

THE NORTH CAROLINA STATE BAR

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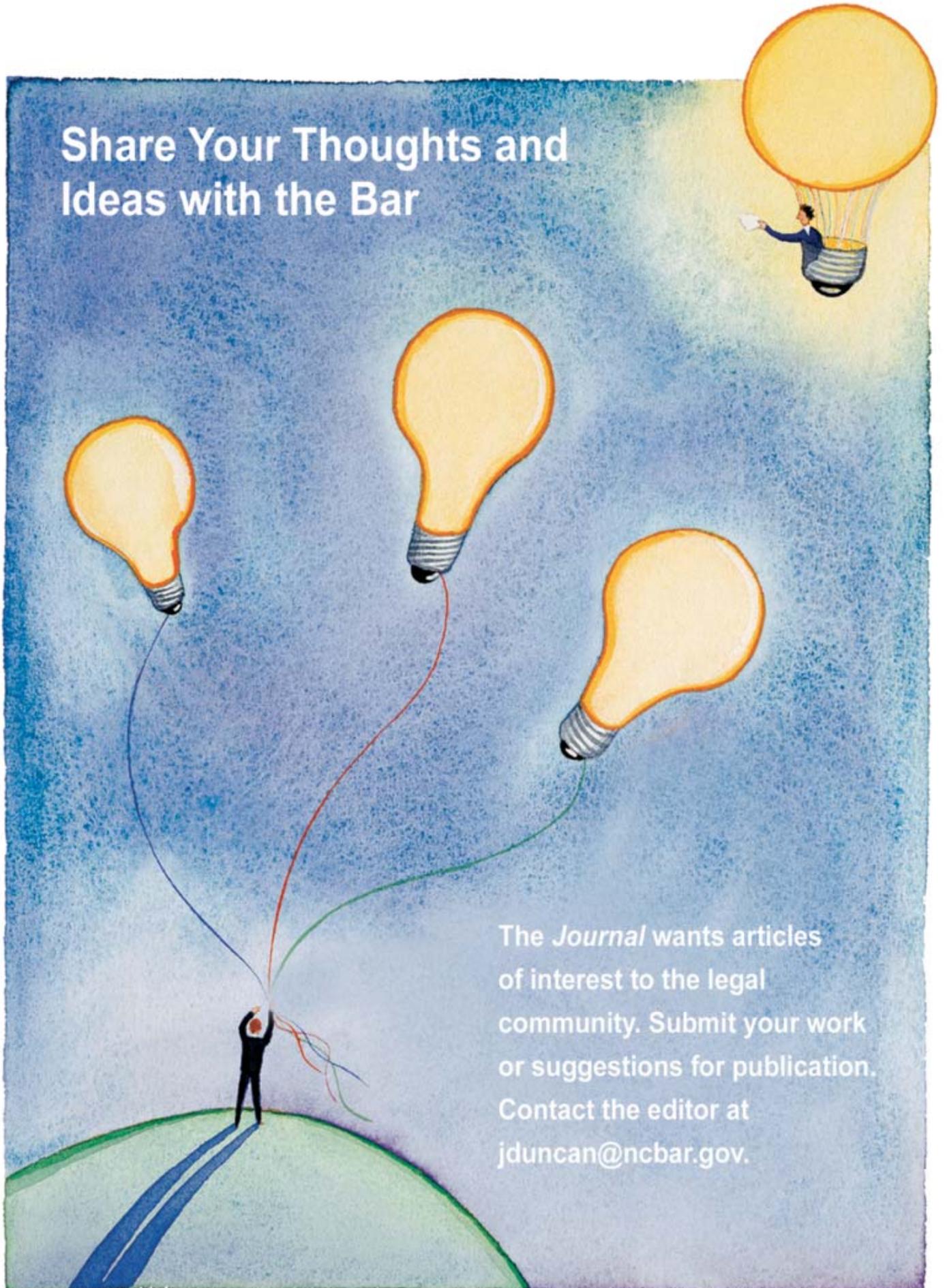
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THE  
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Jennifer R. Duncan

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# What Matters

BY G. GRAY WILSON

My year started with a bang in January. After the first quarterly Bar meeting at the helm, which I survived thanks to our new Executive Director Alice Mine and a stellar cast of other supporting Bar staff, officers, and councilors, I defended a company in a complicated commercial dispute in a highly-compressed, paperless, five-day business court jury trial in a rural county in the Piedmont. Opposing counsel, all four of them (some not from around here), were well prepared and capable. The presiding judge was superb in all respects. My client and I managed to escape with a decent result, but given my own deficiencies, I can only attribute the just outcome to 12 ordinary citizens who patiently sat in the jury box until they received the case just before close of business on a Friday afternoon. Within minutes they asked for a calculator (I am not making this up), and later for a flip chart and marker. I decided we were well and truly cooked, but some time before 8 PM, the jury returned with answers to a ten-interrogatory verdict sheet that were fair and reasonable, at least in my estimation.

How did that happen? There were no professionals in the box, and only a couple had education beyond high school. The evidence was tedious at times, and a few heads could be seen nodding late in the afternoon. Jurors were permitted to take notes, but from our vantage (with all the high-tech equipment the other side packed into the courtroom, I could never see more than seven jurors at any one time), the pads and pencils did not receive a lot of use. Lead counsel for plaintiff argued almost the entire statutory two-hour limit; I spent 22 minutes pressing our case in closing.

In his autobiography, Clarence Darrow viewed the jury trial cynically: "It is extraordinary that a system hoary with age, extravagant and wasteful to the greatest degree, should not be supplanted by some method

of getting at facts directly, and having them passed on by men who understand the controversies that they seek to solve. Every strongly contested case is replete with long arguments, interminable interruptions, and appalling waste."

But did this public ordeal in January have any lasting value for the participants? Did this trial and this jury make any difference in the universe of human intercourse? Did it matter? Or better yet, to broaden the inquiry, what matters? As in, what in this life has abiding value that transcends the daily grind? We all enjoy the occasional excursion into pop philosophy, but no one relishes the tyranny of those who presume to pontificate on the imponderables at every private (or worse, public) opportunity, someone who might charitably be characterized as a veritable "tree of knowledge." Yet I dare to press this dialectical inquiry within the narrow confines of this profession, more specifically the practice of litigation, and even more narrowly, jury trials. But first, a little background from the ancients might help set the stage.

Consider, for a start, the Christian tradition. The book of Philippians instructs that while a heap of praying is a good exercise, no one should worry about anything; that worrying, in fact, is a sin. We are admonished to do good works and trust in a higher power, in exchange for which we will receive "God's peace," or that sense of wellbeing which lies beyond the realm of human comprehension. Some might argue that mild substance abuse can achieve the same state of bliss, but I believe we are talking here about something more than proverbial lotus-eating.

Which provides a great segway into the

ancient Greek culture (where jury trials were sometimes held in Athens, after a fashion), from which our own Socratic dialogue rears its ugly head in law school. Alfred North Whitehead once noted: "The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato." If so, everyone has some commerce with his allegory of the cave, which dismisses human perception as little more than knowledge gained through the senses, uninformed by reason. To this day, the world abounds in cave dwellers.

Head East (no, I am not referring to the arena rock group of "Never Been Any Reason" fame), and one encounters Asian philosophy. Take Buddhism, for example, and there again lies that enticing rapture one seeks, Nirvana (release from suffering and rebirth), although the roadmap for this sublime level offers a tortuous course, namely, a boatload of abnegation and denial. I would rank hunger and boredom at the top of the list for this ordeal. Omphaloskepsis (Hinduism, primarily) is also in the mix, but there is only so much navel contemplation one can do before the SI joints start to scream. And don't even ask me about Yoga (I am married to a diehard yogini), which is derived from "yoke," for which there could be no more appropriate etymology. Enough already about the Asian Way (Tao).

Now delve into the arcane world of trial law, where I can announce without a modicum of authority, but based on over 40 years of trial experience in the state, federal, and appellate courts, that lawsuits don't necessarily matter, at least not all the time. Since my entire adult livelihood has depended on courtroom advocacy, let me explain, with the



caveat that in no way am I suggesting that there is any better adjudicatory system out there than the one we currently have. We would all likely agree that when litigation leads to a just result, society is well served, and we want to believe that this happens most of the time. Lawsuits and criminal prosecutions that ultimately produce the correct legal solution or answer are commendable and provide the glue of societal order, not to mention civilized behavior. But what about the court case that goes off the rails, where the judge or jury goes rogue, delivering a verdict, judgment, or other ruling that violates every principle of jurisprudence?

