawyers: [nclap.org](http://nclap.org).

The following testimonials illustrate how lawyers in our community have benefitted from the services offered by LAP:

"Of the tools for recovery from severe clinical depression, I found the single most

effective and useful tool for me was the connection I had and the support I received from my LAP peer support mentor, another lawyer who had recovered from what I was going through."

"I was at a point in my life where I was confronted with a question—did I want to continue my life of misery or did I want to change? There was no halfway measure I could employ anymore to avoid the misery. Thankfully the LAP created a program for me to not only recover, but to thrive in my personal life and professional career."

"Already sober when I became a lawyer, I relapsed partially due to the inherent stresses of the profession. I had no energy left to take care of myself. LAP was there when I needed support to get back on track and get my life back in balance."

"I needed help on two fronts: alcoholism and the Grievance Committee. When I reached out my hand for help, LAP was there for both."

"LAP has strengthened my connection with others who are seeking sobriety, serenity, and a balanced life while practicing law."

I also encourage every lawyer to subscribe to the *Sidebar* e-newsletter. The *Sidebar* newsletter is a forum through which LAP shares articles and information—from lawyers' personal stories and perspectives on the practice of law, to national mainstream news articles about the effects of stress and strategies for work-life balance. All North Carolina lawyers are invited to subscribe. To do so, fill out the "Sign up for the Sidebar Newsletter" form on the LAP home page at [nclap.org](http://nclap.org). All subscriptions are confidential and anonymous. I personally subscribe to the newsletter and have found it to be informative and inspirational.

So, back to poor Piglet surrounded by ris-

ing water. What did he do?

He found a pencil and a small piece of dry paper, and a bottle with a cork to it. And he wrote on one side of the paper:

HELP!

PIGLIT (ME)

and on the other side:

IT'S ME PIGLIT, HELP

HELP!

Then he put the paper in the bottle, and he corked the bottle up as tightly as he could, and he leant out of his window as far as he could lean without falling in, and he threw the bottle as far as he could throw.

Be like Piglet. Ask for help if you need it. You can call any of these individuals confidentially: Robynn Moraites at 704-892-5699, Towanda Garner at 919-719-9290, Cathy Killian at 704-910-2310, or Nicole Ellington at 919-719-9267. ■

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

## Endnote

1. Patrick Krill, Ryan Johnson, and Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, *Journal of Addiction Medicine*, Feb. 2016, Vol. 10, Issue 1, pp. 46-52.
2. Rule 8.3(a) mandates that a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, must report that information to the Bar. However, Rule 8.3(c) provides that there is no requirement to disclose information otherwise protected by Rule 1.6. Pursuant to 1.6(d), the duty of confidentiality "encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered."

## 2017 Meeting Schedule

Below are the 2017 dates of the quarterly State Bar Council meetings.

January 24-27

NC State Bar Headquarters, Raleigh

April 18-21

NC State Bar Headquarters, Raleigh

July 25-28

Renaissance Hotel, Asheville

October 24-27

NC State Bar Headquarters, Raleigh

*(Election of officers on October 26, 2017, at 11:45 am)*

# Grievance Committee and DHC Actions

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## Disbarments

**Warren Ballentine** of Durham was convicted in the United States District Court for the Northern District of Illinois of mail fraud and wire fraud affecting a financial institution, making false statements to financial institutions, and bank fraud. He was disbarred by the Disciplinary Hearing Commission.

**Donna Karen Cody** of Robbinsville surrendered her license and was disbarred by the DHC. She acknowledged that she misappropriated fiduciary funds totaling at least \$12,300 and filed a false estate accounting.

**Robert J. Howell** of Cary surrendered his license and was disbarred by the Wake County Superior Court. Howell entered a plea of guilty in Charleston County, South Carolina, to one felony count of pointing and presenting firearms at a person, one misdemeanor count of unlawful carrying of handgun, and one misdemeanor count of possession of cocaine.

The DHC disbarred **Joseph M. Kosko** of Topsail Island. Kosko did not act with reasonable diligence in representing clients, did not communicate with his clients, aided others in the unauthorized practice of law, made false and misleading statements to the court and to a debtor, knowingly disobeyed an order of a tribunal, and engaged in conduct prejudicial to the administration of justice.

**Michael C. Stamey**, formerly of Jamestown and now of Lincolnton, was disbarred by the DHC. The DHC concluded that Stamey misappropriated entrusted funds totaling at least \$14,296.68.

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## Suspensions & Stayed Suspensions

**R. Kelly Calloway Jr.** of Hendersonville did not file and pay state taxes in 2007 and did not file federal tax returns or pay federal withholding and unemployment taxes for six years. The DHC suspended him for four years. After serving the first year, Calloway will be eligible to petition for a stay of the balance upon proving compliance with numerous conditions.

The DHC suspended **Dawn E. Ely** of Atlanta for five years. Ely held herself out in online advertisements as able to offer in-house

counsel to North Carolina and Georgia businesses even though she was administratively suspended at the time in both states and her business is not authorized to provide legal services in North Carolina. After serving two years of the suspension, Ely will be eligible to petition for a stay of the balance upon showing compliance with numerous conditions.

The DHC suspended **Jennifer N. Foster** of Asheville for two years. Foster used expletives before a state court magistrate. The North Carolina Court of Appeals reversed her contempt conviction. The suspension is stayed upon her compliance with numerous conditions.

**Clifton J. Gray III** of Greenville and Raleigh was aggressive and disruptive in multiple cases, was found in contempt of court on more than one occasion, was convicted of assault in a road-rage incident, neglected multiple clients, and chronically failed to respond to the State Bar. He was suspended by the DHC for five years. After serving four years of the suspension, Gray will be eligible to apply for a stay of the balance upon demonstrating compliance with numerous conditions.

The DHC suspended **Michael Kyle McEnergy** of Raleigh for five years. While McEnergy was in rehabilitation for heroin addiction, he broke into his friend's house and stole and pawned musical equipment to obtain money to buy drugs. The suspension is stayed for five years upon his compliance with numerous conditions.

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## Interim Suspensions

The Brunswick County Superior Court entered an order of interim suspension of the law license of Calabash lawyer **Christian Scott Mathis**.

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## Censures

**David E. Gurganus** of Williamston was censured by the Grievance Committee. Gurganus prepared estate planning documents for his girlfriend's father. The representation was materially limited by Gurganus' relationship with the client's daughter. Gurganus also did not adequately communicate with the

client, collected an excessive fee, and revealed confidential information to the client's son.

The Grievance Committee censured **Jeffrey S. Berman**, formerly of Greensboro and now of Prairie Village, Kansas. When Berman was suspended from the practice of law in September 2014, he did not fully comply with the requirements for winding down his law practice. Berman also executed a false certificate of service on a motion to withdraw and made false statements to the Grievance Committee.

The Grievance Committee censured **Linnie W. Causey** of Raleigh. Causey submitted inaccurate reimbursement requests to her law firm.

**E. Grey Powell** of Raleigh was censured by the Grievance Committee. Powell provided legal services to North Carolina residents as a "local member" associate attorney for multiple out-of-state law firms. These out-of-state law firms were not authorized to provide legal services in North Carolina. The firms directed and controlled which legal services Powell provided the clients. Powell assisted others in the unauthorized practice of law and in debt adjusting, made false or misleading statements about his services, and collected an illegal fee.

The Grievance Committee issued two censures to **Nichole B. Greene** of Shelby. Greene violated several rules in negotiating a separation agreement and property settlement with an unrepresented party. She had an inadequate conflicts check system. She also obtained confidential information from a prospective client and then filed two lawsuits against that prospective client in matters about which the prospective client consulted her.

The DHC censured **Thomas A. Tate** of Apex. Tate did not provide information about the rate or basis of his fee to a new client, was not diligent in his representation, did not communicate with the client, did not return the client's file, and made a false representation to the client.

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## Reprimands

**Daniel J. Clifton** of Charlotte was reprimanded by the Grievance Committee. Clifton

did not respond to discovery requests and did not produce his client for a noticed deposition. The court dismissed the client's case with prejudice as a sanction for Clifton's misconduct.

**Mark I. Farbman** of Charlotte was reprimanded by the Grievance Committee. He did not send a properly executed release to the insurance company for almost two years after he settled his client's personal injury case.

**James Michael Harrington**, formerly of Concord and now of Plano, Texas, was reprimanded by the Grievance Committee. Harrington did not diligently pursue a client's patent application for seven years and did not respond to the client's reasonable requests for information.

The Grievance Committee reprimanded **Thomas S. Hicks** of Wilmington. Because Hicks did not inform his client for three months that the court entered summary judgment against him, the client lost the right to appeal. Hicks also did not comply with the client's request for his file.

**Ihuoma Igboanugo** of Raleigh was reprimanded by the Wake County Superior Court. Igboanugo checked out a court file and, to correct an affidavit containing a typographical error, removed the first page of the affidavit and replaced it with a corrected first page. She did not return the page she removed to the file. The court found Igboanugo's conduct was mitigated by her inexperience, her lack of dishonest motive, and her lack of personal gain.

**Katherine L. McKee** of Durham was reprimanded by the Grievance Committee. McKee did not sufficiently supervise a nonattorney assistant to whom McKee's law firm gave possession of an estate checkbook. McKee did not conduct any periodic review of the original bank records or canceled checks for the account. The assistant's misappropriation from the estate account was not timely discovered. The committee found mitigating circumstances warranting written discipline rather than referral to the DHC.

**Edward D. Seltzer** of Charlotte was reprimanded by the DHC for his conduct as personal representative in two estates. In one estate, he did not ensure that accountings were timely filed and did not timely comply with the clerk's notice and order to file accountings. In the other estate, he did not timely file an inventory and accountings.

The Grievance Committee reprimanded **Steven B. Wright** of Wilmington. When the court removed Wright from representation of a criminal defendant due to a conflict of inter-

est, Wright did not refund the unearned portion of his fee. Wright also did not respond to the State Bar's Fee Dispute Resolution Program and did not answer the Grievance Committee's supplemental questions.

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### Transfers to Disability Inactive Status

The chair of the Grievance Committee transferred **Raymond M. Sykes Jr.** of Whitakers and **Hallett Sydney Ward III** of Washington to disability inactive status.

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### Reinstatements

**Richard S. Poe** of Charlotte was disbarred by the Wake County Superior Court in June 2010. Poe admitted that he improperly endorsed his law firm employer's name on checks payable to the firm and misappropriated the fees. The DHC found that there was a misunderstanding and genuine dispute regarding Poe's entitlement to the fees. The DHC recommended that the council reinstate Poe. The council reinstated Poe at its October 2016 meeting.

**Porter W. Staples** of Asheville did not reconcile his trust account quarterly and therefore did not account for \$81,570 that the bank mistakenly wired into his account. The DHC found that, although the money disappeared from his account, Staples did not engage in dishonest conduct. The DHC suspended Staples for three years in June 2011. The DHC reinstated Staples and imposed additional conditions.

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### Stays of Existing Suspensions

**Paul B. Brock** of Durham engaged in a sexual relationship with a client and made false and misleading statements to the Grievance Committee in an effort to undermine the client's credibility. The DHC suspended him for two years in September 2015. After serving one year of the suspension, Brock was eligible to seek a stay of the balance upon showing compliance with numerous conditions. The DHC reinstated Brock on September 19, 2016.

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### Notice of Intent to Seek Reinstatement

Notice is hereby given that Jonathan A. McCollum of Raleigh intends to file a petition for reinstatement before the Disciplinary Hearing Commission of The North Carolina State Bar. McCollum surrendered his license and was disbarred October 29, 2010, for forging two documents purporting to be judicial orders, misrepresentation to his clients about

those documents, and initially making false statements in response to the State Bar's inquiry regarding those documents and a plea of guilty to a related misdemeanor offense of fraud in the Wake County Superior Court on August 24, 2010.

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

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## New President (cont.)

The UBE is a three-part bar exam that is available nationally that would be used in place of the current bar exam. The UBE allows a state law component, but the advantage of the UBE is that its results are portable to other states. I respect the expertise of the Board of Law Examiners in making this recommendation after careful study. The State Bar will ultimately need to review and approve these changes, and we will certainly give the recommendations of the Board of Law Examiners careful scrutiny.

### Q: Tell us about your family.

Lindsay and I have been married for going on 36 years. We have three great kids. My oldest son, Alex, is a UNC grad and has been a school teacher in Charlotte for six years. My daughter, Elizabeth, is also a UNC grad and is Bob Steven's assistant in the Office of Governor's Counsel. My youngest son, Jay, is a senior at UNC and still deciding on what to do next. I grew up with three brothers and a sister in the middle of four boys. My siblings are amazingly accomplished people, and we remain very close.

### Q: What do you most enjoy doing when you're not sorting out the legal problems of the university or working for the State Bar?

I probably will not be able to answer this question until next October. Right now free time is at a premium. All kidding aside, my favorite time is still taking walks with Lindsay and our dog Gracie.

### Q: How would you like for your administration to be remembered when the history of the State Bar is finally written?

The history of any organization is like a chain. I hope that we are remembered as a strong link in the chain and as a group that had fun and built productive relationships that benefitted the State Bar along the way. ■



# Someone You Know, Respect, and Like

BY ANNE McDONALD AND ROBYNN MORAITES

A few years ago I saw the movie *Milk*. Maybe you remember it. It was a film biography about the man who became the first openly gay elected official in San Francisco and was shot and killed, along with Mayor George Moscone, in November 1978. Two of his public speeches were re-enacted in the movie and they came to mind recently. I'll explain why in a minute. Fortunately, they were on a website, [filmsite.org/bestspeeches\\_74.html](http://filmsite.org/bestspeeches_74.html) so that I can quote one of them here.

The first speech was at the Gay Freedom Day Parade in San Francisco in late June 1978: **My name is Harvey Milk and I'm here to recruit you. I want to recruit you for the fight to preserve your democracy. Brothers and sisters, you must come out!** Come out to your parents, come out to your friends, if indeed they are your friends. Come out to your neighbors, come out to your fellow workers. **Once and for all, let's break down the myths and destroy the lies and distortions. For your sake, for their sake.** For the sake of all the youngsters who have been scared by the votes from Dade to Eugene. (Emphasis added).

This speech immediately came to my mind as I wrote a previous column about the new ABA study data on substance use, depression, and barriers to treatment. The recent study showed that one of lawyers' major obstacles to seeking help (to the tune of about 67%) was the fear of others finding out one has an illness. And not just any illness, but alcoholism or a mental health condition like depression or anxiety. And yet, at LAP we get the opportunity to know and work with so many wonderful North Carolina lawyers who have successfully managed those illnesses and who are in long-term recovery. We know that actual stigma is wrong and unfair. But we also know from long experience that much of the fear of stigma is really just that: a fear, an illusion. A vast majority of law firms and colleagues are actually supportive when a lawyer comes forward. We at LAP have worked with firms of all sizes across the state—from multi-national to small, closely

held firms. And I know too that so often as I enter into conversation with someone, eventually they mention they have a family member or friend with one of these conditions. So we all know there are lots of lawyers, lots of people, who are dealing with these illnesses and the fear of stigma.

I once received a call from a lawyer who observed that many of our LAP volunteers who tell their personal stories at CLE presentations are those who had extreme situations with very "low bottoms." The caller observed that we might not be sending the correct message—that is has to get "so bad" before someone asks for help. I wholeheartedly agreed with the caller. I then explained that those whose situation was very public—with widespread knowledge of the situation in the local bar—feel a greater sense of freedom to share their stories publicly because everyone already knows what happened on the downslope, and they want to expose what long-term recovery can look like on the upslope. The early exposure of their situation eliminated the fear of stigma. And they have gone on to have happy, successful, productive lives and legal careers.

Lawyers who are high functioning and suffering in silence, unwilling to seek help, seem to have a greater fear of stigma. Fortunately, we do have LAP volunteers who tell their stories at CLE events who, when they called LAP or entered treatment, no one would have guessed had a problem. And we also have lawyers who participate with our program who are not comfortable sharing their stories at CLE because no one knows they ever had a problem, that they ever called LAP, or that they are in long-term recovery today. We at LAP understand and totally respect that decision.

Entering into recovery does not automatically eliminate the fear of stigma. When I was admitted to the NC Bar, I was in long-term recovery. Several LAP volunteer lawyers tried to recruit me to be a volunteer early in my career. I was resistant because of the fear of stigma despite decades of recovery. I was completely comfortable with my recovery



status. But I knew that, at that time, LAP volunteers' names were published on the LAP website. My concern was that as a newly admitted lawyer trying to build a practice, someone might google my name, see it on that list, and jump to uninformed assumptions and conclusions having never met me and/or likely having little knowledge about recovery. I eventually did become a volunteer, but it was for that reason that I removed our volunteers' names from the website when it was revamped.

Some of our volunteers are outspoken about stigma and are committed to reducing it in our profession. One volunteer wrote a compelling article some years ago concerning the correlation between anonymity and stigma. He wrote, "I personally believe [I am in the minority position regarding anonymity] not because of some high-minded adherence to the principle of anonymity, but because of a deep-seated internal sense of shame and fear of lost opportunity." In the article, the author alludes to the fact that he received a coveted clerkship by disclosing his recovery when he writes, "No doubt, I would never have become acquainted with some great people (and some quite prominent) but for my candor about recovery...." The full article can be found at [nclap.org/aa-anonymity/](http://nclap.org/aa-anonymity/).

I think the idea inherent in Harvey Milk's exhortation to come out is that once family and friends—who already know and like someone

and think of them as regular people—find out that the person is LGTB, they will realize they are not that different after all. And this is the kernel, the key to the message of this column. Pogo is famous for his line that “we have met the enemy and he is us.” We’ve met the problem drinker, the stressed, the depressed, the anxious, and she is us. If not me personally, then a friend from law school, a colleague, a partner at my firm, someone I know.

Now LAP is totally confidential, of course, so we don’t talk about individuals. And I’m not actually advocating for those who have successfully managed alcoholism or mental illness to necessarily publicize that fact. What I am trying to advocate is a shift in our attitudes, even a paradigm shift in our perceptions. Recovering alcoholic lawyers are among us everywhere. Lawyers contending with and recovering from depression and anxiety are among us everywhere. We know them. They are not alien, not OTHER. They are our family members, our friends, our associates in the legal profession.

Once upon a not so very long time ago, there was a stigma attached to tuberculosis and to cancer. When I searched cancer stigma on the web, here’s one statement that came up: “Stigma breeds silence, which fuels the fear and ignorance that feeds the stigma. Breaking this vicious circle not only makes life easier for people with cancer, but can also change public attitudes towards prevention and early detection.” [cancerworld.org/Articles/Issues/55/July-August-2013/Patient-Voice/602/Stigma-breaking-the-vicious-cycle.html](http://cancerworld.org/Articles/Issues/55/July-August-2013/Patient-Voice/602/Stigma-breaking-the-vicious-cycle.html).

Early detection for cancer, and thus treatment, can often be fatally delayed just by stigma. The same is true for alcoholism and mental health conditions. And most “mental health conditions” for most lawyers are not permanent, but can be triggered by stressful life events. As I stated in last quarter’s column, *Messy, Unruly, Chaotic Life*, “I can say with confidence that most of what we see clinically are lawyers’ and judges’ responses to the serious difficulties of life and a career in law. Not that there isn’t true psychopathology, because there certainly is. But it is a teeny-tiny fraction of what we encounter in the lawyers we see and work with day to day.”

Patrick Krill, one of the ABA’s study’s authors, also a lawyer and director of the Legal Professionals program at Hazelden, had this to say about stigma:

When drinking becomes problematic, or lawyers develop mental health conditions,

the pervasive stigma associated with those issues creates a barrier for lawyers to seek help, Krill says. “There’s a lot of stigma attached to substance use disorders and mental illness. Because a lawyer’s reputation is so important, there’s a fear in admitting vulnerability or weakness, or admitting that we are struggling,” he said. “And those fears can be justified, because this can be a harshly judgmental and highly competitive environment. But when this data comes out and people realize how many lawyers are struggling, it will be difficult to view these issues through such a judgmental lens. That’s my hope anyway.”

[wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=2&ArticleID=24589](http://wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=2&ArticleID=24589).

The second speech in the biopic was Harvey Milk’s victory speech after the defeat of +Proposition 6 in California in 1978, on the eve of his own assassination: “Tonight, it’s become clear to everyone out there that they do know one of us...” And I’m betting that you

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## State Bar Outlook (cont.)

the ability to practice law effectively. As is well-known, the State Bar is in the public protection business and so is the LAP. Although the program’s orientation is humanitarian, its *raison d’être* is regulatory. The LAP is funded by the State Bar primarily because it saves clients. However, I suspect that most of the people who support, serve, and staff the LAP do so because it saves lives.

The annual cost of the program to the lawyers of North Carolina is about three quarters of a million dollars. This is around 8% of the State Bar’s total budgeted expense for the year and is a testament to the importance the council attaches to the enterprise. The fact that the LAP is a State Bar program with an adequate source of recurrent funding is a double-edged sword, however. Because the money is readily available, the members of our staff are not involved in the sort of constant fundraising that preoccupies many of their counterparts who do similar work in other states for LAP programs that are organized as 501(c)(3)s. Our people are consequently free to work without distraction and with laser focus on a burgeoning caseload that reflects an almost inexhaustible demand for LAP services.

know someone with a substance abuse disorder or a mental health condition, just like you probably know people with diabetes, or heart disease, or asthma—all chronic health conditions that can be successfully managed. The sooner we get rid of stigma the better. ■

*This article was first published in the Kansas Bar Journal in 2016 and authored by Anne McDonald, director of the Kansas Lawyer Assistance Program. It has been modified and reprinted with permission.*

*The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may impair a lawyer’s ability to practice. If you would like more information, go to [nclap.org](http://nclap.org) or call: Cathy Killian (for Charlotte and areas west) at 704-910-2310, Towanda Garner (in the Piedmont area) at 919-719-9290, or Nicole Ellington (for Raleigh and down east) at 919-719-9267.*

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The downside of State Bar affiliation is, no doubt, that a great many suffering lawyers wrongly suppose that the LAP is in cahoots with the Grievance Committee. Although rising numbers of self-referrals suggest that our efforts to dispel that misguided notion have been increasingly effective in recent years, it persists. That is unfortunate, to be sure, but not reason enough to depreciate the program’s great success, of which we all as members of the North Carolina State Bar can be quite proud.

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And so, we’ve come to the end of yet another trilogy, having bravely borrowed a literary device from an ancient civilization to help explain the finances of our boards and why it is so difficult to attract and keep good executives. Although some of you seem to have been edified, I note that others, myself included, remain a bit confused. That’s OK. It’s a lot to take in. The important thing to remember is that all the commendable activity described above, and the surrounding fiscal circumstances, are good things for which we, the lawyers of North Carolina, can justly take credit. Beyond that, well, it’s all Greek to me. ■

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

# IOLTA Makes Grants with Funds from Bank of America Settlement

## Income

**IOLTA account income**—Since 2008-09 we have dealt with a significantly changed income environment due to the economic downturn, which has seen unprecedented low interest rates being paid on lower principal balances in the accounts. In 2015, for the first time since 2008, we did not post a decrease from the previous year in income from IOLTA accounts. However, income from the accounts still did not exceed \$2 million, more than 50% less from our highest income of over \$5 million recorded in 2008. Unfortunately, that slight upward trend has not continued into 2016 as banks continue to adjust their interest rates downwards and a number of bank mergers are resulting in less favorable bank policies.

**Settlement distributions**—During this downturn in income from IOLTA accounts, we have relied heavily on class action cy pres funds and other court awards designated for the provision of civil legal aid to the poor. Distributions allocated to IOLTA programs in the settlement with Bank of America announced by the Department of Justice in August 2014 have been crucial to our ability to continue to make grants. We received just under \$843,000 in 2015, and just over \$12 million in 2016. Though these funds are to be used for restricted purposes—provision of foreclosure prevention and community redevelopment legal services—we do have six strong legal aid programs that have already been collaboratively handling significant foreclosure work, and are eager to have the resources to focus on more holistic community development work.

## Grants

In response to the downturn in income, beginning with 2010 grants, we have limited our grant-making to a core group of (mainly) legal aid providers. Even with that change and the use of over \$3 million in reserve funds,

IOLTA grants have dramatically decreased by over 50% from their highest level of just over \$4 million in 2008 and 2009.

In 2015 the IOLTA trustees used two thirds of the remaining reserve to make grants of ~\$1.9 million. For 2016 the trustees decided to use half of the Bank of America settlement funds received in 2015 (\$421,445), leaving half to remain invested for use in 2017, as otherwise our reserve would be just under \$250,000. We were, therefore, able to make \$2 million in grants.

**Bank of America Funds Grant Program**—Given the large amount of funds received in the second BoA settlement distribution and the time required for some community redevelopment projects, we plan to grant these restricted funds over a number of years. NC IOLTA has prepared a grant program description that includes definitions of terms used in the restrictions applied to the funding, and a description of the reporting that all IOLTA programs have agreed to make to the National Association of IOLTA Programs regarding work completed using the funding.

The IOLTA trustees decided to open a separate grant cycle in 2016-17 to begin making grants with the additional Bank of America settlement funds received in 2016. Applications for that cycle were reviewed by the IOLTA trustees at their September meeting. Total grants of ~\$5.7 million over three years were made. That total includes a grant award of \$750,000 made to the legal aid collaborative working on foreclosure prevention for 2016-17, and just under \$5 million in funds allocated for new and creative multi-year community redevelopment projects.

**Grantee Spotlight**—We hope that North Carolina lawyers are learning more about the work that IOLTA grantees are doing through the articles focusing on this work published in the *State Bar Journal*. In 2015 (winter issue) we published an article on the collaborative of legal aid organiza-



tions focusing on the foreclosure crisis caused by the economic downturn. Featured in the Fall 2016 *State Bar Journal* is an article on IOLTA grantee the Special Education Team at Disability Rights NC (DRNC), and an interview with that project's lead attorney, Chris Trottier, upon her retirement from DRNC after over 35 years as a legal aid attorney advocating for disabled and indigent clients.

## State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. State funding for legal aid has also decreased by over 50% since the economic downturn. Significantly, the appropriation for legal aid work was eliminated in 2014-15. Total state funding from filing fees alone was just over \$2.7 million for 2015-16.

We were pleased to note that proposed recommendations in draft reports of the NC Commission on the Administration of Law and Justice include increasing state funding for legal aid, including loan repayment assistance for public service attorneys through the North Carolina Legal Education Assistance Foundation. The Equal Access to Justice Commission and the North Carolina Bar Association continue to work to sustain and improve the funding for legal aid. ■



# Resources to Protect Yourself from Scams

BY PETER BOLAC, TRUST ACCOUNT COMPLIANCE COUNSEL

The State Bar continues to receive reports of fraudulent activity relating to wired funds in real estate transactions. Scam alerts are posted on the State Bar website (ncbar.gov), Twitter account (@NCStateBar), and Facebook page (facebook.com/ncstatebar).

Here are some additional resources relating to wire fraud scams:

**W.I.R.E. (What I Require Every Time) Brochure and Checklist**, (by Investors Title Insurance Company). The W.I.R.E. brochure provides a list of myths and realities, rules of thumb, red flags, and other advice to help lawyers combat potential wire fraud. The **W.I.R.E. Checklist** is a step-by-step guide to receiving and disbursing wires in a manner that minimizes a lawyer's risk of becoming a victim of wire fraud. The brochure and checklist are available on the Investors Title website at [invtitle.com/wire](http://invtitle.com/wire). Contact Investors Title for additional information.

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## Wire Instruction Fraud Continues to Plague North Carolina Lawyers

By Troy Crawford of Lawyers Mutual

Over the last few weeks, Lawyers Mutual has received multiple reports of North Carolina attorneys who were targeted by scammers attempting to divert seller closing proceeds following real estate transactions. Unfortunately, several of these attacks were successful and hundreds of thousands of dollars were stolen and are very unlikely to be recovered. However, several attacks were foiled by attorneys and staff members who approached transactions with a high degree of skepticism.

While the details of the recent scams are emerging, it appears hackers first became aware of the closing by compromising email accounts of differing parties. Sometimes the attorney account was compromised, some-

times the seller's account, but the most common scenario was that the realtor's account was being monitored by international criminal organizations. The foreign-based hackers would observe the account, likely for several weeks, and only actively intervene once an understanding of the business practices were obtained and a significant wire was to be produced. In the interim, the unsuspecting realtor would continue to use the account unaware his or her client and the closing attorney were being set up to be robbed.

Below are tips to help your office avoid falling victim to the latest series of scams.

### Best Practices to Avoid Falling Victim:

1. EVERY wire request should be verified and the more personal the verification, the better.

The best way to verify wiring instructions is to have the seller sign the wiring instructions at the closing ceremony in the presence of the attorney. We know of no wire fraud which has taken place when this has occurred, and even if it did, the closing attorney would likely be insulated from liability by the doctrine of contributory negligence.

If the seller is unable to attend the ceremony, we recommend wiring instructions be included in the same package in which the deed, lein waiver, and other closing documents are delivered. The seller should sign the wiring instructions and have the signature notarized, if possible. Even then, *the closing instructions should be verified over the telephone via a call initiated by the law office, using contact information from very early in the file, specifically provided prior to any discussion of proceeds and wires.*

Confirming the telephone call via email is a good practice and a great way to document the file. *However, an email verification alone is inadequate.*

2. Do not accept changes to wiring instructions.

3. If wiring instructions are attached to an email from a free email service (gmail, yahoo, aol.com, nc.rr.com, etc.) they should be

assumed to be fraudulent and extra diligence should be taken when verifying their authenticity. Sometimes hackers will create an alias account with a very similar name (frequently dropping or swapping letters) to send modified instructions so the actual user is not aware of their presence. Examining the account name in detail is a good idea; however, as the hacker already has access to the original account, he or she may not take this step.

4. Attorneys should not be using free email accounts. In addition to likely being noncompliant with the ALTA Best Practices, these accounts have major security concerns and are likely being mined for data by their providers in violation of Rule 1.6 of the Rules of Professional Conduct.

5. Faxed wiring instructions should not be assumed to be any safer than those received via email. Numerous "spoofing" services exist which allow a sender to display any number on caller ID and the printed "Sent From" header. Like all other wiring instructions, those received via facsimile transmission should be verified in person or through a telephone call initiated by the law office, using contact information from very early in the file, provided prior to any discussion of proceeds and wires.

6. Be very suspicious of wires going to any account that is not in the name of the seller.

7. Also be suspicious of any account with a geographic location different than the seller. Why is a North Carolina seller relocating to New York sending a wire to Wisconsin? There are some reasons for the different names and odd locations, but these are red flags which should be explored in detail (and not via email).

8. Do NOT send wires overseas. Once money leaves the United States, it is likely gone forever.

9. After initiating a wire transfer, telephone the recipient and provide the details of the wire transmission and request confirmation of

CONTINUED ON PAGE 44

# Ethics Committee Opines on Employment Negotiations with Opposing Counsel

## Council Actions

No proposed formal ethics opinions were considered by the State Bar Council at its meeting on October 28, 2016.

## Ethics Committee Actions

At its meeting on October 27, 2016, the Ethics Committee voted to continue to table proposed 2016 Formal Ethics Opinion 1, Contesting Opposing Counsel's Fee Request to Industrial Commission, pending the conclusion of appellate action on related cases. The committee also voted to publish a revised proposed opinion and a new proposed opinion. Both appear below.

The comments of readers on proposed opinions are welcomed. Comments received by January 12, 2016, will be considered at the next meeting of the Ethics Committee. Comments may be emailed to [ethicsadvice@ncbar.gov](mailto:ethicsadvice@ncbar.gov).

## Proposed 2016 Formal Ethics Opinion 3 Negotiating Private Employment with Opposing Counsel October 27, 2016

*Proposed opinion rules that a lawyer may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.*

**Note:** This opinion is limited to the explanation of the professional responsibilities of a lawyer moving from one place of private employment to another. Rule 1.11(d)(2)(B) governs the conduct of a government lawyer seeking private employment.