Is there some corrective mechanism in the cosmos that sooner or later rights the balance? Take the plaintiff who recovers a windfall with no hint of entitlement, or is denied a recovery that justice demands. Or the defendant who escapes civil or criminal liability, walking away to commit another similar act or omission on an unsuspecting public. Are not the consequences of such a miscarriage dire? No, not if you buy into the notion of karma, in one form or another, once again an Eastern belief in cause and effect related to good or bad deeds and intent. This means that, sooner or later, the bad actor gets caught or otherwise called to account, that the injured party deprived of justice recovers spiritually, if not monetarily, and the judge and jury who botched the case find themselves in the same boat, sooner or later (for further enlightenment, see *Final Destination* in any of its iterations on the silver screen).

Karma takes time. C.S. Lewis recognized this in his writings, that ultimate justice is not always dispensed by the courts, that the judicial branch of government is not infallible, that rendering unto Caesar what belongs to him is not the whole ballgame. He says, "Justice means much more than the sort of thing that goes on in law courts. It is the old name for everything we should now call 'fairness'; it includes honesty, give and take, truthfulness, keeping promises, and all that side of life." Toss in a belief in the afterlife, and it really is crickets for the malefactors (look what Patrick Swayze did to the bad guy in *Ghost*).

Well, if real (i.e., good or fair) justice is meted out by the courts, and injustice is addressed by karma, or whatever, what role in all of this is there for mere process? A lot, I would venture, most of which falls to the

legal profession to administer. Law enforcement, court personnel, judges, and juries provide the vehicle, and statutory and common law the framework. But lawyers lubricate the whole system and make it run forward, if not smoothly, pushing and pulling against everyone and everything else because that is the soul of advocacy, the engine of jurisprudence. They take their licks every day in the courtroom, then rise to fight again the next day, bloody but unbowed (apologies to W.E. Henley), moving past the wrong ruling, the rogue adversary, the jury of psychopaths, striving always to keep us all on that right side of life.

Our own lawyer-author John Hart has written that, "The law is an ocean of darkness and truth." I'm not exactly sure what that means, but it sounds deep and beautiful, and probably explains why his novels get published and mine do not. This was never intended to be a spiritual diatribe, much less an epistemological discourse on justice, but for philosophical cover here, I return to the ancient Greeks once again. Aristotle (who for the life of himself could not get his science right, leaving it to Lavoisier and others to clean up that whole earth, fire, air, and water mess) devoted an entire book of the *Nicomachean Ethics* to the subject of justice. Keying off Socrates and Plato, he posited two kinds of justice, general and particular. The former was virtue expressed in relation to other people, or dealing fairly with them, not taking advantage by lying or cheating. The latter, particular justice, contemplates the correct distribution of just desserts to others. As to particular justice, Aristotle opined that an educated judge was needed to make just rulings in cases; hence, the scales of justice with the blindfolded judge weighing the evidence and rendering a fair decision every time.

Well, I am all about just desserts, from baklava to syllabub to tiramisu, but I think Big A's dichotomy on justice could use a third dish, and that would be sauce for the goose, AKA the Golden Rule. This ethic of reciprocity strikes me as the ultimate recipe for making justice a two-way street. So whoever—be it judge, juror, party, witness, or lawyer—strays from the assigned lane will find himself or herself on the proverbial Road to Damascus, under the archetypal Sword of Damocles, between Scylla and Charybdis, where the Ghost of Christmas Past might volley and thunder the offender

into the Slough of Despond until final atonement, punishment, or damnation, depending on how karma happens to hang at that particular moment. And lest we forget, perhaps the only thing more important in this life than justice, is knowing (and doing) what is right.

I grow weary hearing opposing counsel argue to a jury that the right to be tried by one's peers was first enshrined in the Magna Carta in England in 1215. Drafted by the Archbishop of Canterbury (hardly a disinterested author, since the sectarian trial by ordeal overseen by the clergy collapsed that year), that document only afforded a jury trial to the rebel barons who forced it on King John at Runnymede. King Henry II in the previous century did better than that, creating what later became known as the grand jury, charged with sniffing out the facts for reported crimes to the county assizes. Universal trial by a jury of free men (women had to wait a few more centuries to vote and serve on juries) for ordinary folk has only been around for about 350 years—hardly that deep-rooted in antiquity.

Lucky me, I had another jury trial in April, the week before our second quarterly State Bar meeting. This time defending in another rural county to the west, with excellent opposing counsel and a wonderful trial judge, I found myself staring once again at a jury of total cyphers, no rocket scientists, no professionals, just another group of the great unwashed who could not figure out the code words to use to avoid their civic obligation. Once again we were dealing with a complex commercial dispute, and none of the witnesses were prepared to audition for villain status, much less sainthood. This jury, like the previous one, may have cared about and embraced karma, but in this instance, there were two versions of karma afoot when they began to deliberate. This tangled mass of human debris (apologies to Dante) made short shrift of the first two issues on liability, but then spent the better part of the next day battling over the remaining issue, an affirmative defense that might have set my people free.

By mid-afternoon, they were hopelessly deadlocked at 8-3 (one juror was excused for cause during deliberations because of a family emergency), so everyone assumed, and plausibly so, that the plaintiff was also

CONTINUED ON PAGE 7

# The Passing of the Baton

BY ALICE NEECE MINE

As you thumb through this issue of the *Journal*, before you turn to The Disciplinary Department article (to see if your name is there, as the joke goes), take a minute to visit the In Memoriam sidebar on page 46. This is where the members of the State Bar who died during the preceding quarter are listed (your name should not be there). Being of a certain age, there are now far too many names that I recognize in this sidebar from quarter to quarter. This issue of the *Journal* is dedicated to John McMillan whose name is on the In Memoriam list. John's loss is particularly poignant for anyone who has been closely affiliated with the State Bar for the past 20 plus years. Plain and simple: he was a great lawyer and a great human being. John practiced in Raleigh and, while his good deeds impacted not only the State Bar and Raleigh but the entire state, I'm sure there are many lawyers in other communities who did not know him. If you read Tom Lunsford's tribute to John (page 8), you will wish that you had.

John's life and deeds are duly honored elsewhere in this *Journal*. There are others on the In Memoriam list who are also deserving of our attention, admiration, and homage. Eleven of the lawyers on the list were licensed in 1968 or before, meaning that they were all lawyers for at least 50 years. Remarkable. What is more remarkable is that many of these lawyers were pillars of their local bars and known, like John, by the lawyers in their hometowns, and perhaps across the state, as professionals of the highest caliber.

Two of these senior lawyers were known to me personally: Don Cowan, who practiced in Greensboro and Raleigh, and Jack Stevens, who practiced in Asheville. Both men were gentlemen to their cores; exceptional lawyers

while remaining humble human beings; and integrity was the hallmark of everything they did.

In the early 1990s, Don made a huge impression on a somewhat green State Bar ethics counsel when he asked her for an in-person consult because he had a particularly convoluted ethics dilemma he was trying to untangle. I was initially intimidated by this lawyer who clearly had so much more knowledge and experience, not to mention prestige, than me. While I struggled to appear up to the task, Don treated me as an equal from the moment I shook his hand. He deferred to my advice, encouraged me to expand upon it, asked me probing questions, and listened with the utmost attention and respect to my responses. I am not, to this day, sure that my advice to Don was worthy of this deference, but Don never did anything but treat me as competent professional—the questioning of my ability and worth was all on my side of the equation. By treating me in this manner, Don helped me to move on in my career from self-doubt to self-assurance. Through the gift of his respectful, understated professionalism, I became a better lawyer. This is mentoring of the highest caliber.

At the January quarterly meeting of the State Bar Council, I spoke with one of our past presidents about our shared grief over the loss of John McMillan. Then we both remarked on the deaths of Don and Jack so quickly on the heels of John's passing. The loss of these pillars of the bar seemed insurmountable. Who will be our role models and mentors now? When we speak of "professionalism," who will we point to as our exemplars? We concluded that the baton has, indeed, passed to the generation of Baby

Boomer lawyers who are now moving into their senior years of practice. Are we up to the task? ■

*Alice Neece Mine is the executive director of the North Carolina State Bar.*




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## President's Message (cont.)

holding the majority on this issue as well. Opposing counsel immediately offered to stipulate to a majority verdict, and of course some mental midget (moi) immediately refused. A mistrial was declared, and in short order the jury foreperson, who was firmly in the plaintiff's camp, informed me that the majority of eight favored the defense on the crucial issue that could not be resolved. So please excuse me while I go crawl under a rock and hide from Suzy Creamcheese and the Brain Police (with commendations to Frank Zappa and the Mothers of Invention—karma doesn't hold a candle to that). Enough said. Exit stage left, pursued by a bear... ■

*G. Gray Wilson is a partner with the Winston-Salem firm of Nelson Mullins Riley & Scarborough LLP.*

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# It Was a Wonderful Life

BY L. THOMAS LUNSFORD II

A great lawyer  
died recent-  
ly. John B.  
McMillan

of the Wake County Bar succumbed to cancer on February 6,  
2019, at the age of 76, leaving behind a record of professional



*John McMillan and Tom Lunsford*

accomplishment, service, and leadership in North Carolina that has seldom been equaled and may never be surpassed.

John was, if anything, even more praiseworthy as a public citizen, a family member, and a personal friend. In the 37 years I was privileged to work for and with North Carolina's best lawyers on the State Bar's governing council and its staff, I never encountered anyone who contributed more to the common good. He was a lawyer's lawyer, his own man, and the thoughtful conscience of anyone who had sense enough to be paying attention.

Upon my retirement as the State Bar's executive director at the end of last year, I received several wonderful gifts for which I will always be grateful. Two of the most treasured are being published with this article. One is a photograph of a couple of good-looking gentlemen at a bar meeting who seem remarkably well reconciled to their hair loss. The one of the right is yours truly, genetically and perennially bald but happy in contempla-

tion of his imminent retirement. The guy on the left, John McMillan, is incidentally and momentarily without something to comb. He appears to be happy as well, in spite of his imminent retirement. When the picture was taken, John well knew that his time was short, but he was intent on making the most of it—being as alive as he could possibly be as a lawyer in the company of lawyers. And, as was almost always the case where his involvement with the State Bar was concerned, I happened to be standing by, basking in reflected glory.

The second image associated with this essay is a lovely painting of the State Bar Building that was commissioned in my honor. Though ostensibly referent to me, the painting has much more to do with John McMillan. He, more than anyone else, was responsible for the initiative that resulted in what is now recognized as one of North Carolina's finest public buildings. I can well

remember the day back in 2007 when, as a new officer of the Bar Council, he advised me, with uncharacteristic and surprising bluntness, that my office was a "dump," entirely unworthy of the organized Bar. He said that we would have to do something about it and, ultimately, he did. I don't mean to suggest that John was the only person responsible for getting the thing out of the ground. Of course, he wasn't. Hank Hankins was president when the planning began in earnest, and outstanding leadership was also provided by Bonnie Weyher, Jim Fox, Keith Kapp, Tony di Santi, and John Silverstein, among many others. But it wouldn't have happened when it did and how it did and as well as it did without the involvement of John McMillan. He conceptualized the undertaking, he facilitated acquisition of the site, he cannily addressed every political issue, and he was central to the private fundraising effort that generated three

million dollars toward the construction and furnishing of the building. Just as Yankee Stadium might never have come to be in the absence of Babe Ruth, you can make the case quite convincingly that the profession's home in downtown in Raleigh is the "House that John Built."

I would hasten to note that John McMillan did not limit his construction activities to matters law related. For instance, were it not for his leadership and ability to attract funding, dinosaurs might still be homeless and extinct in North Carolina. Several years ago, John was instrumental in raising money for the expansion of the Museum of Natural Sciences. In the process, he personally led a delegation from the museum that successfully negotiated the purchase of the fossilized *Acrocantiasaurus* that now occupies the facility's third-floor dome. The giant reptile, which is arguably the museum's greatest treasure, annually thrills and terrorizes thousands of schoolchildren who have John McMillan to thank, though they will probably never know it. The dinosaur also keeps watch on the people working across the street at the General Assembly, waiting to pounce if anyone ever tries to dismantle the sensible and humane legislation for which John successfully advocated as an incredibly effective lobbyist for many years. Unlike the schoolchildren, the representatives and senators know that they and their constituents have a lot for which to thank him.

Many other institutions essential to the fabric of our state would be ill-housed and ill-fed were it not for John McMillan. The roster of his known causes and charities is beyond impressive. John's involvement was critical to the North Carolina Symphony, the North Carolina Zoo, the Nature Conservancy, the Boy Scouts, the University of North Carolina and its School of Law, the Clean Water Management Trust Fund, Legal Services of North Carolina, the Democratic Party, and, of course, the State Bar, just to name a few. I make reference to his "known" affinities quite advisedly, understanding that his modesty and humility have made it virtually impossible for anyone to readily compile a complete inventory of his service and beneficence. His obituary, though quite comprehensive in its listing of his engagements, was necessarily abridged. If ever a man deserved a well-researched biography, it was John McMillan. In its absence, we are fortunate to have a significant amount of oral history to share.

Those of us who were privileged to know him personally, have a great responsibility to tell his story, especially among persons who are new to the legal profession. They will need to understand what it takes to be a great lawyer and what it means to be a great human being.

There is, of course, a fairly detailed record of John McMillan's service to the legal profession in the pages of the *State Bar Journal*. Indeed, it would be quite difficult to find any issue of the magazine from the last 35 years that did not reference directly or indirectly some aspect of John's work on behalf of the State Bar. For many years he dispensed justice to misbehaving lawyers as a member, and ultimately chair, of the Disciplinary Hearing Commission. Incidentally, he schooled dozens of lawyers, like me, who appeared before the hearing panels upon which he sat, on the finer points of trial advocacy and professionalism, subjects in regard to which he was a leading authority. He was subsequently elected by the lawyers from the 10th district as one of their representatives on the council. Over nine years and three terms, he served on and chaired numerous committees, including the Grievance Committee, where he excelled in doing the right thing. As his eligibility to serve as a councilor expired, the sages on the council's Nominating Committee made the easiest and best decision ever made by such a group, and nominated him for service as an officer of the State Bar. During the next three years which culminated in his presidency, John took a leading role in, among other things, the initiation of a comprehensive

review of the State Bar's programs, the inclusion in our code of ethics of a black-letter rule promoting *pro bono* service, and the creation of the Distinguished Service Award, now known as the John B. McMillan Distinguished Service Award, which is the only award that has ever been bestowed by the State Bar Council. And all of this was undertaken as he masterminded and helped orchestrate the process whereby the State Bar's new headquarters building would be constructed.

Following his service as an officer, John continued his involvement with the State Bar in a variety of key roles. For many years he was a member of IOLTA's Board of Trustees and, inevitably, became its chair. While on the board, he championed the so-called "comparability rule," which had the effect of prohibiting banks from discriminating against IOLTA accounts in terms of interest paid. Implementation of the rule had the effect of sustaining the program's revenues in a time of great economic uncertainty. The additional income engendered thereby, almost of all which has been used to fund legal services for the poor, has increased access to justice in North Carolina—a particular passion of John's—by a very significant amount.

During the same period, John also served as chair of the North Carolina State Bar Foundation's Board of Trustees. The foundation was created at John's behest to raise money to build and maintain the new State Bar Building. As noted above, the fundraising

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Rick Grayson

# Ingenuity, Chicanery, and Deception: The History of the John B. McMillan Distinguished Service Award

BY ANTHONY S. DI SANTI

**T**his article reveals how the Distinguished Service Award became the John B. McMillan Distinguished Service Award.<sup>1</sup> It required ingenuity, chicanery, deception, and the stretching of the rules, a strange process for the State Bar Council.

I became vice-president of the State Bar in October 2008, the same time that John McMillan became president of the State Bar. I had worked with John on numerous matters after my election by the 24th Judicial District (now the 35th Judicial District) as its councilor in December of 1999. However, working together as officers of the State Bar for a number of years provides an opportunity to interact on a professional, social, and casual basis that really enables one to learn the true character of a person, and in certain instances develop a true and lasting friendship. Fortunately for me, working with John those many years allowed us to establish that true and lasting friendship. I had earlier learned the true character of John, and analyzing him as a friend in conjunction with the award criteria established for the Distinguished Service Award, it was obvious that he was the epitome of the lawyer who

deserved that honor. I decided that my first act when I became president would be to present to the State Bar Council the proposition of changing the name of the award to the John B. McMillan Distinguished Service Award. Now to the ingenuity, chicanery, deception, and the stretching of the rules.