## Inquiry:

May a lawyer negotiate for employment with a law firm that represents a party on the opposite side of a matter in which the lawyer is also representing a party?

## Opinion:

Yes, with client consent.

A lawyer shall not represent a client if the representation of a client may be materially limited by a personal interest of the lawyer unless the lawyer reasonably believes that he can provide competent and diligent representation to the affected client and the client gives informed consent, confirmed in writing. Rule 1.7(b)(2). As observed in Rule 1.7, cmt. [10], when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.

On the same issue, ABA Formal Ethics Op. 96-400 (1996) advises that there are two overriding factors affecting the "likelihood that a conflict will eventuate" and "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosing courses of action": the nature of the lawyer's role in the representation of the client; and the extent to which the lawyer's interest in the firm is concrete, and has been communicated and reciprocated. The ABA opinion states:

[t]he likelihood that a lawyer's job search will adversely affect his "judgment in considering alternatives or foreclosing courses of action" is far greater when the lawyer has an active and material role in representing a client. Thus, if the posture of the case is such that there is no call on the lawyer's judgment in representing a client during the period of his job search, it is not likely that his search and negotiations will adversely affect his judgment. Furthermore, if a lawyer's interest in another firm, or its interest in him, is not reciprocated, it seems unlikely, in most cases, that such unreciprocated interest will have a material effect on a lawyer's judgment in

## Public Information

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

a matter between them.

While the exact point at which a lawyer's own interest may materially limit his representation of a client may vary, the committee believes that clients, lawyers, and their firms are all best served by a rule that requires consultation and consent at the earliest point that a client's interests could be prejudiced.

The ABA opinion concludes that a lawyer who is interested in negotiating employment with a firm representing a client's adversary must obtain the client's consent before engaging in substantive discussions<sup>1</sup> with the firm or the lawyer must withdraw from the representation.

*The Restatement (Third) of the Law Governing Lawyers* advises that once the discussion of employment has become concrete and the interest is mutual, the lawyer must promptly inform the client; without effective client consent, the lawyer must terminate all discussions concerning the employment, or withdraw from representing the client. *Restatement (Third) of the Law Governing Lawyers: A Lawyer's Personal Interest Affecting the Representation of a Client*, §125, cmt. d (2000). See also Kentucky Ethics Op. E-399 (1998) (lawyer may not negotiate for employment with another firm where firms represent adverse

parties and lawyer is involved in the client's matter or has actual knowledge of protected client information, unless the client consents to negotiation).

We agree: a job-seeking lawyer who is representing a client, or has confidential information<sup>2</sup> about the client's matter, may not engage in substantive negotiations for employment with the opposing law firm without the client's informed consent.

To obtain the client's informed consent, the job-seeking lawyer must explain to the client the current posture of the case, including what, if any, additional legal work is required, and whether another firm lawyer is available to take over the representation should the lawyer seek to withdraw. If the client declines to consent, the job-seeking lawyer must either cease the employment negotiations until the client's matter is resolved or withdraw from the representation but only if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b)(1). Because personal conflicts of interests are not imputed to other lawyers in the firm, another lawyer in the firm may continue to represent the client. Rule 1.10(a).

Similarly, the hiring law firm must not engage in substantive employment negotiations with opposing counsel unless its own client consents. If the client does not consent, the firm must cease the employment negotiations or withdraw from the representation. The firm may only withdraw if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b) (1).

## Endnote

1. A substantive discussion entails a communication between the job-seeking lawyer and the hiring law firm about the job-seeking lawyer's skills, experience, and the ability to bring clients to the firm; and the terms of association. ABA Formal Ethics Op. 96-400 (1996). Thus there is a two-prong test for "substantive discussions." There must be (1) a discussion/negotiation that is (2) substantive. Sending a resume blind to a potential employer is not a "discussion." Speaking generally with a colleague at a social event about employment opportunities is not "substantive."
2. A job-seeking lawyer who is only peripherally involved in a client's matter and does not have confidential client information is not required to seek the client's consent before engaging in substantive employment negotiations with the opposing law firm.

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## Proposed 2016 Formal Ethics Opinion 4 Disclosing Confidential Information to Execute on a Judgment for Unpaid Legal Fees

October 27, 2016

*Proposed opinion rules that lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees.*

### Inquiry:

A lawyer with Firm represents Client in a domestic matter. Client fails to pay Firm for legal services and Firm withdraws from representation. Firm provides Client written notice of the North Carolina State Bar's Fee Dispute program. Client waives the right to participate in the program. Firm files a lawsuit against Client to recover the unpaid legal fees and obtains a default judgment against Client. Firm now wants to execute on its judgment against Client.

During the course of Firm's representation of Client, Firm learned financial information about Client, including the location of Client's bank accounts and the account numbers. Firm does not know if that information is still accurate. Firm would like to provide this information to the sheriff to aid the sheriff in executing on a writ of execution.

May Firm provide the sheriff with information about Client's bank accounts to execute on Firm's judgment for unpaid fees against Client?

### Opinion:

No. Disclosing Client's financial information to the sheriff would violate Rule 1.6(a) of the Rules of Professional Conduct.

Rule 1.6(a) provides that a lawyer "shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." None of the exceptions set out in Rule 1.6(b) applies to the instant scenario.

It is true that Rule 1.6(b)(6) allows a lawyer to disclose information to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and

the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client." Comment [12] to Rule 1.6 specifically addresses actions to collect legal fees and provides that "[a] lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it."

The instant scenario does not fall within the Rule 1.6(b)(6) exception because the action to collect the unpaid legal fees has concluded. Firm has proven the legal services rendered and has obtained a default judgment against Client. The purpose of the exception to the duty of confidentiality having been fulfilled, Firm may not now use Client's confidential information to collect on the judgment. Firm may utilize post-judgment procedures to obtain information about Client's assets without breaching the duty of confidentiality set out in Rule 1.6. ■

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## Civil Legal Aid (cont.)

Jim Barrett, executive director of Pisgah Legal Services, said this year's Poverty Forum was very well attended with great interest from the community—including members of the legal profession—in hearing Ms. Edelman speak. "Each year the Poverty Forum opens a community conversation around critical issues facing the poorest individuals in our mountain communities. Marian Wright Edelman has long been a passionate advocate for children and disadvantaged individuals. Tonight she appealed to community members, decision makers, and partners to keep working together to solve poverty's challenges." ■

*Mary Irvine is the access to justice coordinator for NC IOLTA, a program of the North Carolina State Bar that uses interest earned on lawyers' trust accounts to make grants for the provision of civil legal assistance and other programs that work to improve the administration of justice. Irvine also works as director of external affairs for the Equal Access to Justice Commission and director of the Equal Justice Alliance.*



# Amendments Approved by the Supreme Court

On September 22, 2016, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar (for the complete text see the Fall 2015, Spring 2016, and Summer 2016 editions of the *Journal*, unless otherwise noted, or visit the State Bar website):

## Amendments to the Rules on the Organization of the State Bar

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

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

## Amendments to the Discipline and Disability Rules

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

The amendments to the Discipline and Disability Rules separate Rule .0114, Formal Hearing, into five shorter rules. In addition, the content of existing Rule .0114 is reorganized within this five-rule structure, and numerous substantive changes were approved, including amendments to the provisions on mandatory scheduling conferences, settlement conferences, default, sanctions, and post-hearing procedures relative to stayed suspensions. Amendments to the substance of existing Rule .0115, Effect of a Finding of Guilt in Any Criminal Case, (renumbered as Rule .0119) explain the documents constituting conclusive evidence of conviction of a crime and the procedure for obtaining an interim suspension.

With the division of existing Rule .0114 into five shorter rules, existing Rule .0115 and all subsequent rules in this section are renumbered and internal cross references to other rules throughout the section are renumbered accordingly.

Amendments to Rule .0129, Confidentiality, clarify that the State Bar may disclose, after the Disciplinary Hearing Commission (DHC) proceeding

has concluded or to address publicity not initiated by the State Bar, the fact that a complaint was filed before the DHC pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4) because the defendant rejected discipline imposed by the Grievance Committee.

## Amendments to the Rules Governing the Board of Law Examiners

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

An amendment to Rule .0105, Approval of Law Schools, recommended by the Board of Law Examiners, eliminates the ten-year licensure requirement from the rule that allows a graduate of a non-ABA accredited law school to be considered for admission to the State Bar if the graduate was previously admitted to the bar of another state and remained in good standing with that bar for ten years.

## Amendments to the Procedures for the Administrative Committee

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

Amendments to the rules on reinstatement from inactive status and administrative suspension eliminate from the CLE requirements for reinstatement the condition that five of the 12 CLE credit hours required for each year of inactive or suspended status must be earned by taking practical skills courses.

Amendments to Rule .0905 specify that *pro bono* practice status for an out-of-state lawyer ends when the lawyer ceases working under the supervision of a North Carolina legal aid lawyer, and clarify that the status may be revoked by the council without notice to the out-of-state lawyer or an opportunity to be heard.

## Amendments to the Continuing Legal Education Rules

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

## Highlights

- Supreme Court approves amendments to Discipline and Disability Rules that improve the procedures for hearings before the Disciplinary Hearing Commission.
- Court also approves rule governing the Board of Law Examiners that permits a lawyer, whose law degree was sufficient to obtain licensure in another state, to apply for the North Carolina bar exam regardless of whether the law school is ABA accredited.
- Council publishes proposed rule on media coverage of DHC hearings.

The amendments to Rule .1512 clarify that the sponsor/attendees fee charged for each hour of CLE credit is earned for every hour reported regardless of subsequently claimed exemption or adjustment in reported hours. In addition, amendments to Rule .1517 add full-time tribal chiefs and vice-chiefs to the list of lawyers holding political office who are exempt from mandatory CLE.

## Amendments to the Specialization Rules

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization; Section .2400, Certification Standards for the Family Law Specialty; Section .2700, Certification Standards for the Workers' Compensation Specialty

Amendments to Rule .1804 of the hearing rules for the specialization program simplify the procedure for a failed applicant to appeal a final certification decision of the Board of Legal Specialization to the council. The amendment to the standards for the family law specialty will permit a family law specialist who was elected or appointed to the district court bench to

meet the substantial involvement requirement for recertification if the specialist's service on the bench involved hearing a substantial number of family law cases. The amendment to the standards for recertification in the workers' compensation specialty clarifies that a specialist must earn at least six CLE credits in workers' compensation law courses in each year of the five-year

period of certification.

### Amendments to the Rules of Professional Conduct

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

The amendments to Rule 1.0, Terminology, replace the term "Partner" with the more generic and apt term

"Principal" and modify the definition of the term to include lawyers who have management authority over legal departments of a company, organization, or government entity. In accordance with this change in terminology, amendments in other rules (and the comments thereto) replace the word "partner" with the word "principal" where appropriate.

## Proposed Amendments

At its meeting on October 28, 2016, the council voted to publish proposed amendments to the Rules of Professional Conduct that are explained and set forth in an accompanying article. The council also voted to publish the following proposed rule amendments for comment from the members of the Bar:

### Proposed Amendments to the Rule on Judicial District Bar Dues

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

The proposed amendment shortens the time that district bars have to report delinquent district bar dues from 12 months to 6 months after the delinquency date.

#### .0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. §84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar. ...

(b) Accounting to State Bar. ...

(c) Delinquency Date. The date upon which the annual membership fee shall be delinquent if not paid shall be not later than ninety days after, and not sooner than thirty days after, the date of the first invoice for the annual membership fee. The delinquency date shall be stated on the invoice and the invoice shall advise each member that failure to pay the annual membership fee must be reported to the North Carolina State Bar and may result in suspension of the member's license to practice law.

(d) Late Fee...

(e) Members Subject to Assessment. ...

(f) Members Exempt from Assessment. ...

(g) Hardship Waivers. ...

(h) Reporting Delinquent Members to

State Bar. ~~Twelve~~ **Three to six months** after the ~~delinquency date of the first invoice~~ for the annual membership fee, the judicial district bar shall report to the North Carolina State Bar all of its members who have not paid the annual membership fee or any late fee.

### Proposed Amendments to the Rule on Formal Hearings Before the DHC

27 N.C.A.C. 1B, Section .0100, Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

Upon the request of the Disciplinary Hearing Commission (DHC), the council approved for publication proposed amendments to the rule on formal hearings before the DHC specifying that, absent a showing of good cause, the media will be permitted to broadcast and photograph formal DHC hearings; the chair of a hearing panel who denies a request for such access must make findings of fact supporting that decision; a request for media access must be filed no less than 48 hours before the hearing is scheduled to begin; the chair of the hearing panel must rule on such motion no less than 24 hours before the hearing is scheduled to begin; and, except as set forth in the proposed amendments, Rule 15 of the General Rules of Practice for the Superior and District Courts will apply to electronic media coverage of DHC hearings.

#### .0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

(a) Public Hearing

(1) ...

**(2) Media Coverage — Absent a showing of good cause, the chairperson of the hearing panel shall permit television, motion picture and still photography**

## The Process

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

## Comments

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

**cameras, broadcast microphones and recorders (electronic media) to record and broadcast formal hearings. A media outlet shall file a motion with the clerk of the commission seeking permission to utilize electronic media to record or broadcast a hearing no less than 48 hours before the hearing is scheduled to begin. The chairperson will rule on the motion no less than 24 hours before the hearing is scheduled to begin. Any order denying a motion to permit the use of electronic media to record or broadcast a formal hearing shall contain written findings of fact setting forth the facts constituting good cause to support that decision. Except as otherwise provided in this paragraph, the provisions of Rule 15 of the**

General Rules of Practice for the Superior and District Courts (Electronic Media and Still Photography Coverage of Public Judicial Proceedings) shall apply to electronic media coverage of hearings before the commission.

(b) Continuance After a Hearing Has Commenced ...

**Proposed Amendments to the Certification Standards for the Criminal Law Specialty**

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty

The proposed amendment to the standards for board certification in criminal law changes the requirements relative to peer review from opposing counsel and judges in cases recently tried by the applicant.

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

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

- (a) Licensure and Practice ...
- (d) Peer Review

(1) Each applicant for certification as a specialist in criminal law and the subspecialty of state criminal law must make a satisfactory showing of qualification through peer review.

(2) ...

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

(5) ...

**Proposed Amendments to the Regulations for PCs and PLLCs**

27 N.C.A.C. 1E, Section .0100, Regulations for Organizations Practicing Law

The proposed amendments eliminate the requirement that a notice to show cause be issued to a professional corporation or professional limited liability company for failure to

apply for renewal of a certificate of registration. The applicable statutes, N.C. Gen. Stat. §§55B-11 and 55B-13, do not require such notice prior to the suspension or revocation of a certificate of registration.

**.0103 Registration with the North Carolina State Bar**

(a) Registration of Professional Corporation ...

(e) Renewal of Certificate of Registration - The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) ...

(3) Renewal Fee - An application for renewal of a certificate of registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of \$25;

(4) ...

(5) Failure to Apply for Renewal of Certificate of Registration - In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, ~~the secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee and a late fee of \$10, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application, the renewal fee, and the late fee within said thirty days, or to show cause within said time period, shall result in the suspension of the certificate of registration for the delinquent professional corporation or professional limited liability company shall be suspended and the issuance of a notification to the secretary of state will be notified~~ of the suspension of said certificate of registration;

(6) Reinstatement of Suspended

Certificate of Registration - Upon (a) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees and late fees; and (b) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

(7) ... ■

**Trust Accounting (cont.)**

receipt. Specifically request that your office be notified if the funds do not post within a reasonable time frame. This will provide early notice if you are falling victim to a fraud scheme and allow for remediation. We have worked with several attorneys to freeze accounts and eventually recover some or all of the diverted funds.

10. Regularly change your passwords.

I understand these policies appear harsh and some pushback may occur. However, hacking crimes can be devastating to a law firm's finances and reputation. Explaining the policy up front is a good way to limit negative actions. Below is sample language I recommend to be included in your Seller engagement letter.