To change the name of the award required the affirmative action of the State Bar Council. The entire council generally only meets on the Friday morning of each quarterly meeting. I was being installed as president on the Thursday evening before, and it was my goal to announce the name change during my presentation after taking the oath of office from then Chief Justice Sara Parker. Also, I knew if I placed the issue on the agenda for Friday's council meeting, John would be aware of the proposed change, and knowing him as I did, he would not allow the honor as it would bring too

much attention to himself. However, I remembered the protocol that required the council to meet briefly on Thursday at noon to officially elect the officers who would be installed that evening. As the incoming president, one of my duties that Thursday was to host the 50 Year Lawyers Luncheon and greet the honorees beforehand, which would preclude me from attending the short council meeting at which, presumably, I would be elected, and at which I might present my proposal. To assure that John did not attend this meeting, I told him that I had an urgent matter that I needed to address with the council, and asked if he would greet the 50 Year Lawyers before the luncheon on my behalf. Of course, John readily agreed to do so. When the council meeting was called to order, the election was conducted and I made the proposal to the council that the Distinguished Service Award be renamed in honor of John B. McMillan, and that I be authorized to present the first John B. McMillan Distinguished Service Award to John himself at the installation dinner that evening. The request was unanimously and enthusiastically approved by the council, but as I was proposing to adjourn the meeting, a member of the council requested the floor to raise a point of order: a criteria of the State Bar awarding the Distinguished Service Award is that each recipient must have a criminal background check conducted before its presentation. It was obvious that



*The above photo, part of the State Bar's art collection, was taken by John McMillan during his several years of camping safaris in Kenya, Tanzania, Botswana, and Zambia.*

the council considered the point of order to be ridiculous with regard to John, but, as chair of the meeting, I knew the councilor who had raised the issue was correct. To resolve the issue, relying on my limited knowledge of Roberts Rules of Order, I ruled that the speaker was out of order, refused to concede the floor to the speaker, and declared the meeting adjourned, thus completing the chicanery, deception, and stretching of the rules, albeit with the enthusiastic endorsement of the council.

At the installation dinner that evening, after Chief Justice Parker administered my oath of office, I officially announced that henceforth, the North Carolina State Bar Distinguished Service Award would be the North Carolina State Bar John B. McMillan Distinguished Service Award, and that it was my honor to present the first John B. McMillan Distinguished Service Award to John B. McMillan. John's reaction was the complete surprise that I anticipated, and when he joined me at the podium to accept the award, as I also anticipated, he expressed his thanks and stated how humbly honored he was, but chided me for the chicanery, deception, and stretching of the rules that enabled us to share that moment. For me,

simply seeing his usual smile, but with subtle tears in his eyes, made the chicanery, deception, and stretching of the rules worthwhile.

After a courageous battle against cancer, John died February 6, 2019. At the last quarterly meeting of the State Bar Council in January 2019, Tom Lunsford, who recently retired after many years as executive director of the State Bar, was honored at a dinner in Raleigh, which John attended. Regardless of how ill he was, when he joined my wife, Debbi, and me at our table, he met us with the same infectious smile that I saw when I met John at my first council meeting in January 2000. As we talked, he would not address his health situation, and would only discuss the status of our health, our recent trip to Colorado to visit with our daughter's family, which includes our two young grandsons, and his love for Blowing Rock and the North Carolina mountains where we live and where he loved to visit.

One of my proudest achievements as State Bar president was the naming of the John B. McMillan Distinguished Service Award and the presentation of the first to John. In my opinion, he set the standard not only for the award, but for his life as a lawyer, husband, friend, member of his community, and leader

of our state. His standard will be recognized in the future as the North Carolina State Bar considers and awards the John B. McMillan Distinguished Service Award to the lawyers of our state who practice and live by the standard set by John. ■

*Anthony di Santi, former president of the North Carolina State Bar, is a partner with the Boone firm of di Santi Watson Capua Wilson & Garrett, PLLC. He was presented with a John B. McMillan Distinguished Service Award in May 2019.*

#### **Endnote**

1. The John B. McMillan Distinguished Service Award is the highest, and only, award presented by the North Carolina State Bar to its members. In January 2007, State Bar Vice-President John B. McMillan presented an idea to the Issues Committee to implement a program by which the State Bar recognized the positive achievements of lawyers for their work in the profession, their community, and the state. As a result of the idea, the Distinguished Service Award program was approved by the council in April 2008. For an excellent article regarding the initiation, implementation, and award criteria of the Distinguished Service Award program, *Who Inspires You* by Suzanne S. Lever, assistant ethics counsel and staff liaison to the Distinguished Service Award Committee in the Summer 2018 edition of *The North Carolina State Bar Journal* can be accessed via the State Bar's website, [ncbar.gov](http://ncbar.gov), via its News and Publications Section.

# Fixing a Broken Election System—Our Democracy Depends On It

BY TOM ROSS

*“Something must be done or we shall disappoint not only America, but the whole world... We must make concessions on both sides.”*

— Elbridge Gerry

The above quote came from Elbridge Gerry—signer of the Declaration of Independence, framer of the US Constitution, drafter of the Bill of Rights, governor of Massachusetts, US congressman, and fifth vice-president of the United States of America—in 1787 at the Constitutional Convention. This was a time of crisis in our nation’s history, when there was a need for leaders to come together to fix a broken governing system that was crippling the nation. The Articles of Confederation had proved to be ineffective, and our young country needed a new governing document to guide it.

Elbridge Gerry (pronounced “Gary”), of course, is not remembered for fixing the broken system that existed under the Articles of Confederation, but rather for being the namesake of gerrymandering, a term used to describe the practice of manipulating voting district lines to favor one party over another.

The semi-eponymous term “gerrymander” was coined in 1812 when Gerry was governor of Massachusetts. Governor Gerry approved a redistricting plan that was drawn in such a way that favored his Democratic-Republican Party candidates over the Federalist Party’s candidates. A political cartoon emerged shortly thereafter that traced

the boundaries of one of the newly drawn voting districts and determined it looked like a mythical salamander. The cartoonist dubbed the resulting contorted voting district a “gerrymander.”

Two hundred years later, we’re still using the term because gerrymandering is still plaguing our democracy. In fact, because of advanced software, sophisticated algorithms, and troves of big data, voting district maps can profile and select which voters should be in certain districts to maximize a political party’s likelihood of winning elections. Such precise manipulation allows politicians to choose their voters instead of voters choosing their politicians. When politicians can decide the types of voters they do (or do not) want in their districts, our democracy is undermined. People’s votes are diluted and increasingly made meaningless by this practice. Political polarization is exacerbated by this practice, in part because the only challenge incumbents in gerrymandered districts fear is from the more extreme elements within their own party. Working across the aisle is seen as an ideological weakness. There is a disincentive to compromise and, thus, finding solutions to difficult problems becomes nearly impossible. The long history of gerrymandering by both major political parties has put our democracy at serious risk. Our government functions poorly or not at all in a ger-



rymandered world. Citizens are losing confidence in their government. The practice of partisan gerrymandering has broken our system. We need to fix it. And we need to fix it now. Our democratic form of government depends on it.

## How Technology is Used in the Process

Once every ten years, after the US Census is completed, our voting district lines must be redrawn to account for changes in population, so as to ensure that each voting district contains an equal number of people, so as to comply with the “one person, one vote” standard enunciated by the US Supreme Court in *Baker v. Carr*. It is important that



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each vote have equal value and carry the same weight if we are to have a government that is truly of the people, by the people, and for the people. In the past, new voting district lines in North Carolina for members of the US Congress and for members of the North Carolina Senate and House have been drawn by the General Assembly. City Council, County Commission, and School Board districts have traditionally been drawn locally. In drawing new voting districts, the General Assembly and local officials must comply with the Voting Rights Act of 1965, which attempts to protect minority voters from having their votes diluted or diminished. Once population headcounts and racial information have been taken into account, the practice recently has been to use sophisticated software that includes information on voting history, political affiliation, income level, age, social media information, online shopping data, as well as magazine or newspaper subscription information. All of these data points are fed into advanced algorithms that are essentially able to predict how people will vote, down to the city-block level.