**Funds Availability Policy**

It is our goal to make real estate commission checks and funds available as soon as practical following closing. However, NC State Bar Rules expressly prohibit disbursing any closing funds prior to recording. Should you request funds be wired, our office can accommodate the request for a fee of \$\_\_\_00. In order to prevent fraud and protect your proceeds, all wiring instructions must be verified and you will be required to sign the instructions at the closing ceremony. THIS OFFICE WILL NOT ACCEPT CHANGES TO WIRING INSTRUCTIONS. ■

*Troy Crawford is claims counsel with Lawyers Mutual handling claims in various practice areas including real estate, bankruptcy, estate administration, and guardianships. Contact Troy at 800.662.8843 or tcrawford@lawyersmutualnc.com.*



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# Proposed Rule Amendments on Disclosure of Information About a Possible Wrongful Conviction

At its meeting on October 28, 2016, the council voted to publish proposed amendments to the Rules of Professional Conduct that, under certain circumstances, require the disclosure of post-conviction information or evidence that may exonerate a convicted defendant. The proposed amendments to Rule 3.8, Special Responsibilities of a Prosecutor, set forth specific disclosure requirements for a prosecutor who comes into possession of new, credible information or evidence creating a reasonable likelihood that a defendant was wrongfully convicted. A proposed new Rule 8.6, Information About a Possible Wrongful Conviction, sets forth comparable requirements for all other members of the Bar. In addition, the comment to Rule 1.6, Confidentiality, is amended to add a proposed cross-reference to new Rule 8.6. The proposed amendments appear below.

In light of the importance of the subject matter and the potential for conflicting points of view from the criminal defense bar and from prosecutors, the study of whether to amend the Rules to establish this new duty was undertaken with care to include important stakeholders from various constituencies. This introduction provides insight into that process.

At its meeting in January 2016, the Ethics Committee voted to appoint a subcommittee to study paragraphs (g) and (h) of ABA Model Rule 3.8 (ABA MR 3.8) which set forth a prosecutor's duty upon receipt of potentially exonerating post-conviction evidence. Darrin Jordan, the chair of the Ethics Committee, appointed five Ethics Committee members to the subcommittee. William S. Mills of Durham served as chair of the subcommittee. Bradley Bannon of Raleigh and Eben T. Rawls III of Charlotte, both criminal defense lawyers, were appointed to the subcommittee along with US Attorney for the Eastern District of North Carolina John S. Bruce of Raleigh, and former State Prosecutor C. Branson Vickory of Mount Olive. Colon Willoughby, a State Bar councilor who serves on the Grievance Committee and the former prosecutor for

Wake County, was asked to serve as an advisory member of the subcommittee.

The subcommittee met five times over six months. All meetings except the initial planning meeting were in person. Representatives of the following organizations were present or participated by conference call in some or all of the four in-person meetings of the subcommittee: NC Administrative Office of the Courts, NC Advocates for Justice, NC Center on Actual Innocence, NC Conference of District Attorneys, NC Department of Justice, NC Office of Indigent Defense Services, NC Lawyers Mutual Insurance Company, Federal Public Defender for the Eastern District, Duke Law School Wrongful Convictions Clinic, UNC School of Law, and Wake County Office of the Public Defender. The representatives were all given unlimited opportunity to address the subcommittee. In addition, the deliberations of the subcommittee were monitored by and reported upon by an Associated Press reporter.

The subcommittee started with the consideration of ABA MR 3.8(g) and (h) and the duties imposed on prosecutors by those provisions of the model rule. There was soon consensus that wrongful convictions undermine the integrity of the adjudicative process and are of concern to all participants in the criminal justice system. The subcommittee resolved the question of whether a duty of disclosure should be imposed upon prosecutors and, concluding that there should, considered the questions of what information or evidence must be disclosed and to whom. The subcommittee also considered, but rejected, ABA MR 3.8(h), which creates a duty to remedy a wrongful conviction. Finally, it determined that there should be a safe harbor for a prosecutor who, acting in good faith, determines that information is not subject to disclosure under the rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

During the deliberations, the subcommittee members agreed that the threat to the integrity of the adjudicative process present-

ed by wrongful convictions justifies extending the duty to disclose to all members of the State Bar. The subcommittee then carefully sought to balance a lawyer's duty of confidentiality to a client and the duty to the justice system to disclose potentially exonerating information. This balancing of competing duties is found in paragraph (b) of new Rule 8.6, which limits the duty to disclose when, among other circumstances, disclosure would criminally implicate a client, substantially prejudice the client's interests, or violate the attorney-client privilege.

The proposed amendments to Rule 3.8 and proposed new Rule 8.6 are consensus recommendations of all members of the subcommittee. When the subcommittee presented its report to the Ethics Committee, the full committee voted unanimously in favor of recommending publication to the State Bar Council, and the council's vote on that recommendation was also unanimous.

Questions about the process or the proposed amendments may be directed to Alice Mine, counsel to the Ethics Committee, at [ethics@ncbar.gov](mailto:ethics@ncbar.gov). Comments on the proposed amendments for the consideration of the Ethics Committee are welcomed. Please send comments to Ms. Mine at the above email address.

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## Proposed Amendments to the Rules of Professional Conduct

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

### Rule 1.6, Confidentiality of Information

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

(b) ...

### Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for

the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, ~~and~~ Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients, and Rule 8.6 for a lawyer's duty to disclose information to rectify a wrongful conviction.

[2]...

### Rule 3.8, Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) ...

(g) When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:

(1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence or information to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction; or

(2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence or information to the prosecutor's office in the jurisdiction of the conviction or to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction of conviction.

(h) A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (g) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

#### Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict **or to uphold a conviction.** This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the

November 3, 2016

Mark Merritt, President  
North Carolina State Bar

Darrin Jordan, Chair  
Ethics Committee

Re: Proposed Amendments to Rule 3.8 - Special Responsibilities of a Prosecutor and Proposed New Rule 8.6, Disclosing Information About a Potential Wrongful Conviction

Dear Mark and Darrin:

I am writing to share with you my experience as a participant in the various meetings that were held by a subcommittee of the State Bar Ethics Committee that considered and ultimately approved new ethics rules regarding the disclosure of information relevant to the problem of wrongful convictions. Bill Mills of Durham chaired the subcommittee; Brad Bannon, John Bruce, Eben Rawls, Branny Vickory and Colon Willoughby were the members. Alice Mine was the advisor to the subcommittee.

As you might expect given the diverse backgrounds and perspectives of the members, there was much discussion about the relative merits of the various proposals considered by the subcommittee. Everyone, however, recognized that the problem of wrongful convictions in North Carolina (and elsewhere) was real and was serious, and that it was in everyone's interest to correct such miscarriages of justice as soon as possible. So although the discussions were vigorous, everyone listened carefully to different perspectives, made appropriate compromises, and ended up with draft amendments to Rule 3.8, and a new proposed Rule 8.6, that passed the subcommittee (and eventually, the full Ethics Committee) *unanimously!* That is a great result, and a testament to Bill Mills, Alice Mine, and the members of the subcommittee. These new Rules will hopefully go a long way to making sure that when new evidence surfaces indicating that an innocent person is serving a sentence for a crime he or she did not commit, it will be disclosed and acted upon as quickly as possible.

But I also want to commend Bill, the subcommittee, and Alice, for welcoming the participation and input of other members of the State Bar. There were many interested attorneys who attended all the meetings, including sitting District Attorneys, such as Lorrin Freeman of Wake County and Andrew Murray of Mecklenburg County, and attorneys who do the incredible work of freeing innocent people from prison, including Chris Mumma of the North Carolina Center on Actual Innocence and Theresa Newman of the Duke Law School Wrongful Convictions Clinic. Chris, in particular, shared her concerns as someone who was instrumental in creating the North Carolina Innocence Inquiry Commission and who has been responsible for freeing innocent people from prison for her entire professional career. It was clear to me that all of us who attended these meetings were listened to carefully, and that our experiences and perspectives were considered by everyone on the subcommittee.

So I write in the hope that more attorneys can be encouraged to participate in such discussions in the future, on topics that affect their clients and their professional conduct, or that simply interest them as a professional matter - even if they are not formal members of any ethics subcommittee. Based on my experience, it will be well worth the time and effort. We all can and should have a voice when it comes to the ethical rules that control our actions as lawyers. If we speak, the ethics committee will listen.

Sincerely,  
David S. Rudolf  
Rudolf Widenhouse  
Charlotte, NC

basis of sufficient evidence ...

[8] When a prosecutor knows of new,

credible evidence or information creating a reasonable likelihood that a defendant did

not commit an offense for which the defendant was convicted in the prosecutor's district, paragraph (g)(1) requires prompt disclosure to the defendant. However, if disclosure will harm the defendant's interests or the integrity of the evidence or information, disclosure should be made to the defendant's lawyer, if any. Disclosure must be made to North Carolina Indigent Defense Services (NCIDS) or, if appropriate, the federal public defender under all circumstances regardless of whether disclosure is also made to the defendant or the defendant's lawyer. If there is a good faith basis for not disclosing the evidence or information to the defendant, disclosure to NCIDS or the federal public defender and to any counsel of record satisfies this rule. If the conviction was obtained in another jurisdiction, paragraph (g)(2) allows the prosecutor promptly to disclose the evidence or information to the prosecutor's office in the jurisdiction of conviction in lieu of any other disclosure. The prosecutor in the jurisdiction of the conviction then has an independent duty of disclosure under paragraph (g)(1). In lieu of disclosure to the prosecutor's office in the jurisdiction of conviction, paragraph (g)(2) requires disclosure to the defendant or to the defendant's lawyer, if any, and to NCIDS or, if appropriate, the federal public defender.

[9] The word "new" as used in paragraph (g) means evidence or information unknown to a trial prosecutor at the time of the conviction or, if known to a trial prosecutor at the time of the conviction, never previously disclosed to the defendant or defendant's legal counsel. When analyzing new evidence or information, the prosecutor must evaluate the substance of the information received, and not solely the credibility of the source, to determine whether the evidence or information creates a reasonable likelihood that the defendant did not commit the offense.

[10] Nevertheless, a prosecutor who receives evidence or information relative to a conviction may disclose that evidence or information as directed in paragraph (g)(1) and (2) without examination to determine whether it is new, credible, or creates a reasonable likelihood that a convicted defendant did not commit an offense. A prosecutor who receives evidence or information subject to disclosure under paragraph (g) does not have a duty to undertake further

investigation to determine whether the defendant is in fact innocent.

[11] A prosecutor's independent judgment, made in good faith, that the new evidence or information is not of such nature as to trigger the obligations of paragraph (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

#### Rule 8.6, Information About a Possible Wrongful Conviction [NEW RULE]

(a) Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to the North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction.

(b) Notwithstanding paragraph (a), a lawyer shall not disclose evidence or information if:

- (1) the evidence or information is protected from disclosure by law, court order, or 27 N.C.A.C. Ch. 1B §.0129;
- (2) disclosure would criminally implicate the client or otherwise substantially prejudice the client's interests; or
- (3) disclosure would violate the attorney-client privilege applicable to communications between a lawyer and client.

(c) A lawyer who in good faith concludes that information is not subject to disclosure under this rule does not violate the rule even if that conclusion is subsequently determined to be erroneous.

(d) This rule does not require disclosure if the lawyer knows an appropriate governmental authority, the convicted defendant, or the defendant's lawyer already possesses the information.

#### Comment

[1] The integrity of the adjudicative process faces perhaps no greater threat than when an innocent person is wrongly convicted and incarcerated. The special duties of a prosecutor with respect to disclosure of potentially exonerating post-conviction information are set forth in Rule 3.8(g) and (h). However, as noted in the comment to Rule 3.3, Candor Toward the Tribunal, the

special obligation to protect the integrity of the adjudicative process applies to all lawyers. Under Rule 3.3(b), this obligation may require a lawyer to disclose fraudulent testimony to a tribunal even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. Similarly, the need to rectify a wrongful conviction and prevent or end the incarceration of an innocent person justifies extending the duty to disclose potentially exculpatory information to all members of the North Carolina State Bar, regardless of practice area and limited only by paragraph (b). It also justifies the disclosure of information otherwise protected by Rule 1.6. For prosecutors, compliance with Rule 3.8(g) and (h) constitutes compliance with this rule.

[2] This rule may require a lawyer to disclose credible evidence or information, whether protected by Rule 1.6 or not, if the evidence or information creates a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted. To determine whether disclosure is required, a lawyer must not only consider the credibility of the evidence or information and its source, but must also evaluate the substance of the evidence or information to determine whether it creates a reasonable likelihood that the defendant did not commit the offense.

[3] The duty to disclose is qualified in paragraph (b) by legal obligations and client loyalty. A lawyer may not disclose evidence or information if prohibited by law, court order, or the administrative rule that makes the proceedings of the State Bar's Grievance Committee confidential (27 N.C.A.C. Ch. 1B §.0129). The latter prohibition insures a lawyer's response to a grievance does not inadvertently impose a duty to disclose on the lawyers in the State Bar Office of Counsel or on the State Bar Grievance Committee. In addition, paragraph (b) specifies that a lawyer may not disclose evidence or information if doing so would criminally implicate the lawyer's client or the evidence or information was received in a privileged communication between the client and the lawyer. Disclosure is also prohibited when it would result in substantial prejudice to the client's interests. Substantial prejudice to a client's interests includes bodily harm, loss of liberty, or loss of a significant legal right or

CONTINUED ON PAGE 48



## State Bar Swears in New Officers



Merritt



Silverstein



Wilson

### Merritt Installed as President

Charlotte attorney Mark Merritt has been sworn in as president of the North Carolina State Bar. He was sworn in by Chief Justice Mark Martin at the State Bar's Annual Dinner on Thursday, October 27, 2016.

Merritt is a graduate of the University of North Carolina where he was a Morehead Scholar and a member of Phi Beta Kappa. He earned his law degree in 1982 from the University of Virginia and served as editor in chief of the Virginia Law Review. After law school he clerked on the Fifth Circuit Court of Appeals for Judge John M. Wisdom. He returned to Charlotte in 1983 to practice law at Robinson Bradshaw & Hinson. In September 2016 Merritt left Robinson Bradshaw & Hinson to become vice chancellor and general counsel at the University of North Carolina at Chapel Hill.

His professional activities include serving as treasurer and president of the Mecklenburg County Bar, serving on the Board of Directors and as president of Legal Services of Southern Piedmont, and serving as chair of the North Carolina Bar Association Antitrust Section Council. While a State Bar councilor he has served as chair of the Ethics Committee and of the Lawyer Assistance Program. He has served as a member of the Facilities, Grievance, Issues, and Authorized Practice Committees. He also served as chair of the Special Committee on Ethics 2020.

Mark is a member of the American College of Trial Lawyers and the

International Society of Barristers.

He is married to Lindsay Merritt and has three children, Alex, Elizabeth, and Jay.

### Silverstein Elected President-Elect

Raleigh attorney John M. Silverstein has been sworn in as president-elect of the North Carolina State Bar. He was sworn in by Chief Justice Mark Martin at the State Bar's Annual Dinner on Thursday, October 27, 2016.

A native of Charleston, West Virginia, Silverstein is a graduate of Colgate University. He earned his law degree in 1971 from the University of North Carolina School of Law. From 1972-1976 he worked in the Attorney General's Office. Since 1976 he has practiced with the Raleigh firm of Satsky & Silverstein, LLP.

His professional activities include membership in the Wake County Bar Association and the Wake County Real Property Lawyers Association. He served as president of the 10th Judicial District Bar in 1994.

In addition to his professional activities, John is involved in his community. Twice he has served as president of Temple Beth Or and is currently a life trustee. He is on the Lineberger Comprehensive Cancer Center Board of Visitors, was chair of the Raleigh Board of Adjustment, and was a youth soccer coach.

While a State Bar councilor he has served as chair of the Facilities Committee, Attorney/Client Assistance Committee, and the Grievance Committee.