### How Votes are Diluted

Traditionally, the party in the majority holds the pen that is used to draw the new voting districts and controls the redistricting process. No matter which party is in control, at the time of redistricting two principal tactics are used to leverage the information about how people will vote: cracking and packing. Cracking dilutes the power of citizen's votes by spreading like-minded voters out across multiple voting districts, to ensure that they do not have a concentrated majority at the voting district level. Packing dilutes the power of citizen's votes by concentrating like-minded voters in a few districts to diminish their voting power in other voting districts. The idea behind these gerrymandering redistricting schemes is to maximize the number of districts the majority party wins and to minimize their number of losses. This is why we see voting district lines that zig and zag across streets, neighborhoods, and communities. The real harm, however, is that these methods are designed to waste people's votes—creating “safe” districts” that ensure a certain party will win just because of the way the district lines are drawn.

### How Polarization is Increased

The creation of safe districts has led to the polarization of our politics. Safe districts push candidates on both sides of the aisle to the extremes of their respective parties. When a voting district is overwhelmingly stacked for one party, candidates become more ideological in their views. Furthermore, a representative elected in a safe district is all but guaranteed to be re-elected, and therefore has no incentive to be truly accountable to all the voters—he or she need only appeal to those in his or her party whose votes really matter (the “base” voters) in the safe district to ensure re-election. And, if the representative does something to upset the base of voters, then he or she risks being subjected to a primary by a candidate that is most likely a more extreme member of the party.

### How Compromise is Discouraged

In this polarized environment, representatives are disincentivized to work across the aisle for common sense solutions to the many problems we face. If they compromise with the opposite party, they are seen as ideological-

ly weak and subject themselves to having their own party put forth an opposition candidate in the primary. In safe districts, voters often feel their vote no longer matters—that the incumbent or nominee of the party in control of the district will win regardless of whether or not they vote. Over time, this situation has resulted in more and more North Carolinians feeling disengaged from their democracy. Who is to blame? Both major political parties are guilty, and as a former superior court judge, I know guilty when I see it.

We have serious issues facing our state—issues around the economy, education, environment, crime, and health care. To be solved, these issues require our elected officials to work together to find solutions that the people of North Carolina so desperately desire, need, and deserve. However, our gerrymandered system has become so dysfunctional that it prevents our representatives from being accountable to the voters and doing what is needed to move our state forward.

### How We Should Fix It

In 2016, as a Terry Sanford distinguished fellow at the Sanford School of Public Policy, I was on a mission to figure out how to end partisan gerrymandering in North Carolina. I gathered together ten former North Carolina judges who agreed to serve as part of a redistricting experiment to draw nonpartisan voting districts. The judges—five Democrats and five Republicans—included five former chief justices of the North Carolina Supreme Court, a former associate justice, two court of appeals judges, and two superior court judges. The panel was tasked with creating North Carolina congressional districts without using political party registration or voting history, while insuring that the districts they drew had essentially equal populations and complied with the Voting Rights Act of 1965. We gave them access to map drawing software and election law attorneys. After four months, the judges completed their work and the congressional map they drew was tested for political competitiveness using voting history data from prior elections. The resulting maps drawn by the judges yielded the following results: 6 of the 13 voting districts were likely to be won by a Republican, 4 of the 13 voting districts were likely to be won by a Democrat, and 3 of the 13 voting districts were likely toss-up districts. These results were markedly different from the results of the elections held using maps drawn by the

General Assembly. Although no process will ever be perfect, I believe that the panel's work clearly demonstrates how removing partisan information from the redistricting process can produce voting districts that more accurately reflect the voters of North Carolina, and in turn better serve our needs.

Since the redistricting simulation in 2016, I have worked with a bipartisan group of North Carolinians to found a nonprofit called North Carolinians for Redistricting Reform ([ncredistrict.org](http://ncredistrict.org)), which I co-chair with Representative Chuck McGrady (R – HD 117). We have brought together a Board of Directors comprised of North Carolinians who are Democrats, Republicans, and independents. Our effort is singularly focused on fixing the broken redistricting process in advance of the voting district lines being redrawn in 2021. Together, our group has studied, discussed, and drafted a solution: The Fairness and Integrity in Redistricting (FAIR) Act.

The FAIR Act, or House Bill 140, introduced by Representative McGrady, seeks to bring transparency and clear, nonpartisan rules to the redistricting process by means of a constitutional amendment. Our solution proposes that legislative staff draw the voting districts, subject to the process and guidelines prescribed by the constitutional amendment, and that the General Assembly then votes on those maps. The process and guidelines that are set forth in the FAIR Act's constitutional amendment are as follows: the population of each district must be equal, county and geographic boundaries must be respected to the extent practicable, and districts must be compact and contiguous. Also, the following data is prohibited from being used in the legislative drafting process: prior voting history, party affiliation, residence of the incumbent or declared candidate, demographic information (except to comply with state and federal law), and any data that could be used with reasonable certainty to identify how a group of people votes. Additionally, all data and methodology that is used in the legislative drafting of voting districts would be required to be disclosed five days prior to the introduction of the redistricting plan.

Our board believes that enshrining these guidelines into the North Carolina Constitution is critically important to get both Republicans and Democrats to the table on this issue. First, if the FAIR Act's principles are “constitutionalized,” they

would be more difficult for subsequent legislatures (controlled by either party) to change them. Second, we need both Republicans and Democrats to support this bill to get it on the ballot in 2020—in North Carolina, a constitutional amendment must be passed by 60% of both the North Carolina House and Senate before it can be put to the people for a vote.

If we are successful in getting our initiative on the ballot, we are confident that the voters of North Carolina will pass it. The broken system we are now living with hurts all of us, and therefore redistricting reform is an issue that Republicans, Democrats, and Independents should support.

Furthermore, we believe that now is the right time for redistricting reform in North Carolina. There is so much uncertainty right now, including uncertainty as to how the US Supreme Court will rule in *Common Cause v. Rucho*, the partisan gerrymandering case pertaining to North Carolina congressional districts, and uncertainty as to how *Common Cause v. Lewis*, the case on partisan gerrymandering as it pertains to our North Carolina legislative districts, will be resolved. There is also a great deal of political uncertainty as we approach the 2020 election cycle, and no one knows which party will emerge victorious.

This uncertainty creates an opportunity for North Carolina—an opportunity for real reform that will allow our government to function more like the Founding Fathers intended. We have an opportunity, in this moment in our history when our democracy is in crisis, for our political leaders in both major parties to come together to fix a broken system that is crippling our state and our nation. Both parties have been the victims of sophisticated gerrymandering and both parties have enjoyed its political spoils. The consistent loser no matter which party is in control has been the voters, the citizens of North Carolina. It is going to take all of us, no matter our political leanings, coming together to accomplish the reform our democracy so desperately needs.

Despite the jokes we all endure, I believe lawyers are still respected by the overwhelming majority of North Carolinians. The opinions of lawyers matter to their fellow citizens. Lawyers have an outsized voice in the public arena. Lawyers have influence. The time has come to use your privileged status as a member

CONTINUED ON PAGE 17

# Hurricane Florence: A Chance for Attorney Volunteerism

BY KATHERINE ASARO

On September 14, 2018, Hurricane Florence made landfall in the Carolinas. The storm brought winds over 90 miles per hour and over three feet of rain in some locations. With \$44 billion in estimated damages and lost output, Florence is one of the ten costliest hurricanes in United States history. Disasters leave in their wake myriad civil legal issues that, if not addressed early on, can lead to even more costly problems in the long run, particularly for the more than 639,093 residents eligible for civil legal aid in the 34 North Carolina counties designated as disaster areas due to Florence. Lawyers are uniquely equipped to resolve many of these disaster-related problems, returning survivors to productivity and preventing future reliance on the state and federal government.

The North Carolina Pro Bono Resource Center (PBRC), a program of the North Carolina Equal Access to Justice Commission, was launched to assist lawyers in fulfilling their professional responsibility to provide *pro bono* legal services. The PBRC partners with legal aid, local bars, law schools, community groups, and other stakeholders to connect attorney volunteers to *pro bono* opportunities that address unmet legal needs like those caused by Hurricane Florence.

In anticipation of the damage Hurricane Florence would cause, PBRC Director Sylvia Novinsky connected with the North Carolina Bar Association's Young Lawyers Division (YLD), the North Carolina Bar Foundation, and Legal Aid of North Carolina to discuss how *pro bono* attorneys might provide needed legal assistance on the ground in the affected areas. Given the urgent need for this legal assistance, NC IOLTA Executive Director Mary Irvine and



*Volunteer paralegals check in clients at the Morehead City FEMA Appeal and Reconsideration Clinic.*

the IOLTA Board of Trustees were able to offer a special grant cycle dedicated to providing legal assistance to hurricane survivors. The PBRC sought and received funding from IOLTA, Ellis & Winters, Kilpatrick Townsend & Stockton, Nelson Mullins Riley & Scarborough, and Troutman Sanders for a staff attorney to lead the *pro bono* efforts surrounding hurricane legal assistance. Katherine Asaro was hired in October to serve as the staff attorney in charge of these efforts.