In 2002 John was a recipient of the Wake County Bar Association's Joseph Branch Professionalism Award. He has also received the President's Award and the Outstanding Volunteer Lawyer Award.

He is married to Leslie, and they have two daughters, Amy and Elizabeth.

### Wilson Elected Vice-President

Winston-Salem attorney G. Gray Wilson has been sworn in as president of the North Carolina State Bar. He was sworn in by Chief Justice Mark Martin at the State Bar's Annual Dinner on Thursday, October 27, 2016.

Wilson is a cum laude graduate of Davidson College, and earned his law degree from Duke University School of Law. He was admitted to the practice of law in North Carolina in 1976. He is currently a senior partner at Wilson & Helms.

Wilson's professional activities include serving as a district councilor for the Forsyth County Bar Association. He also served the North Carolina Bar Association on its Board of Governors, and was president from 2004-2005. Since 2006 he has served on the Board of Directors of Lawyers Mutual Liability Insurance Company, and has been chair of the board since 2015.

Wilson was a North Carolina State Bar Councilor from 2007-2015, during which time he was vice-chair of the Grievance II Subcommittee, and chair of the Board of Paralegal Certification and Publications Committee.

In addition to his numerous professional activities, Wilson is also involved with his community, serving his church as a deacon, and working with the Old Hickory Council of the Boy Scouts of America. ■

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## Proposed Amendment (cont.)

interest such as the right to effective assistance of counsel or the right against self-incrimination.

[4] When disclosure of information protected by Rule 1.6 is permitted, the lawyer should counsel the client confidentially, advising the client of the lawyer's duty to disclose and, if possible, seeking the client's cooperation. ■

## Resolution of Appreciation for Margaret M. Hunt

WHEREAS, Margaret M. Hunt was elected by her fellow lawyers from Judicial District 29 in January 2005 to serve as their representative in this body. Thereafter, she was elected for three successive three-year terms as councilor; and

WHEREAS, in October 2013 Mrs. Hunt was elected vice-president, and in October 2014 she was elected president-elect. On October 22, 2015, she was sworn in as president of the North Carolina State Bar; and

WHEREAS, during her service to the North Carolina State Bar, Mrs. Hunt has served on the following committees: Ethics, Grievance, Administrative, Appointments Advisory, Executive, Disciplinary Advisory, Issues, Facilities, Finance and Audit, Legislative, Program Evaluation, Attorney/Client Assistance, the Special Committee to Study Ethics 20/20, and the Special Committee to Review AP Advisory Opinion 2002-1; and

WHEREAS, during her year as president, the State Bar faced extensive criticism from members of the criminal defense bar, among others, in regard to disciplinary prosecutions of three highly respected practitioners of criminal law. Although many of these criticisms were ill-founded, Margaret Hunt understood that the agency's critics were sincere, were deserving of a respectful hearing, and might very well be helpful in improving the State Bar's disciplinary practices and procedures. Accordingly, she convened two public meetings at which the facts and circumstances surrounding the cases at issue were thoroughly and frankly discussed. These meetings had the salutary effect of clearing the air, demonstrating the State Bar's good faith and the integrity of its disciplinary program, and suggesting ways in which the credibility of self-regulation could be enhanced; and

WHEREAS, Margaret Hunt has, throughout her tenure as an officer of the State Bar and particularly as president, striven to enhance understanding and appreciation of the State Bar and its regulatory mission among members of the public and the profession. To that end, she has worked tirelessly to bolster the agency's external communications. Under her leadership the State Bar has established its identity and increased its outreach through the use of social media. In addition, the State Bar has, by renovating and modernizing its website, become more transparent and interactive. Thanks to President Hunt, complaints can now be filed online and disciplinary records can be searched through the Internet with relative ease. Finally, Margaret Hunt has established a Speakers Bureau, ensuring that the State Bar's message will never fail for want of a messenger; and

WHEREAS, although Margaret Hunt has greatly enhanced the State Bar's means of communication, she has been even more effective as a personal communicator. She has told the State Bar's story and celebrated its accomplishments with zeal and ubiquity. No one has ever traveled more extensively or addressed more people personally as State Bar president than Margaret Hunt; and

WHEREAS, as president of the State Bar, Margaret Hunt has been wonderful to work with and for. She has facilitated thoughtful and reality-based consensus among the State Bar's leadership, she has been enthusiastically supported and admired by the State Bar's staff, and she has personified the agency in a most appealing and credible fashion among the people of North Carolina.

NOW, THEREFORE, BE IT RESOLVED that the council of the North Carolina State Bar does hereby publicly and with deep appreciation acknowledge the strong, effective, and unselfish leadership of Margaret M. Hunt, and expresses to her its debt for her personal service and dedication to the principles of integrity, trust, honesty, and fidelity.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the Annual Meeting of the North Carolina State Bar and that a copy be delivered to Margaret M. Hunt.

## Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, Richard A. Vinroot, addressed the attendees, and each honoree was presented a certificate by the president of the State Bar, Margaret M. Hunt, in recognition of his or her service. After the ceremonies were concluded, the honorees in attendance sat for the photograph below. ■



*First row (left to right):* Charles Brown, Robert Johnson, Fenton Erwin, Ronnie Pruett, Ray Vallery, Maurice Horne, Louis Trosch, Robert Cordle, Charles Hubbard, Doris R. Bray, Eugene Thompson, Harold Greeson *Second row (left to right)* Tom M. Grady, Ron Aycock, Charles F. Powers, E.D. Gaskins, Edwin L. Johnson, William K. Davis, C. Penn Craver Jr., Charles P. Younce, P. Wayne Robbins, William R. Hoyle, Steve Griffith, Jerry S. Weston *Third row (left to right)* Harold E. Russell Jr., Eugene Hafer, Frederick J. Sternberg, Arthur J. Donaldson, John J. Doyle Jr., Thomas J. White III, Joshua J. Morton Jr., Richard A. Vinroot, Eric C. Michaux, Thomas A. Gardner

## Client Security Fund Reimburses Victims

At its October 27, 2016, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$9,799.67 to eight applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$350 to a former client of Garey M. Ballance of Warrenton. The board determined that Ballance was retained to get a client's driver's license restored. Ballance failed to provide any valuable legal services for the fee paid. Ballance was disbarred on November 13, 2015. The board previously reimbursed seven other Ballance clients a total of \$3,473.

2. An award of \$1,700 to a former client of Garey M. Ballance. The board determined that Ballance was retained to seek relief on a client's behalf for two 1990 felony convictions by filing a motion for appropriate relief. Ballance failed to provide any valuable legal services for the fee paid and failed to refund the \$200 filing fee.

3. An award of \$363 to a former client of Garey M. Ballance. The board determined that Ballance was retained to handle a client's speeding ticket. Ballance failed to provide any valuable legal services for the fee paid and failed to refund the amount collected for payment of costs.

4. An award of \$200 to a former client of Garey M. Ballance. The board determined that Ballance was retained to handle a client's speeding ticket. Ballance failed to provide any valuable legal services for the fee paid.

5. An award of \$720 to a former client of Garey M. Ballance. The board determined that Ballance was retained to handle a client's speeding tickets in two counties. Ballance failed to provide any valuable legal services for the fee paid and failed to refund the amount collected for payment of costs.

6. An award of \$1,300 to a former client of

CONTINUED ON PAGE 60



# Law School Briefs

## Campbell University School of Law

**Community Law Clinic opens**—Campbell Law ceremonially cut the ribbon and welcomed public and civic leaders to its Community Law Clinic on September 23. The celebratory event took place at the clinic’s home base, the historic Horton-Beckham-Bretsch House in downtown Raleigh.

The Community Law Clinic provides backup legal services free of charge to area nonprofit agencies and their clients when legal issues complicate such important steps as acquiring housing or employment. The clinic supports organizations like StepUp Ministry, Urban Ministries of Wake County, and the Raleigh Rescue Mission among others. A grant of \$150,000 from the Z. Smith Reynolds Foundation that has been matched by other donors is making this effort possible. Ashley Campbell is the clinic director.

**Connections receives ABA Gambrell Award**—Campbell Law Assistant Dean of External Relations Megan West Sherron accepted a 2016 E. Smythe Gambrell Professionalism Award from the American Bar at the organization’s annual meeting on August 6. Sherron accepted the award on behalf of Campbell Law Connections, the mentorship program which she oversees.

Connections exposes students and newly minted attorneys to valuable learning opportunities and experiences by partnering them with practicing legal professionals.

**Campbell Law launches 3+3 program**—Campbell Law now has an accelerated dual degree option for students seeking to earn undergraduate and juris doctor degrees in record time. Under the 3+3 accelerated dual degree program with Campbell University students can earn both degrees in six years rather than seven.

Students enrolled in the 3+3 accelerated dual degree program are enrolled in undergraduate courses throughout their first three years of studies. After successfully completing 104 hours they matriculate into the law school as first year students. Twenty hours of law school classes will then count towards the undergraduate degree as free electives, ultimately satisfying the requirements for a bachelor’s degree.

## Charlotte School of Law

Student Bar Association and Black Law Students Association (BLSA) modeled the role of lawyer as social change agent and hosted a town hall on October 3rd entitled: We Need Change! The event was held in response to the civil unrest in Charlotte that followed the death of Keith Scott on September 20, 2016. Community leaders Minister Corine Mack, president of NAACP Charlotte-Mecklenburg branch); Ms. Aisha Dew, NC state director for Bernie 2016; and Attorney Andrew Fede, community activist, participated. Event facilitator Ahmed Toure (3L) led the diverse group in attendance through a unique opportunity for dialogue, sharing, and learning, with the ultimate goal of BLSA submitting a letter to Charlotte city leaders highlighting key town hall topics and suggested actions aimed at healing the city.

Attorneys from Election Protection Initiative, a nonpartisan coalition formed to ensure that all voters have an equal opportunity to participate in the political process, were on campus in September to address students and recruit them to serve as poll monitors to

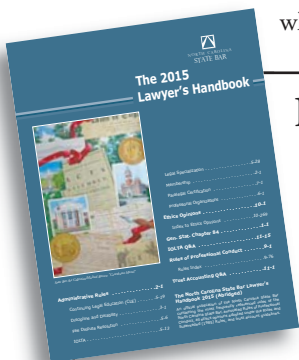
help investigate reports of voter suppression and threats to election integrity.

For the third consecutive year, the Charlotte School of Law *Pro Bono* and Community Service Programs were named to the President’s Higher Education Community Service Honor Roll under the Economic Opportunity Category by the Corporation for National and Community Service. This recognition signifies the highest federal recognition that higher education institutions can receive for community service, service-learning, and civic engagement. CharlotteLaw is the only law school in North Carolina to have received this honor for three consecutive years. CharlotteLaw’s recognition in the economic opportunity category highlights the law school’s *pro bono* student work that has benefited the financial well being and security of economically disadvantaged individuals. Since the law school’s founding, students have performed more than 150,000 *pro bono* hours in Charlotte and beyond.

## Duke Law School

**Duke Law takes leadership role in e-discovery study and training**—Duke Law’s Center for Judicial Studies has taken over Electronic Discovery Reference Model (EDRM), a well-known organization that develops standards, guidelines, and professional resources for e-discovery. The move positions Duke Law to explore new opportunities for preparing law students to work in an increasingly technology-fueled industry and partnering with law firms, technology vendors, government agencies, and the judiciary to study e-discovery and information governance issues. (Read more at [law.duke.edu/news/duke-law-acquires-e-discovery-standards-organization-edrm/](http://law.duke.edu/news/duke-law-acquires-e-discovery-standards-organization-edrm/).)

**Graduates with Duke’s dual degree in law and entrepreneurship find hiring edge**—Duke Law’s first graduates to earn an LLM in law and entrepreneurship concurrently with their JDs all secured employment with major global law firms by the time they were hooded in May. Duke established the JD/LLMLE program in 2013 to prepare students to advise,



## Preorder the 2017 Lawyer's Handbook

You can order a hard copy by submitting an order form (found on the State Bar’s website at [bit.ly/2ejzJwD](http://bit.ly/2ejzJwD)) by March 17, 2017. The digital version will still be available for download and is free of charge.

create, and lead entrepreneurial ventures. Students complete requirements for both degrees in three years of study plus a start-up immersion experience during the first half of their 1L summer. They can elect to participate in a practicum with a start-up company, counsel early-stage companies in Duke Law's Start-Up Ventures Clinic, and access special networking functions in the Research Triangle entrepreneurial community.

The success of the JD/LLMLE graduates in the job market capped a strong year of hiring for Duke Law graduates overall. As of March 15, 93% of students in Duke Law's Class of 2015 were employed in long-term, full-time positions that required passage of the bar exam or were "JD preferred." Duke ranked fourth among all US law schools on that measure, according to an analysis by *The National Law Journal*. Sixty-seven percent of 2015 graduates were working for law firms with at least 101 attorneys, and 15 percent were serving in judicial clerkships.

### Elon University School of Law

*American Bar Association leadership visit*—ABA President Linda Klein visited Elon Law on October 10 for a special luncheon with some of the school's top students and legal leaders from the North Carolina Bar Association and the Greensboro Bar Association. Klein is the first sitting ABA president to visit the law school since it first opened in 2006.

*Access Group grant*—The Access Group Center for Research & Policy Analysis awarded Elon Law a grant of more than a quarter million dollars to assess enhancements to the school's curriculum. Researchers will collect and analyze admissions data, test scores and grades, satisfaction surveys, bar passage, and job placement data to create a clearer picture of the way prospective students learn about the law school and, once enrolled, how the curriculum and other resources affect their learning success.

*Leadership in the Law Award*—A distinguished North Carolina jurist received Elon Law's highest professional honor on September 23 at an annual leadership event led by *North Carolina Lawyers Weekly* in partnership with Elon Law. Patricia Timmons-Goodson, a former associate justice of the North Carolina Supreme Court now serving as vice chair of the US Commission on Civil Rights, received Elon Law's Leadership in the Law Award during a banquet in Raleigh

## In Memoriam

**Rion C. Brady**  
Archdale, NC

**Glenn W. Brown**  
Waynesville, NC

**James R. Bruner**  
Greenville, NC

**Beth M. Bryant**  
Nebo, NC

**David Robert Crawford**  
Winston-Salem, NC

**William Ayden Creech**  
Raleigh, NC

**James Albert Harrill Jr.**  
Winston-Salem, NC

**Joe Cockrill Jauregui**  
Davidson, NC

**Gary K. Joyner**  
Raleigh, NC

**Richard Alexander Lucey**  
Charlotte, NC

**Robert J. Miller II**  
Raleigh, NC

**James D. Monteith**  
Matthews, NC

**Amanda Marie Patty**  
Greensboro, NC

**Theodore C. Pruett Jr.**  
Dallas, TX

**Anne Taylor Reeves**  
Matthews, NC

**Randall C. Scarborough**  
Raleigh, NC

**James Rudolph Streeter**  
Greenville, NC

**James Allen Vinson III**  
Goldsboro, NC

**William Fletcher Womble**  
Winston-Salem, NC

**Reginald Lee Yates**  
Charlotte, NC

**Terri Lynn Young**  
Charlotte, NC

attended by more than 200 of the state's top legal leaders, practitioners, and scholars.

*Honored for advocacy*—The American Immigration Lawyers Association presented Elon Law with a *Pro Bono* Champion Award in Las Vegas at the association's 2016 annual conference. The AILA's Carolinas Chapter nominated Elon Law's Humanitarian Immigration Law Clinic for the award after a 2015 spring break advocacy trip by students to a civil immigration detention center in Texas where noncitizen women and children are confined during federal immigration proceedings.

### North Carolina Central School of Law

*NCCU School of Law hosts delegation from Kyrgyzstan*—On April 14, 2016, four delegates from the Central Asian country of Kyrgyzstan visited. They were participating in the US Department of State's International Visitor Leadership Program (IVLP). The delegates' interests focused around civil society, rule of law, and human rights.

The delegation included Mr. Adilet Eshenov, head of the Coalition for

Democracy and Civil Society NGO; Mr. Ulan Dastan Uulu, attorney and director of the Adilet Legal Clinic; Ms. Altynai Isaeva, attorney and civil liberties expert with the Internews-funded Media Policy Center; and Mr. Renat Samudinov, head of the Youth Wing of the SDPK Political Party.

The Kyrgyzstan delegation selected this site because its mission and curricula align with the delegates' desire to learn about United States democracy, rule of law, and civic freedoms. The guests met with students and faculty engaged in human rights work—public interest law, Moral Monday protests, and community advocacy. The delegation visited classes to discuss the American legal process and access to justice.

*NCCU School of Law appoints Charles Hamilton Houston endowed chair*—Barbara R. Arnwine was appointed as the Fall 2016 Charles Hamilton Houston endowed chair. Professor Arnwine is widely known as a civil and social justice activist. She is a brilliant legal strategist who battles current voter ID laws that suppress minority, senior, and student voting rights, a key legal issue in the state of

North Carolina.

Professor Arnwine's appointment furthers an established legacy of strong scholarly leaders selected to serve as NCCU School of Law's Charles Hamilton Houston endowed chair. She brings a unique wealth of knowledge in many areas of the law—employment, fair housing, education, environmental justice, and voting rights. Under her guidance, students will graduate with a deeper awareness of critical social justice issues, and will venture out more “practice-ready.”

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### University of North Carolina School of Law

*Thirteen alumni honored with NC Lawyers Weekly 2016 Leaders in the Law Award*—North Carolina Lawyers Weekly's sixth annual Leaders in the Law awards celebration recognized 36 lawyers—13 of which attended Carolina Law—as the most influential individuals in the state's legal community. UNC School of Law alumni recipients include Leah Michelle Broker '92, Karen Chapman '05, Jeffrey Davis '03, Judge Martha Geer '83, Nancy Grace '96, Mark Johnson '01, Carlos Mahoney '99, Eric Mills '01, LeeAnne Quattrucci '06, Jim Slaughter '89, M. Gray Styers Jr. '89, Louis Trosch Jr. '92, and Frank Whitney '87.

*North Carolina Association of Women Attorney's 2016 awards*—NCAWA recognized Mackenzie Willow-Johnson 3L as one of seven individuals to receive the 2016 Sarah Parker '69 Scholarship Award, which grants \$500 scholarships to female student leaders from North Carolina's law schools who encourage female participation in the judicial

system and public offices, and promote women's rights under the law. NCAWA also recognized Beth S. Posner '97, UNC Clinical assistant professor of law, Christopher Brook '05, legal director of the ACLU of NC, and Julie Klipp Nicholson '06, coordinator of the Buncombe County Family Justice Center, as the 2016 recipients of the Gwyneth B. Davis Award.

*CE3: effecting environmental change through scholarship*—The UNC School of Law Center for Climate, Energy, Environment, and Economics (CE3), which provides advanced student education and legal examination of issues surrounding the law of climate, energy, environment, and economic development, awarded Kristin Brunn 1L the first full-tuition academic law scholarship in the country for a student to study the intersection between environmental and energy law. CE3, which recently named new Assistant Professor Jonas Monast as co-director, has a goal to assist in molding future energy, environment, climate, and development policies while providing unique educational experiences for Carolina Law students.

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### Wake Forest University School of Law

Wake Forest Law's National and AAJ trial team has once again been invited to compete in the Tournament of Champions (TOC), hosted by the University of California, Berkeley, School of Law. The 2016 tournament began October 20 in San Francisco, California. Only 16 teams from across the country were invited to the tournament.

Selections are based upon a three-year performance at both the National Trial

Competition and the American Association of Justice Student Trial Advocacy Competition, according to William H.D. Fernholz, director of the 2016 NITA Tournament of Champions.

This invitation is a direct result of the efforts of the trial team coaches—Professors Mark Boynton (JD '97) and Matthew Breeding (JD '06) along with Stephanie Reese (JD '96) and Katie King (JD '12)—says Professor Carol Anderson, director of the Litigation Externship Clinic. The coaches consistently maintain a focus on the individual, one that encourages each student to discover their own voice and style through practical skill sets because they ultimately want to produce strong litigators, not just mock trial competitors.

Wake Forest Law students Ethan Clark, Shayn Fernandez, and Brian Kuppelweiser were the overall team champions in the inaugural 2016 Wake Forest Transactional Law Competition, according to co-organizers Darryl Walton and Ben Westcott.

“I'm very proud of all the hard work Ben and Darryl put into this to make it happen,” said competition adviser Professor Harold Lloyd. “I'm also very happy to see Wake Forest Law at the forefront of adding a much-needed transactional balance to the traditional litigation focus of many law schools.”

The negotiation, or final round, was held in the Law Commons of the Worrell Professional Center on Saturday, October 15. The competition included 14 teams of second- and third-year Wake Forest Law students. Area practitioners and Wake Forest faculty members judged the competition. ■

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## John B. McMillan Distinguished Service Award

### Justice Willis P. Whichard

Justice Willis P. Whichard received the John B. McMillan Distinguished Service Award on September 15, 2016, at the Durham County Bar Association luncheon. North Carolina State Bar Vice-President John M. Silverstein presented the award.

After 15 years as a practicing attorney, Justice Whichard was elected to the North Carolina House of Representatives and then to the North Carolina Senate. In 1980 he

was appointed to the North Carolina Court of Appeals, where he served until he became a justice of the North Carolina Supreme Court in 1986. Judge Whichard has the distinction of being the only person in the history of North Carolina who has served in both the state House and the state Senate, and also sat on both the North Carolina Court of Appeals and the North Carolina Supreme Court.

Justice Whichard has served as a adjunct

professor at UNC School of Law and as adjunct instructor of business law at Duke University. Justice Whichard retired from the Supreme Court in 1998 and served as dean of the Norman Adrian Wiggins School of Law at Campbell University from 1999 until his retirement as dean in 2006.

Justice Whichard has received numerous awards, including the Distinguished Alumnus Award and the Distinguished Service Medal from the University of North



Carolina at Chapel Hill, the Outstanding Appellate Judge Award from the North Carolina Academy of Trial Lawyers, the Christopher Crittenden Award from the North Carolina Literary and Historical Association, and the Outstanding Legislator Award from the NC Academy of Trial Lawyers.

Justice Whichard has made significant contributions to the legal profession and community and is a deserving recipient of the John B. McMillan Distinguished Service Award.

### Howard L. Gum

On October 12, 2016 Howard L. Gum received the John B. McMillan Distinguished Service Award. North Carolina State Bar President Margaret M. Hunt presented the award.

Howard has devoted the majority of his professional life to the betterment of the legal profession in North Carolina and beyond.

Since its inception Howard has been active in the Family Law Section of the North Carolina Bar Association. In 1987 the North Carolina Board of Legal Specialization formed the Family Law Specialty Committee for the purpose of establishing a specialty certification in family law. Howard was chair of the initial committee, and continued to serve as chair for six years, during which time the standards for certification in family law were developed.

In 1996 Howard was appointed to the North Carolina Board of Legal Specialization. He served as both vice chair and chair of the Board of Legal Specialization through June 2001. In 2006 the North Carolina Board of Legal Specialization established the Howard L. Gum Award, which is awarded to a specialty committee member annually for exemplary service and commitment to excellence.

In 2000 Howard was appointed by the chief justice of the North Carolina Supreme Court to serve on committees of the North Carolina Administrative Office of Courts. Howard was reappointed in 2001 and again in 2004.

Howard was elected as the 28th Judicial District councilor to the North Carolina State Bar in 2006. He served on the Authorized Practice Committee, the Grievance Committee, and the Executive Committee. Howard also previously served on both the Attorney Client Assistance Committee and

the Administrative Committee.

Howard is a fellow in the American Academy of Matrimonial Lawyers. He has served as treasurer, president-elect, and president of the North Carolina Chapter of the American Academy of Matrimonial Lawyers.

Howard has served on the North Carolina Bar Association's Lawyer Effectiveness and Quality of Life Committee and on the Board of Directors of North Carolina BarCARES, Inc.

Howard has consistently counseled younger lawyers both within and outside of his position as State Bar Councilor. For many years he has devoted time to serving those unable to afford legal services through the local Pisgah Legal Services program.

He has served with honor and distinction for the furtherance of the profession, making him a role model and a deserving recipient of the John B. McMillan Distinguished Service Award.

### Robert C. Cone

Robert C. Cone ("Bob") received the John B. McMillan Distinguished Service Award on October 20th at the Greensboro County Bar luncheon. Margaret Hunt and John Silverstein presented the award.

Bob earned his undergraduate degree and his law degree from the University of North Carolina at Chapel Hill, where he was a Morehead-Cain Scholar. He was admitted to practice in North Carolina in 1978.

Throughout his legal career and his life of service, Bob has demonstrated his commitment to the principles and goals stated in the Preamble to the Rules of Professional Conduct, and he has put those principles and goals into practice. He has done so by representing his clients with exemplary skill and professionalism, by making valuable contributions to the legal profession, and by devoting lifelong service to his community.

Bob has practiced law for over 35 years: seven years with the firm of Boone, Higgins, Chastain & Cone and 28 years with the firm of Tuggle Duggins.

Bob has served the legal profession in multiple capacities. As a State Bar councilor, he was a member of various committees including the Grievance, Legislative, and Executive Committees.

Bob has chaired the UNC Law Foundation, served as a preceptor at Elon Law School, served as a member of the Greensboro Bar Association's Board of

Directors and as president, and chaired the Fee Dispute Resolution Committee of the GBA.

Bob helped to organize and lead the Guilford Inn of Court that promotes ethics, civility, and excellence within the Bar, and served as treasurer and master of the bench.

He has performed *pro bono* service as a volunteer with the Lawyer on Line Legal Service Program and was a co-founder of the Herb Falk Society of the Greensboro Bar Association, which promotes *pro bono* service by Greensboro Bar Association members.

Bob was the recipient of the Whitney M. Young Jr. Service Award from the Boy Scouts of America for his work in promoting diversity and bringing scouting to lower-income neighborhoods in Greensboro, and of the Centennial Award that is presented jointly by the Greensboro Bar Association and the NCBA for exemplary community service.

Bob has also contributed countless hours to Cone Health, a private, not-for-profit health care delivery system in Greensboro, having served on the Board of Trustees for 20 years and as chair of the foundation where he worked tirelessly to assure that the marginalized, underserved, and others had access to appropriate health care.

Throughout his career Bob has used that unique body of knowledge and skills that all lawyers possess to help his clients resolve legal problems, to help in the self-regulation and improvement of the legal profession, to actively mentor young lawyers, to serve as a role model for all lawyers, and to be actively engaged in the civic and philanthropic life of his community.

### Seeking Award Nominations

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

Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, [nbar.gov](http://nbar.gov). Please direct questions to Suzanne Lever, [SLever@nbar.gov](mailto:SLever@nbar.gov) ■

# February 2017 Bar Exam Applicants

The February 2017 bar examination will be held in Raleigh on February 21 and 22, 2017. Published below are the names of the applicants whose applications were received on or before October 31, 2016. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Lee A. Vlahos, Executive Director, Board of Law Examiners, 5510 Six Forks Rd., Suite 300, Raleigh, NC 27609.

<b>Andrew Abbasi</b> Charlotte, NC	Durham, NC	<b>Brittney Burch</b> Greensboro, NC	HighPoint, NC	<b>Joshua Dingle</b> Blythewood, SC
<b>Jessica Alatorre</b> Charlotte, NC	<b>Omar Bashi</b> Raleigh, NC	<b>Christopher Burgher</b> Hillsborough, NC	<b>Stella Chukwueme</b> State College, PA	<b>Bertha Dixon</b> Browns Summit, NC
<b>Knatarsha Allen</b> Durham, NC	<b>Starr Battle</b> Raleigh, NC	<b>Shante Burke-Hayer</b> Charlotte, NC	<b>Patrice Clark</b> Charlotte, NC	<b>Greg Dixon</b> Elizabeth City, NC
<b>Matthew Allen</b> Asheville, NC	<b>David Bazylewicz</b> Somerville, MA	<b>Kirstyn Burleson</b> Charlotte, NC	<b>Kevin Cleys</b> Chapel Hill, NC	<b>Julie Dogan</b> Bermuda Run,, NC
<b>Dawnwin Allen</b> Charlotte, NC	<b>Jeffrey Beauchesne</b> Astoria, NY	<b>Jared Burtner</b> Apex, NC	<b>Pamela Collins</b> Durham, NC	<b>Joseph Donnan</b> Cary, NC
<b>Katherine Allen</b> Tarboro, NC	<b>Leslie Bennett</b> Augusta, GA	<b>Gregory Buscemi</b> Wrightsville Beach, NC	<b>Paul Comer</b> Charlotte, NC	<b>Camille Doom</b> Charlotte, NC
<b>Allison Allen</b> Charlotte, NC	<b>Alice Bennett</b> Augusta, GA	<b>Donald Butler</b> Monroe, NC	<b>Cheryl Comer</b> Gastonia, NC	<b>Kristina Drozdowski</b> Raleigh, NC
<b>Kelvin Allen</b> Durham, NC	<b>Victoria Bennett</b> Raleigh, NC	<b>Matthew Butler</b> Waxhaw, NC	<b>Ian Conn</b> Harrisburg, NC	<b>Debra Duncan</b> Monroe, NC
<b>Fernando Alvarez-Perez</b> Durham, NC	<b>Ruth Bernard</b> Cornelius, NC	<b>Justin Byrd</b> Greensboro, NC	<b>Birshari Cooper</b> Raleigh, NC	<b>Sharon Dunmore</b> Greensboro, NC
<b>Khawaja Amin</b> High Point, NC	<b>Denise Bernard</b> Charlotte, NC	<b>Anil Caleb</b> Fayetteville, NC	<b>David Cox</b> Charlotte, NC	<b>Keith Dunsmore</b> Mint Hill, NC
<b>Denise Anderson</b> Concord, NC	<b>Kevona Bethune</b> Charlotte, NC	<b>Nicole Canguesta</b> Charlotte, NC	<b>Joshua Cox</b> Baton Rouge, LA	<b>Kimberleigh Dyess</b> Goldsboro, NC
<b>Sharlene Anderson</b> Pinehurst, NC	<b>Kimberley Beyer</b> Glenville, NC	<b>Natashia Cannedy</b> Kings Mountain, NC	<b>Hamilton Craig</b> New York, NY	<b>Carlosha Easton</b> Durham, NC
<b>Charles Anderson</b> Raleigh, NC	<b>Elizabeth Bhuta</b> Holly Springs, NC	<b>Rocco Carbone</b> St. Augustine, FL	<b>Ashley Crawley</b> Winston-Salem, NC	<b>Emily Edwards</b> Charlotte, NC
<b>Danielle Anderson</b> Fayetteville, NC	<b>Corey Biazzo</b> Mint Hill, NC	<b>Richard Carey</b> Carrboro, NC	<b>Robert Creech</b> Newnan, GA	<b>Ashley Edwards</b> Durham, NC
<b>Marios Antoniou</b> Mooresville, NC	<b>Brandye Birdsall</b> Elizabeth City, NC	<b>Jennifer Carpenter</b> Wilmington, NC	<b>Nathan Creger</b> Durham, NC	<b>Christina Ellison</b> Raleigh, NC
<b>Rosa Antunez</b> Durham, NC	<b>Jennifer Blakeney</b> Wingate, NC	<b>Tevin Carr</b> Greensboro, NC	<b>Christopher Criner</b> Lewisville, NC	<b>Hannah Emory</b> Durham, NC
<b>Benjamin Apple</b> Chapel Hill, NC	<b>Charles Blanton</b> Wilmington, NC	<b>Dione Carroll</b> Aiken, SC	<b>Sharon Cripe</b> Parkton, NC	<b>Allen Ervin</b> Virginia Beach, VA
<b>Jason Arter</b> Salisbury, NC	<b>Brandon Boykin</b> Raleigh, NC	<b>Eric Carter</b> Jacksonville, FL	<b>Thomas Cull</b> Greenville, SC	<b>Ryan Evans</b> Gastonia, NC
<b>Nana Asante</b> Durham, NC	<b>Brittany Brady</b> Charlotte, NC	<b>Christa Carter</b> Jamestown, NC	<b>Constance Daly</b> Clyde, NC	<b>Matthew Everhart</b> Charlotte, NC
<b>Leah Ash</b> Charlotte, NC	<b>Alexandra Braverman</b> Charlotte, NC	<b>Yvonne Carver</b> Winston-Salem, NC	<b>Mollie Daniel</b> Wake Forest, NC	<b>Jennifer Farrell</b> Greensboro, NC
<b>Taimoor Aziz</b> Bunnlevel, NC	<b>Danielle Brent-Bownes</b> Greensboro, NC	<b>Kerry Cassidy</b> Raleigh, NC	<b>Jason Davis</b> Raleigh, NC	<b>Deirdre Farrington</b> Crawfordville, FL
<b>David Bain</b> Oceanside, CA	<b>Amanda Brigman</b> Huntersville, NC	<b>Manuel Davis</b> Rocky Mount, NC	<b>James Davis</b> Davidson, NC	<b>Danielle Feller</b> Mooresville, NC
<b>Erin Ball</b> Charlotte, NC	<b>Taryn Bristol</b> Charlotte, NC	<b>James Davis</b> Davidson, NC	<b>Leroy Davis</b> Kernersville, NC	<b>Monique Ferebee</b> Charlotte, NC
<b>Thanasis Ballas</b> Clemmons, NC	<b>Thelma Brooks</b> Charlotte, NC	<b>James Chandler</b> Sumter, SC	<b>Aundrea Dean</b> Charlotte, NC	<b>Raquel Fernandez</b> High Point, NC
<b>Mark Barber</b> Killeen, TX	<b>Blakeney Brown</b> Gastonia, NC	<b>Megan Chavis</b> Charlotte, NC	<b>Carolyn Detmer</b> Durham, NC	<b>Tonya Fewell</b> Fayetteville, NC
<b>Joshua Barfield</b> Sharpsburg, NC	<b>Corey Brown</b> Arlington, VA	<b>Lianna Chayoun</b> Charlotte, NC	<b>Iris DeWitt</b> Charlotte, NC	<b>Maggie Fishell</b> Gastonia, NC
<b>Artrice Barksdale</b> Charlotte, NC	<b>Kenyada Brown</b> Charlotte, NC	<b>Taren Cherry</b> Durham, NC	<b>Ashton Dillard</b> Statesville, NC	<b>Trina Fisher</b> Raleigh, NC
<b>Ashley Bartolucci</b> Charlotte, NC	<b>Christopher Bryant</b> Charlotte, NC	<b>Meredith Chilausky</b> Durham, NC	<b>Peter Dillard</b> Raleigh, NC	<b>Darrilyn Fisher</b> Raeford, NC
<b>Julia Bartz</b>	<b>James Buchanan</b> Charlotte, NC	<b>Nalina Chinnasami</b>		<b>Kara Fletcher</b>