One of Katherine's first priorities became providing legal information to hurricane survivors at FEMA Disaster Recovery Centers (DRCs). Some of the services provided at DRCs included:

- information about FEMA or other disaster assistance programs,

- guidance regarding disaster recovery assistance and programs for survivors,
- clarification of any written correspondence received from FEMA,
- housing assistance and rental resource information,
- answers to questions, resolution to problems, and referrals to agencies that may provide further assistance,
- status of applications being processed by FEMA,
- Small Business Administration (SBA) program information regarding assistance, and
- legal assistance.

The PBRC, along with Legal Aid of NC and the NC Bar Association's YLD, organized attorneys to staff tables at DRCs. The PBRC and its volunteers staffed the New

Bern DRC on Fridays in two shifts—one in the morning and one in the afternoon—with attorneys signing up to volunteer for three hours. The DRC in New Bern remained open until late-December 2019, and the PBRC recruited and oversaw *pro bono* attorneys there until the last day it was open. In addition, *pro bono* attorneys staffed the Fayetteville DRC on Wednesdays from mid-November until it closed in December. Over the course of the PBRC DRC work, 35 attorneys volunteered, helping 49 survivors with brief advice and counsel on a variety of issues related to Hurricane Florence. An issue that consistently emerged from these client conversations was the need for help with appealing FEMA decisions. As a result, the PBRC took the next step of organizing on-

site FEMA Appeal and Reconsideration Clinics in partnership with Legal Aid of North Carolina and the North Carolina Bar Foundation.

In December, planning for this next phase began. After consulting with Legal Aid and capitalizing on PBRC's experience in New Bern and an understanding of the community, the PBRC scheduled the first clinic for January 12 in New Bern. As a preliminary step, the PBRC approached Michael Morgan, commission member and associate justice of the Supreme Court of North Carolina—a New Bern native—for advice on where to hold the first clinic. Justice Morgan had many ideas for potential locations, but his suggestion to reach out to the local community college proved to be a stroke of genius. The first clinic was held at Craven Community College and the subsequent clinics were all also held at local community college campuses—Cape Fear Community College in Wilmington, Carteret Community College in Morehead City, and Lenoir Community College's Jones County Center in Trenton. Partnering with a community college fulfilled many of the needs of each legal clinic perfectly—excellent facilities, technologically advanced capabilities, parking, and an air of legitimacy for the clinic participants. The backing of their local community college—a place the public knows and trusts—was a great strength to the success of the clinics.

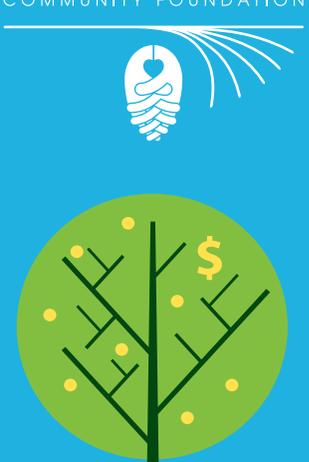
With the location in place, preparation began for the New Bern clinic itself. Attorneys, law students, and paralegals were recruited to volunteer at the clinic. Attorney volunteers ranged from current working attorneys to retired attorneys, and they came from all over North Carolina to the eastern part of the state to help those impacted by Florence. In addition, paralegals were absolutely instrumental to the success of the clinics. Rachel Royal, *pro bono* chair of the NC Bar Association's Paralegal Division, recruited paralegals for each clinic. They conducted check in and check out, and did all onsite intakes for walk-in clients. Volunteers were supported by Legal Aid of North Carolina's and New York Legal Assistance Group's training materials, developed during a prior emergency's FEMA appeals process.

Similarly, Hurricane Florence survivors were invited to sign up for free appointments for legal advice and counsel. In addition to contacting local legislators and news outlets

with information about the clinic, the PBRC targeted organizations that would have large networks of people affected by the storm: the largest employers in Craven County, social service agencies, and places of worship. After communicating with these various local organizations, the first clinic was full with a long waitlist. Nevertheless, as was the case at each of the four clinics, *pro bono* attorney, paralegal, and law student volunteers ensured no client was ever turned away.

The planning phase for the New Bern clinic offered a chance to create an effective model that would be replicated in the subsequent clinics. The New Bern event began with introductory remarks by Justice Morgan. After that, Lesley Albritton, head of Legal Aid of NC's disaster relief efforts, presented on FEMA policy and procedure. This presentation was repeated in the afternoon at each clinic. Lesley's information sessions were open to the public, and attendance was required prior to an attorney meeting. After the session, clients went to a waiting room until they were called for their attorney meeting. Lesley also served as the subject matter expert for the attorneys as they met with survivors. Legal Aid attorneys Richard Klein and Brad Piland also helped as subject matter experts.

The New Bern clinic was a resounding success. Nineteen attorneys, three law students, and two paralegals met with 49 survivors. The information sessions were held in a large room in the school's student center, and the attorney meetings were held in several computer labs across campus. Of course, the event was not without its "bumps." Originally, FEMA Appeals were to be drafted using an online portal that crashed upon submission of the client's matter. But everyone persevered. The attorneys pivoted and reentered the clients' information in an appeal template in Microsoft Word and drafted the appeals that way. Despite the initial lost time and effort, at the end of the day the volunteers and survivors left happy and hopeful. Ben Williams, an attorney volunteer, reflected on the clinic with this: "The Pro Bono Resource Center's Appeal Clinic was an inspiring event. It was great to see so many advocates from around the state come together and dedicate a day to helping fellow Tar Heels who had their lives upended by Florence. I left the event amazed by the persistence and optimism of the people we helped."



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Left: A pro bono attorney and a UNC law student speak with clients at the Morehead City FEMA Appeal and Reconsideration Clinic. Below: A client sorts through records to prepare FEMA appeal paperwork. (Photo Credit: Donn Young)



After New Bern, the second clinic was held on February 9 in Wilmington. Twenty-two attorneys, seven paralegals, and six law students served 57 survivors over the course of the day-long event. Wilmington was the busiest clinic in terms of volume of clients served. The third clinic was held on February 23 in Morehead City. This clinic featured introductory remarks by North Carolina State Senator Norman Sanderson, who represents Carteret County. At the Morehead City clinic, a large group of law students from UNC and several from Duke made it possible for each attorney to have a law student help them during the clinic. Fifteen attorney/law student pairs served 42 clients in Morehead City. Two more law students sat with survivors and interviewed them about their experiences since Hurricane Florence made landfall. In addition, nine paralegals ran the administrative end of the second event.

At the first clinic in New Bern, a survivor spoke to the PBRC about hosting a clinic in her community, Trenton, North Carolina. Jones County, where Trenton is located, was hit especially hard by Hurricane Florence—many buildings, including the court house and public schools, are still closed due to flood and storm damage. The PBRC was able to hold its fourth and final clinic in Trenton on March 6. The Trenton clinic was different than the first three in that it was held on a weeknight with a single information session. The Trenton clinic was the busiest in terms of walk-ins and clients seen by attorneys. In Trenton, nine attorneys saw 18 clients, and Legal Aid completed intake for 20 survivors. In addition, five paralegals

ran check-in, check-out, and walk-in intake.

The PBRC is honored to have been able to facilitate these *pro bono* volunteer experiences and is grateful to NC IOLTA for funding these needed disaster relief efforts and to partners for their support. After each clinic, attorneys submitted evaluations to the PBRC regarding training and clinic experiences. Most told the PBRC that they were grateful to be able to help North Carolinians in need in a way that capitalized on their skills—their legal skills. One attorney said, “I volunteered because it was a great way to effectuate my good intentions. After the storm, I spent days hauling soaked drywall and ductwork, too. Both were gratifying, but volunteering for *pro bono* clinics put my more unique skill set to use. There is nothing like the satisfaction of feeling like you provided much needed assistance. The camaraderie with the other volunteer legal staff and the good people from NC Pro Bono was a lovely extra.”