Statesville, NC  
**Sidney Fligel**  
Charlotte, NC  
**Chelsea Flynt**  
Goldsboro, NC  
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Durham, NC  
**Mason Forrest**  
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**Joshua Franks**  
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**Jennifer Fredette**  
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**Jeremy Friedman**  
Parkland, FL  
**Jenifer Galloway**  
Charlotte, NC  
**Latoya Gardner**  
Charlotte, NC  
**Lisa Garner**  
Greensboro, NC  
**Jonah Garson**  
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**Tyesha Gary**  
Charlotte, NC  
**Ryan Geibl**  
Charlotte, NC  
**Christian Gerencir**  
Charlotte, NC  
**Caroline Gieser**  
Charlotte, NC  
**Charmaine Gilmore**  
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**Kathleen Goeller**  
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**Charnique Green**  
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**Niccolle Gutierrez**  
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**Gloria Gyamfi**  
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**Rebecca Hammond**  
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**Camekia Hammond**  
Charlotte, NC  
**Zoe Hansen**  
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**Parker Harroff**  
Charlotte, NC

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**Kia Harvey**  
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**Mirsada Haticic**  
Gastonia, NC  
**Tyler Hawn**  
Charlotte, NC  
**Amanda Hayes**  
Charlotte, NC  
**Mengfan He**  
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Winston-Salem, NC  
**Sean Helle**  
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**Christopher Heller**  
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Charlotte, NC  
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**Emily Morrison**



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**Jennifer Stevens**  
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**Matthew Stone**  
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**Ryan Stowe**  
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**Megan Strickland**  
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**Marc Subin**  
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**Teesta Sullivan**  
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**Jacob Sullivan**  
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**Archie Sumpter**  
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**Christine Sutherland**  
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**Lalisa Sweat**  
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**William Taylor**  
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**Jaimie Terry**

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**Brian Walker**  
 Wilmington, NC  
**Elise Wall**  
 Pisgah Forest, NC  
**Candace Walton**  
 Charlotte, NC  
**Ashwini Kumar Wankhede**  
 Greensboro, NC  
**Megan Ware-Fitzgerald**  
 Huntington, WV  
**Robin Washington**  
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CONTINUED ON PAGE 61

# Annual Reports of State Bar Boards

## Board of Legal Specialization

*Submitted by Laura D. Burton, Chair*

Last year I informed you that my immediate predecessor as board chair, Jim Angell, had set visionary goals for the specialization program including enhanced efforts to reach the benchmark of 1,000 certified specialists. I am pleased today to report that there are now over 1,000 North Carolina State Bar board certified legal specialists—1,008 to be exact. After the administration of the certification examinations this month and next, the board anticipates that the number of North Carolina board certified lawyers will increase to over 1,050 or 6% of the active members of the State Bar who are eligible for certification.

The State Bar's specialization program certifies lawyers in 12 specialties including utilities law, which was approved by the council as a new specialty last year. In the spring we received 96 applications from lawyers seeking certification. To give you a sense of the work involved in processing specialization applications: close to 1,000 peer review forms were sent to peer references by our diligent and incredibly well-organized Administrative Assistant Lanice Heidbrink, and 640 completed peer review forms were returned and evaluated by the 94 volunteer members of the specialty committees. Of the 2016 applicants, five qualified for application scholarships as public interest lawyers and 75 of the applicants satisfied the substantial involvement, CLE, and peer review standards for certification and were approved to sit for the specialty exams. In addition, the 12 members of the Utilities Law Specialty Committee who drafted and will grade the specialty exam will be certified, in accordance with board rules, upon the completion of the exam administration.

The specialization exams are being administered this fall online utilizing ExamSoft, an efficient, secure, cloud-based software that is used by many law schools and on most bar exams. At this juncture, the benefits of ExamSoft for our specialization program are threefold: the ability to administer our exams online; the ability to “bank” exam questions to facilitate the creation of future exams; and the

ability to more readily perform statistical analyses of exam data. These benefits will help to ensure that our specialization exams are valid and reliable. In the future, the use of ExamSoft may enable the board to offer “on-demand” examinations throughout the year. Through extraordinary effort, the specialization program's Assistant Director Denise Mullen and Special Projects Coordinator Justin Edmonson tackled the difficult project of learning the software and converting all of our existing exams to ExamSoft in record time and without complaint.

This summer the board was asked by Matthew Cordell, current chair of the Young Lawyers Division of the Bar Association, to create a new specialty in privacy and information security law. It was fitting that the request to create a specialty in this cutting-edge area of law came from a young lawyer. After receiving the application and supporting information required for the board to initiate the study of a new specialty, the board concluded that this is an important emerging practice area for which the identification of qualified practitioners is critical for consumers. Eight lawyers were appointed to the initial Privacy and Information Security Law Specialty Committee—not surprisingly, all seven lawyers qualify as “young lawyers.” Proposed standards for the specialty will be presented to the council at the January 2017 quarterly meeting. We hope that the council will look favorably on this important new specialty.

In April the board held its annual luncheon to honor 25-year and newly certified specialists. At the lunch, 53 new specialists were recognized and presented with specialization lapel pins. The board also recognized 19 specialists who were originally certified in 1991 and who have maintained their certifications for 25 years. In addition, I had the pleasure of presenting the board's three special recognition awards named in honor of past chairs of the board. The Howard L. Gum Excellence in Committee Service Award was given to Julie Boyer, a juvenile delinquency law specialist, for her instrumental role in the creation of the

qualifications for certification in a specialty for which there were no national or state models. The James E. Cross Leadership Award was presented to immigration law specialist Ann Robertson for her humanitarian work for refugees and her reputation for handling every imaginable immigration matter over her long career. The Sara H. Davis Excellence Award was presented to Albert F. Durham, certified in bankruptcy law, for his enthusiastic and compassionate advocacy for his clients and for his consistent willingness to share his encyclopedic knowledge of the Bankruptcy Code and his legal experience with lawyers both inside and outside his firm.

To prepare for changes in the practice of law and in specialty certification, the board appointed a Long Range Planning Committee in 2014. The committee, which is composed of three past board chairs, three former board members, and two current board members, continues to make recommendations to the board relative to goals for the certification program and policy initiatives. The committee is currently studying whether an emeritus status for retired and semi-retired specialists should be created and, if so, the parameters for this status.

Last, I am pleased to report that the specialization program continues to operate on a financially sound basis. We started the year with approximately \$185,000 in reserves. It is anticipated that revenues will exceed expenditures again this year, and, therefore, there will be no need to dip into the reserves. We are grateful to the council for approving, in January, an increase in the annual fee for specialists. With this additional revenue we were able to move forward with the ExamSoft project including the part-time employment of Mr. Edmonson.

On behalf of the board, I want to express my sincere appreciation to the members of the council for your continuing support of the specialty certification program—a program that continues to provide incentives to lawyers to be the best lawyers they can be and to assist consumers in finding suitable and qualified legal representation.

## Board of Continuing Legal Education

*Submitted by J. Dickson Phillips III*

Lawyers continue to meet and exceed their mandatory continuing legal education requirements. By mid-March 2016, the CLE department processed and filed over 26,542 annual report forms for the 2015 compliance year. I am pleased to report that 99% of the active members of the North Carolina State Bar complied with the mandatory CLE requirements for 2015. The report forms show that North Carolina lawyers took a total of 366,246 hours of CLE in 2015, or 15 CLE hours on average per active member of the State Bar. This is three hours above the mandated 12 CLE hours per year.

The CLE program operates on a sound financial footing and has done so almost from its inception over 30 years ago. Funds raised from attendee and noncompliance fees not only support the administration of the CLE program, but also support three programs that are fundamental to the administration of justice and the promotion of the professional conduct of lawyers in North Carolina. The program's total 2015 contribution to the operation of the Lawyers Assistance Program (LAP) was \$159,355. To date in 2016, the board has also collected and distributed \$233,352 to support the work of the Equal Access to Justice Commission and \$276,235 to support the work of the Chief Justice's Commission on Professionalism. In addition, the CLE program generated \$73,821 to cover the State Bar's costs for administering the CLE-generated funds for the LAP and the two commissions.

Perhaps the CLE program's biggest success of 2016 was the launch in February of online filing of annual report forms. Over 11,000 lawyers took advantage of the online option for reviewing and approving their annual report forms for the 2015 compliance year. In 2016, 1,108 lawyers did not file their annual report form by the February 28 deadline. This is a significant reduction in late forms from 2015, when 2,311 lawyers did not file by the deadline, and from 2014 when 1,466 did not file on time. Automated filing increased compliance with the filing deadline but, more significantly, lawyers across the state appreciated the convenience and ease of satisfying the filing requirement online.

This year the board began a study of the administrative rules setting forth the requirements for the formal designation of a CLE provider as an "accredited sponsor." The board

is concerned that the designation, coming from the CLE Board, implies that the programs presented by an accredited sponsor are of superior quality when, in fact, the status is granted to CLE sponsors that have been in operation for at least three years and have satisfied certain primarily bureaucratic requirements. The board is examining whether the status should be more difficult to obtain, and should require demonstration of ongoing programmatic quality and periodic renewal. Discussion of this issue will continue at the board's retreat in 2017.

In our annual report last year, we informed the council of the hundreds of requests for exemptions from CLE requirements that the board receives every spring. This year the Exemptions Committee heard and decided over 300 such requests. The committee has, for a number of years, been comprised of one board member, usually a district court judge. This has helped to maximize and maintain consistency and fairness in the handling of exemption requests. Although the board keeps the identity of the committee members under wraps to avoid personal requests (or recriminations), this year we are "outing" Wake County District Court Judge Margaret Eagles because her term on the board has, unfortunately, come to an end. The Resolution of Appreciation for Judge Eagles adopted by the board in September says it best:

WHEREAS, as the sole member of the Exemptions Committee for six years, Judge Eagles was the unsung hero of the CLE program: on a routine basis spending numerous hours reviewing hundreds of requests for exemptions, waivers of fees, and extensions of time; and, in deciding whether to grant such requests, demonstrating exemplary judicial temperament in the separation of the foolish and the frivolous from the meritorious; and, in making wise and appropriate decisions, saving the board from many unnecessary appeals.

Regrettably, in addition to the end of Judge Eagles' term, the terms of Chair Amy P. Hunt and Board Member James A. Davis have also come to an end. All three board members will be greatly missed.

The board strives to ensure that the CLE requirements meaningfully advance the competency of North Carolina lawyers. We welcome any recommendations or suggestions that councilors may have in this regard. On behalf of the other members of the board, I

thank you for the opportunity to contribute to the protection of the public by overseeing the mandatory continuing legal education program of the State Bar.

## Board of Paralegal Certification

*Submitted by G. Gray Wilson, Chair*

The first application for paralegal certification was accepted by the board on July 1, 2005. As of today, there are 4,149 North Carolina State Bar certified paralegals. This year, 471 paralegals applied for certification—the highest number of new applicants in three years. The increase in applications is due, in large part, to Assistant Director of Paralegal Certification Joy Belk's speaking campaign to explain paralegal certification to students in paralegal programs across the state. Although Hurricane Matthew complicated the administration of the October certification exam, the launch of online examinations using ExamSoft software was largely successful. The software will enable the board's Certification Committee (the committee that updates the exam annually) to "bank" questions and may, ultimately, allow us to administer the exam on demand. We anticipate designating a number of new CPs after the results of the October exam are released in November.

Also in 2016 the board considered 4,039 recertification applications. To maintain certification, a certified paralegal must earn six hours of continuing paralegal education (CPE) credits, including one hour of ethics, every 12 months. I am pleased to report that certified paralegals have continued to improve their competency by taking over 24,000 hours of CPE in the last 12 months.

The board held its annual retreat in May at the Grandover Hotel in Greensboro. On the agenda were important policy questions including whether to create an "emeritus" or "retired" status that will permit a CP to be inactive for a period of time and then reactive certification without retaking the exam; whether to allow paralegals who have been certified by qualified national organizations, including the National Association of Legal Assistants and The American Society of Administrative Professionals, to sit for our exam although they do not satisfy the educational requirement for certification; and whether to qualify educational programs that are offered entirely online. The board anticipates presenting proposed rule amendments to the council on some or all of these issues in 2017. Also at the retreat, the board continued



to monitor Washington State's Limited License Legal Technician Program (LLLT program). The board has not reached any conclusions about the LLLT program and will continue to monitor it and to report to the officers.

Like many State Bar programs, paralegal certification relies on dedicated volunteers who serve on the board and its committees. The Certification Committee writes the exam and the Item Writing Workshop generates ideas for exam questions.

Regrettably, my term on the Board of Paralegal Certification has come to an end. Thank you for the opportunity to work with this fine board to promote the professionalism of North Carolina paralegals.

### Lawyer Assistance Program

*Submitted by Robynn Moraites, Director*

This has been an exciting and productive year for the Lawyer Assistance Program (LAP). For a detailed analysis of the work completed in 2015-2016, please see the LAP Annual Report at [nclap.org/annual-report](http://nclap.org/annual-report).