The PBRC is also grateful to the survivors who came to the clinics for help. Clients shared deeply personal experiences of loss and resiliency. Many cried when describing what happened to them and what Hurricanes Florence and Michael have left behind. Many also left empowered with legal information and assistance. Volunteer attorneys played a significant role in helping to explain a process that can be confusing and intimidating. When asked about their experience overall, one client gave this feedback about the clinic: The best part was “the compassion everyone showed for the folks affected by the hurricane. They genuinely wanted

to help.” When asked about the best part of the clinic, another survivor wrote, “[H]aving a compassionate, sympathetic, and knowledgeable person to help us through this process. We had more help from our volunteer professional than we did from [anyone so far].” ■

*Katherine Asaro is the staff attorney for the North Carolina Pro Bono Resource Center.*

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## Fixing a Broken Election System (cont.)

of the Bar and as a professional to support meaningful reform of our redistricting process. I call on each of you to join me and North Carolinians for Redistricting Reform in advocating for a nonpartisan redistricting process that will restore fairness to our election districts. The security and health of our democracy, as well as the future of our beloved Old North State, depend on how each of us responds.

*Tom Ross is co-chair of North Carolinians for Redistricting Reform, a North Carolina bipartisan non-profit focused on moving North Carolina to a nonpartisan redistricting process. He also serves as president of the Volcker Alliance, a New York non-partisan focused on advancing effective management of government.*

# Tort Claims for Alienation of Affections and Criminal Conversation are Alive and Well in North Carolina

BY G. EDGAR PARKER

While most states have abolished the common law tort claims of alienation of affections and criminal conversa-

tion, and while there have been many attempts by North Carolina attorneys to abolish them, these tort claims continue to flourish in North Carolina.<sup>1</sup>

The recent attempts by North Carolina opponents of alienation of affections and criminal conversation to abolish the torts through legislative and judicial means is not new. The first serious challenge to the torts was by the North Carolina Court of Appeals in the case of *Cannon v. Miller*, 71 N.C. App. 460 (1984), *vacated* 313 N.C. 324 (1985). In a 37-page opinion, the court of appeals held that alienation of affections and criminal conversation were unconstitutional. In a one-page opinion, the North Carolina Supreme Court vacated the court of appeals decision stating:

It appears that the panel of judges of the

court of appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow these decisions, until otherwise Ordered by the Supreme Court.

It is therefore Ordered that the Petition for Discretionary Review is allowed for the sole purpose of vacating the decision of the court of appeals purporting to abolish the causes of action for Alienation of Affections and Criminal Conversation.

Every year from approximately 1999 through 2008, bills were introduced into the



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North Carolina General Assembly to eliminate and abolish these torts. Each year, legislative committees discussed and debated these bills; and each year the bills were defeated resulting in alienation of affections and criminal conversation continuing to be recognized and enforced.

In 2009 the North Carolina General Assembly enacted a statute with reference to these torts. The statute, N.C.G.S. § 52-13 provided:

(a) No act of the Defendant shall give rise to a cause of action for alienation of affections or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or the plaintiff's spouse that the physical separation remain permanent.

(b) An action for alienation of affections or criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.

(c) A person may commence a cause of action for alienation of affections or criminal conversation against a natural person only.

The act was effective October 1, 2009, and is applicable to all actions arising from acts occurring on or after that date.

In the opinion of the undersigned, the new statute merely cleared up a few issues that many practitioners, whether representing plaintiffs or defendants, had struggled with in prosecuting and defending against these actions over the years. The statute did not change the substantive law of and the elements required to prove alienation of affections and criminal conversation. Under the new statute, the acts must occur before the spouses separate with intent by one of them to separate permanently. In other words, the act giving rise to a cause of action for alienation of affections and criminal conversation must occur pre-separation. Second, the statute clarified the statute of limitations related to the two torts. A third clarification, which most practitioners thought was the North Carolina law without the need for a statute, stated that a person may only sue a natural person and cannot sue the person's employer for alienation of affections and criminal conversation.

Over the years, many attorneys representing defendants in these actions have alleged as an affirmative defense that the tort claims violate the rights of the defendants under the US and North Carolina Constitutions. As of this date, no attack on the constitutionality of these torts has prevailed.

The most recent constitutional attack on alienation of affections and criminal conversation was in 2016 in *Malecek v. Williams*, \_\_\_\_ N.C. App. \_\_\_\_, 804 SE2d 592 (2017), review denied, a Forsyth County alienation of affections and criminal conversation action in which the trial judge granted

defendant's Rule 12(b)(6) motion to dismiss on the ground that these torts are facially unconstitutional. In reversing the trial court's order, the court of appeals in *Malecek* held that the torts of alienation of affections and criminal conversation are constitutional and further stated:

\*\*\*

\*\*\*It is well-settled that alienation of affections and criminal conversation seek to remedy an injury to a person. *Misenheimer v. Burris*, 360 N.C. 620, 624, 637 S.E.2d 173, 176 (2006). Moreover, although the Supreme Court in *Lawrence (Lawrence v. Texas)*, 539 U.S. 558 (2003) did not explain what it meant by an "institution the law protects," the institution of marriage seems an obvious choice. Marriage is, after all, perhaps the most important institution in human history. "The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations." *Obergefell v. Hodges*, \_\_\_\_ US \_\_\_\_, \_\_\_\_, 135 S. Ct. 2584, 2594 (2015). "Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations." *Id.* "Importantly, marriage is a commitment. Among the most central vows in a marriage is the promise of fidelity." *Id.* at 2608. In most marriages, this means a promise of monogamy; an agreement to share romantic intimacy and sexual relations only with one's spouse. \*\*\* ...the state has a legitimate interest (indeed, a substantial interest) in protecting the institution of marriage, ensuring that married couples honor their vows, and deterring conduct that would cause injury to one of the spouses.

We thus turn to the critical question presented here: is the state's need to protect these interests sufficient to justify private tort actions that restrict one's right to engage in intimate sexual conduct with other consenting adults?

We hold that it is.\*\*\*

\*\*\*These causes of action do not demean the existence of any group of people. They apply evenly to everyone. Moreover, the state's interest in preserving these torts is

strong. As explained above, these torts deter conduct that causes personal injury; they protect promises made during the marriage; and they help preserve the institution of marriage, which provides innumerable benefits to our society.

\*\*\*... our state's common law causes of action for alienation of affections and criminal conversation do not violate the Fourteenth Amendment.

\*\*\*

Dr. Williams (defendant in the case) next argues that alienation of affections and criminal conversation violate his rights to free speech, expression, and association guaranteed by the First and Fourteenth Amendments.

We agree with Dr. Williams (defendant in the case) that, even where the challenged causes of action are based solely on the existence of an extra-marital sexual relationship, they can implicate protected speech and expression.

\*\*\*

...we agree with Dr. Williams (defendant in the case) that facing liability for engaging in intimate sexual relations with a married person can implicate the First and Fourteenth Amendment rights to free speech and expression.

But, as with the substantive due process claim discussed above, the mere fact that these common law claims can burden the right to free speech and expression does not mean they must be struck down. In most applications of these torts, the state is not concerned with the *content* of the intimate speech or expression that occurs in an extra-marital relationship. Instead, the state seeks to deter and remedy the harmful effects *that result* from acts that cause people to break their marriage vows, inflict personal injury on others, and damage the institution of marriage. Put another way, these torts may restrict certain forms of intimate speech or expression, but they do so for reasons unrelated to the content of that speech or expression.

\*\*\*

These common law torts are facially valid under this standard. They further the

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state's desire to protect a married couple's vow of fidelity and to prevent the personal injury and societal harms that result when that vow is broken. As explained above, preventing these personal injuries and societal harms is a substantial governmental interest. Moreover, the state's interest is unrelated to the content of the protected First Amendment right. If the defendant's actions deprived a married person of the love and affection of his or her spouse, the state will impose liability regardless of what the defendant actually said or did. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). \*\*\*

Simply put, these torts are intended to remedy harms that result when marriage vows are broken, not to punish intimate extra-marital speech or expression because of its content. And, because the availability of a tort action to the injured spouse provides both a remedy for that harm and a deterrent effect (one that benefits the state and society without punishing any speech or expression that does not cause these harms), the torts are narrow enough to survive constitutional scrutiny under the *O'Brien* test.

Dr. Williams (defendant in this case) also argues that these torts are facially unconstitutional because they violate the First Amendment right to free association. \*\*\*... his argument collapses back to arguments about rights to intimate speech and expression. For the reasons discussed above, the incidental burden on those

rights does not render these torts facially unconstitutional.