In early 2016 the ABA released the results of a national landmark study that is the first of its kind to bring into sharp focus, with hard data and real numbers, what we are facing in our profession across a spectrum of mental health issues. The study was conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs. The findings were published in the peer-reviewed *Journal of Addiction Medicine* in February. The study found what our own NC data has shown for years: depression and alcoholism are the two 600-pound gorillas. And yet there remains a host of other issues. Younger lawyers are the most at risk. Both the peer reviewed research article and a more reader-friendly article summarizing the results can be found on our website under the research tab. Thanks to this study, we now have hard data showing that 1 in 3-to-4 of us are at real risk and are not likely to seek out assistance. The good news is that this study has caught the attention of the bar and we have received many requests to provide CLE talks about the study and the results.

The study verifies why LAP messaging and outreach should continue to be a priority. In order for lawyers to be comfortable utilizing LAP services they first need to know about the program. While not uncommon, it is still surprising to me whenever a lawyer approaches me after I have delivered a CLE presentation to report that he or she was unaware of our

program or services (usually despite many years in practice). LAP staff and volunteers give an extraordinary number of CLE talks each year across the state. We have a regular column that appears quarterly in the *State Bar Journal*. And in an effort to make contact with every lawyer in the state, a few years ago our LAP Steering Committee secured our position as the state-wide provider of the requisite one-hour work-life balance talk as part of the mandatory professionalism program for all newly admitted lawyers. Even with those efforts, we realize our outreach needs to start sooner in a lawyer's career.

The ABA study found that 32% of lawyers under the age of 30 have problems with alcohol, while 28% are struggling with depression. The LAP Steering Committee has continued its focus on bolstering LAP's relationship with our seven law schools through its ongoing law school initiative. Seven of our Steering Committee members are serving as primary liaisons for each of the law schools. In addition, LAP partnered with the NC Board of Law Examiners to host a law school summit in September to examine these issues more closely and provide best practice guidance to law schools regarding character and fitness. Our hope is that by the time a lawyer is licensed, he or she will be well aware of LAP, its services, and its confidentiality. There is no such thing as too much messaging or too many reminders about confidentiality given that fears around this issue accounted for the single greatest obstacle cited in the study for lawyers' reluctance to seek help.

Along the lines of continued messaging and outreach, LAP also undertook three other initiatives this year. We partnered with Lawyers Mutual (LM) to develop "Getting By with a Little Help from Our Friends," a mental health CLE program for the annual CLE program LM offers to all its insureds. That program will launch in the late fall. We also began the development of a series of short videos to be used in the LM CLE as well as on our website. And finally, we collaborated with HRC, the administrator of the NCBA's BarCARES program, on an educational presentation to the BarCARES Board about how LAP and BarCARES differ but complement each other, focusing specifically on how they cross refer and collaborate.

While the LAP Foundation of NC, Inc. is not part of LAP or the State Bar, I would be remiss if I did not highlight its recent activity, which is having an immediate and profound

impact on our clients. The foundation is a separate, stand-alone 501(c)(3) entity. Its mission is to provide last dollar support for lawyers and judges who meet financial eligibility guidelines and who cannot afford the level of care needed. The foundation provides grants and loans to allow lawyers and judges to obtain the treatment they need for whatever issues they face. Due to extremely limited resources, the foundation has historically helped only a couple of lawyers a year with

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## Client Security Fund (cond.)

Thomas S. Hicks of Wilmington. The board determined that Hicks was retained by a client to write to or file a civil suit against the client's neighbors. Hicks provided no valuable legal services for the fee paid prior to being suspended on May 4, 2016.

7. An award of \$2,500 to an applicant who suffered a loss because of Thomas S. Hicks. The board determined that Hicks was retained to represent the applicant's son on several serious drug charges. Hicks accepted the fee for the case just 13 days prior to his hearing that resulted in an active suspension, and failed to provide any valuable legal services for the fee paid.

8. An award of \$2,666.67 to a former client of Devin F. Thomas of Winston-Salem. The board determined that Thomas was retained to handle a client's personal injury claim. Thomas settled the matter, paid himself and his co-counsel, paid the client, and retained funds from the settlement proceeds to pay the client's medical provider. Thomas failed to pay that medical provider. Due to misappropriation, Thomas' trust account balance was not sufficient to pay all his client obligations. Thomas was disbarred on April 20, 2016. The board previously reimbursed five other Thomas clients a total of \$90,138.50.

In April and July it was reported that some claims had been approved but not yet paid due to the low balance of the fund. Those claims have now been paid, necessitating the Board of Trustees and the State Bar Council to ask the North Carolina Supreme Court to increase the assessment—for fiscal year 2017 only—from the customary \$25 per active lawyer to \$50 per active lawyer to restore the fund's balance and accomplish the purposes of the fund for the coming year. ■

treatment costs or counseling fees. The new Foundation Board launched a major gifts campaign this year in an effort to increase its impact and its ability to assist those in real need. The campaign has been a major success, and lawyers who would otherwise have had to forego essential treatment and care have already begun to benefit. The impact of this initiative will be felt for decades to come.

In terms of our client base, the rate of new cases and the ratio of addiction to mental health cases have remained fairly consistent over the past several years. Alcoholism and depression continue to be the two most prevalent issues with which lawyers struggle. Overall, the data this year remains consistent

with the trends we have seen over the past few years. The percentage of lawyers who refer themselves to our program continues to remain high (52% this year), an indicator that our messaging and outreach efforts are indeed effective.

#### A Special Note Regarding Our Volunteers

We could not accomplish all that we have this year (or any other year) without the dedication and enthusiasm of our incredible volunteers. It is an honor and a privilege to witness their love for their fellow lawyers (no other word for it) and their commitment to fostering the wellbeing of those in our profession. They inspire me every day. Interacting

## 2017 Appointments to Boards and Commissions

In 2017 there are several appointments to be made to the State Bar's boards and commissions. Read about them at [bit.ly/2fSgo5A](http://bit.ly/2fSgo5A).

with our volunteers is unquestionably the highlight of my job, and I want to thank each and every one of them for their unique contribution to making our program one of the best, most dynamic, most enviable programs in the country. ■

## Classified Advertising

### Positions Available

**PI Junior Associate Attorney (Jacksonville, FL)**—Law Firm of Military Veterans is seeking Veterans for their growing law firm. PI Jr Associate Attorneys (0-3 years' experience and recent grads). Salary commensurate with experience. Please send cover letter and resume with references to [Ron@youhurtwe-fight.com](mailto:Ron@youhurtwe-fight.com).

The AV-rated law firm of Clement & Wheatley in Danville, Va., seeks to hire an associate to join its Business Law and Commercial Real Estate Practice. We are seeking a Virginia licensed attorney with 2-6 years of experience. The successful candidate will focus his/her practice on complex commercial transactions and commercial real estate matters (e.g., entity formation, buy-sell agreements, acquisition and sale of businesses, title insurance, commercial leasing, construction

and development, zoning, corporate, organizational structure, financing and trademark licensing). The successful candidate must have strong interpersonal skills and must be committed to his/her community. Requirements:

- 2-6 years of relevant business transactional and commercial real estate experience.
- Virginia License (North Carolina License a plus)
- Excellent written and oral communication skills
- Meticulous attention to detail and strong organizational skills.

Please send resume, salary requirement and cover letter to: Joyce Tate, Clement Wheatley, P.O. Box 8200, Danville, VA 24543-8200, or by email to [tatej@clementwheatley.com](mailto:tatej@clementwheatley.com)

### For Sale

**For Sale**—Thriving Corporate Law, Estate Planning, Tax Law Firm in Central NC. Strong profit margins! Long-established with diversified client base. Counsel to several

hundred business clients. For more information: [www.TheLawPracticeExchange.com](http://www.TheLawPracticeExchange.com). Contact: [Amanda@TheLawPracticeExchange.com](mailto:Amanda@TheLawPracticeExchange.com) or (919)789-1931.

**For Sale**—Successful Real Estate, Estate Planning Firm Coastal NC. Great location! Strong networking system and market share. Seller offering to assist, train, and transition with purchaser. For more information: [www.TheLawPracticeExchange.com](http://www.TheLawPracticeExchange.com). Contact: [Amanda@TheLawPracticeExchange.com](mailto:Amanda@TheLawPracticeExchange.com) or (919)789-1931.

**For Sale**—Acquire a Successful and Well Established Workers Comp Law Firm NC. Very profitable! Tremendous reputation and referral network. Owner offering training, assistance, and transitional services. For more information: [www.TheLawPracticeExchange.com](http://www.TheLawPracticeExchange.com). Contact: [Amanda@TheLawPracticeExchange.com](mailto:Amanda@TheLawPracticeExchange.com) or (919)789-1931.

### Bar Exam (cont.)

Angela Watkins  
Monroe, NC  
Emily Watson  
Advance, NC  
Robert Wayland  
Raleigh, NC  
Ciara Weaver  
Monroe, NC  
Jordyn Webb  
Vinton, VA  
James Webster  
Raleigh, NC  
Madelyn Weeks

Washington, DC  
Jessica Wells  
Holly Springs, NC  
James West  
Rowland, NC  
John Wheatley  
Charlotte, NC  
Megan White  
Cornelius, NC  
Matthew White  
Greensboro, NC  
Chimeaka White  
Greensboro, NC  
Roberta Whitner  
Fort Mill, SC

Bethany Wigfield  
Charlotte, NC  
Randi Wilde  
Mount Holly, NC  
Donna Williams  
Greensboro, NC  
Ronald Williams  
Greensboro, NC  
Matthew Williams  
N. Wilkesboro, NC  
JaMonika Williams  
Danville, VA  
Jackson Williford  
Charlotte, NC  
Meghan Williford

Greensboro, NC  
Charles Willis  
Charlotte, NC  
Herman Wilson  
Fayetteville, NC  
Yvette Wiltshire  
Charlotte, NC  
Amy Wold  
Charlotte, NC  
Elizabeth Wood  
New Bern, NC  
Hillary Woodard  
Cary, NC  
Molly Woodcock  
Charlotte, NC

Michael Wray  
Charlotte, NC  
Shannon Wright  
Charlotte, NC  
Farrah Yaghi  
Durham, NC  
Roni Yashaev  
Charlotte, NC  
Katie Young  
Charlotte, NC  
Kristie Young  
Zebulon, NC  
Yao Zhu  
Charlotte, NC

# The North Carolina State Bar and Affiliated Entities

## Selected Financial Data

<b>The North Carolina State Bar</b>			<b>Operating expenses</b> (2,348,886) (2,250,243)			<b>Revenues and Expenses</b>		
	2015	2014	Non-operating revenues	8,434	14,773	Operating revenues-specialization fees	\$151,035	\$150,323
			Net income (loss)	\$457,359	\$(513,064)	Operating expenses	(149,452)	(147,431)
<b>Assets</b>			<b>Board of Client Security Fund</b>			<b>Non-operating revenues</b>		
Cash and cash equivalents	\$7,062,359	\$6,735,818				Net income	\$1,585	\$2,965
Property and equipment, net	17,048,205	16,863,396	<b>Assets</b>			<b>The Chief Justice's Commission on Professionalism</b>		
Other assets	<u>1,057,694</u>	<u>321,776</u>	Cash and cash equivalents	\$1,201,890	\$1,069,103		2015	2014
	\$25,168,258	\$23,920,990	Other assets	-	<u>335</u>	<b>Assets</b>		
<b>Liabilities and Fund Equity</b>				\$1,201,890	\$1,069,438	Cash and cash equivalents	\$377,096	\$238,271
Current liabilities	\$5,756,195	\$4,685,121	<b>Liabilities and Fund Equity</b>			Other assets	-	<u>124,645</u>
Long-term debt	<u>10,653,533</u>	<u>11,098,958</u>	Current liabilities	\$71,205	\$17,951		\$377,096	\$362,916
	16,409,728	15,784,079	Fund equity-retained earnings	<u>1,130,685</u>	<u>1,051,487</u>	<b>Liabilities and Fund Equity</b>		
Fund equity-retained earnings	<u>8,758,530</u>	<u>8,136,911</u>		\$1,201,890	\$1,069,438	Current liabilities	-	982
	\$25,168,258	\$23,920,990	<b>Revenues and Expenses</b>			Fund equity-retained earnings	<u>377,096</u>	<u>361,934</u>
<b>Revenues and Expenses</b>			Operating revenues	\$788,236	\$785,346		\$377,096	\$362,916
Dues	\$8,080,785	\$7,880,063	Operating expenses	(709,376)	(1,104,565)	<b>Revenues and Expenses</b>		
Other operating revenues	<u>1,178,959</u>	<u>847,703</u>	Non-operating revenues	<u>338</u>	<u>688</u>	Operating revenues-fees	\$357,769	\$354,055
Total operating revenues	9,259,744	8,727,766	Net loss	\$79,198	\$(318,531)	Operating expenses	(342,607)	(313,435)
Operating expenses	(9,153,057)	(8,359,854)	<b>Board of Continuing Legal Education</b>			Non-operating revenues	-	<u>6</u>
Non-operating expenses	<u>(389,862)</u>	<u>(410,160)</u>		2015	2014	Net income	\$15,162	\$40,626
Net income	\$(283,175)	\$(42,248)	<b>Assets</b>			<b>Board of Paralegal Certification</b>		
<b>The NC State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA)</b>			Cash and cash equivalents	\$615,508	\$279,922		2015	2014
	2015	2014	Other assets	<u>9,937</u>	<u>217,640</u>	<b>Assets</b>		
<b>Assets</b>				\$625,445	\$497,562	Cash and cash equivalents	\$448,943	\$431,035
Cash and cash equivalents	\$1,758,268	\$2,025,021	<b>Liabilities and Fund Equity</b>			Other assets	-	-
Interest receivable	235,232	221,154	Current liabilities	293,009	114,007		\$448,943	\$431,035
Other assets	<u>1,073,101</u>	<u>238,374</u>	Fund equity-retained earnings	<u>332,436</u>	<u>383,555</u>	<b>Liabilities and Fund Equity</b>		
	\$3,066,601	\$2,484,549		\$625,445	\$497,562	Current liabilities - accounts payable	47,951	14,417
<b>Liabilities and Fund Equity</b>			<b>Revenues and Expenses</b>			Fund equity-retained earnings	<u>400,992</u>	<u>416,618</u>
Grants approved but unpaid	\$2,015,225	\$1,910,140	Operating revenues	\$740,246	\$686,253		\$448,943	\$431,035
Other liabilities	<u>266,320</u>	<u>246,712</u>	Operating expenses	(746,165)	(646,750)	<b>Revenues and Expenses</b>		
	2,281,545	2,156,852	Non-operating revenues	-	<u>6</u>	Operating revenues-fees	\$245,596	\$234,700
Fund equity-retained earnings	<u>785,056</u>	<u>327,697</u>	Net (loss) income	\$(5,919)	\$39,509	Operating expenses	(223,570)	(220,478)
	\$3,066,601	\$2,484,549	<b>Board of Legal Specialization</b>			Non-operating revenues	<u>4</u>	<u>10</u>
<b>Revenues and Expenses</b>				2015	2014	Net income	\$22,030	\$14,232
Interest from IOLTA participants, net	\$2,797,811	\$1,716,642	<b>Assets</b>			<b>Revenues and Expenses</b>		
Other operating revenues	-	<u>5,764</u>	Cash and cash equivalents	185,496	190,062	Operating revenues-fees	\$245,596	\$234,700
Total operating revenues	2,797,811	1,722,406	Other assets	<u>5,217</u>	-	Operating expenses	(223,570)	(220,478)
				\$190,713	\$190,062	Non-operating revenues	<u>4</u>	<u>10</u>
<b>Liabilities and Fund Equity</b>			<b>Liabilities and Fund Equity</b>			Net income	\$22,030	\$14,232
Current liabilities	9,323	10,257	Current liabilities	9,323	10,257	<b>Revenues and Expenses</b>		
Fund equity-retained earnings	<u>181,390</u>	<u>179,805</u>	Fund equity-retained earnings	<u>181,390</u>	<u>179,805</u>	Operating revenues-fees	\$245,596	\$234,700
	\$190,713	\$190,062		\$190,713	\$190,062	Operating expenses	(223,570)	(220,478)



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Winter 2016

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