We emphasize that our holding today does not mean that every application of these common law torts is constitutional. There may be situations where an as-applied challenge to these laws could succeed. Take, for example, one who counsels a close friend to abandon a marriage with an abusive spouse. But this case, as the parties concede, is not one of those cases. It was decided as a facial challenge on a motion to dismiss at the pleadings stage. In the future, courts will need to grapple with the reality that these common law torts burden constitutional rights and likely have unconstitutional applications. *For now, we hold only that alienation of affections and criminal conversation are not facially invalid under the First and Fourteenth Amendments.* \_\_\_ N.C. App. at 1-15 (2017); emphasis added.

Compared to many other areas of North Carolina law in which there have been substantial changes and modifications over the years, until the enactment of N.C.G.S. §52-13 in 2009, neither the North Carolina Legislature nor the North Carolina Appellate Courts made any changes or modifications to the common law torts of alienation of affections and criminal conversation in over 200 years. Moreover, as of the present time, neither the North Carolina Legislature nor the North Carolina Appellate Courts have declared the common law torts of alienation of affections and criminal conversation unconstitutional. Alienation of affections and

criminal conversation have evolved without the need to change the elements of the torts. They have stood the test of time. The elements of these torts are clear and well-defined. Alienation of affections and criminal conversation are as applicable today as they were in the common law years ago.

At the present time in North Carolina, the court of appeals is deciding approximately the same number of alienation of affections and criminal conversation appeals as it has determined in the past 20 to 30 years. In recent years, the Supreme Court has not determined any appeals in these types of cases. In 2015 the court of appeals heard two appeals; in 2016 three appeals; in 2017 one appeal; and as of December 14, 2018, two appeals.

Prior to the *Falls v. Noah* trial in 1997 in Forsyth County, North Carolina, there were no jury verdicts that exceeded a million dollars. Since the *Falls v. Noah* case, there have been several jury verdicts and bench trial verdicts exceeding a million dollars.

Examples of some of the jury verdicts, judgments, and settlements favorable to plaintiffs since the *Falls v. Noah* case include the following:

1. *Falls v. Noah*  
 131 N.C.App. 152 (1998)  
 Forsyth Cty.  
 \$185,000 A/A Compensatory  
 \$300,000 A/A Punitive  
 \$185,000 C/C Compensatory  
\$500,000 C/C Punitive  
 \$1,100,000  
 Jury Verdict

2. *Hutelmeyer v. Cox*  
133 N.C.App. 364 (1999)  
Alamance Cty.  
\$500,000 A/A & C/C Compensatory  
\$500,000 A/A & C/C Punitive  
\$1,000,000  
Jury Verdict
3. *Oddo v. Pressler*  
358 N.C. 128 (2004)  
Mecklenburg Cty.  
\$910,000 A/A & C/C Compensatory  
\$500,000 A/A & C/C Punitive  
\$1,410,000  
Jury Verdict
4. *Cooper v. Chvaly*  
Guilford Cty. (11/01)  
\$1,000,000 A/A& C/C Compensatory  
\$1,000,000 A/A & C/C Punitive  
\$2,000,000  
Jury Verdict
5. *Kinlaw v. Dr. John Harris*  
Robeson Cty. (2004)  
\$100,000 A/A Compensatory  
\$ 67,000 C/C Compensatory  
\$400,000 A/A & C/C Punitive  
\$567,000  
Jury Verdict
6. *Patterson v. Basurto*  
Hoke Cty. (5/05)  
\$500,000 – A/A & C/C  
Jury Verdict
7. *Sitterson v. Miller*  
Rowan Cty. (5/05)  
\$400,000 A/A Compensatory  
\$100,000 C/C Compensatory  
\$250,000 A/A & C/C Punitive  
\$750,000  
Jury Verdict
8. *Shackelford v. Lundquist*  
07 CvD 12047  
Guilford Cty. (3/19/2010)  
(D did not appear)  
\$5 Million A/A & C/C Compensatory  
\$4 Million A/A & C/C Punitive  
\$9 Million  
Jury Verdict
9. *Arcare v. Pecorare*  
07 CvS 1450  
Pitt Cty. (8/11/)  
\$2,097,543.15 A/A Compensatory  
\$1,250,000.00 A/A Punitive  
\$1,299,400.00 C/C Compensatory  
\$1,250,000.00 C/C Punitive  
\$5,896,943.15  
Bench Trial Judgment
10. *McCoy v. Freeman*  
Rowan Cty. (2011)  
\$425,000 A/A Compensatory  
\$175,000 A/A Punitive  
\$850,000 C/C Compensatory  
\$850,000 C/C Punitive  
\$2.3 Million  
Jury Verdict
11. *Filipowski v. Oliver*  
\$107,500 A/A & C/C  
Settlement after Non-Jury Trial
12. *Puryear v. Devin*  
Wake Cty. (5/14)  
(D did not appear for trial but had two attorneys appear separately)  
\$10,000,000 – A/A & C/C Comp.  
\$20,000,000 – A/A & C/C Punitive  
\$30,000,000  
Bench Trial Judgment
13. *Malecek v. Williams*  
\_\_\_\_ N.C. App \_\_\_\_  
804 SE2d 592 (2017)  
(Set forth in this article)
14. *Hayes v. Waltz*  
246 N.C. App. 438 (2016)  
\$82,500 – A/A Compensatory  
\$47,700 – A/A Punitive  
Jury found in favor of defendant on criminal conversation claim  
Jury Verdict
15. *Rodriguez v. Lemus*  
817 S.E.2d 201 (2018)  
Catawba County  
\$65,000 A/A & C/C Compensatory  
Non-Jury Trial Judgment
16. Unnamed Parties  
Guilford County (2017)  
\$10,000  
Settlement
17. \_\_\_\_ v. \_\_\_\_  
Iredell County (11/2/17)  
\$750,000 – A/A & C/C Comp.  
\$350,000 – A/A & C/C Punitive  
\$1,100,000
- Jury Verdict
18. *King v. Huizar*  
Durham County (7/2018)  
A/A, C/C, Assault & Battery; and Infliction of Emotional Distress:  
\$2,215,312 A/A & C/C Compensatory  
\$6,645,936 A/A & C/C Punitive  
Plus costs including \$25,000 in expert witness fees  
Bench Trial

Lawyers that handle these cases represent plaintiffs and defendants, just as lawyers in domestic cases represent wives and husbands. Except for three verdicts that totaled more than a million dollars in “contested” jury trials (*Falls v. Noah*, Forsyth County, \$1,100,000; *Hutelmeyer v. Cox*, Alamance County, \$1,000,000, 133 N.C. App. 364 (1999); and *Oddo v. Presser*, Mecklenburg County, \$1,410,000, 158 N.C. App. 360 (2003)), most North Carolina jury verdicts have ranged from nominal amounts to substantial amounts.

In the opinion of the undersigned, there have been misconceptions and misrepresentations by opponents of alienation of affections and criminal conversation tort claims:

- a. That the actions are outdated and antiquated. The reason most often cited by opponents of these tort claims is that the cases did refer to women as “chattels” (or property), which was, unfortunately, the status of women in the 1800s, when the earliest of these tort actions were tried. For many years, at least 50% of these torts have been instituted by women. This notion should require no further comment, and it is an insult to women for opponents of these torts to argue this as a basis for North Carolina eliminating the torts.
- b. That alienation of affections and criminal conversation claims are brought for the purpose of “blackmail.” Alienation of affections and criminal conversation are independent tort claims and have no legal relationship with the domestic cases of the innocent spouse involved. If the purpose of a plaintiff is to attempt to blackmail or obtain an unfavorable settlement in his or her domestic case, the defendant would have a remedy, the filing of a Rule 11 motion for sanctions against the plaintiff for filing the action for an improper purpose.



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c. That the damages are difficult to prove and are misleading. This is simply untrue. The NC Pattern Jury Instructions for the torts clearly set forth the damage elements as follows:

In awarding damages, you may consider the loss of companionship, mental anguish, humiliation, injury to health, family honor, suspicion cast on the legitimacy of offspring, and loss of support (being the loss of the income by the plaintiff of plaintiff's spouse's income). Moreover, NC case law clearly spells out compensatory and punitive damages which can be awarded.

d. That the torts hurt children. This is no more accurate than when children are involved in other types of civil or criminal cases. In my 47 years of trying these tort cases, I can't recall even one time a child was involved. It is the domestic litigation that hurts children, i.e., when children are subpoenaed to testify in open court in front of their parents.

e. That the tort claims are not a deterrent. A jury award for compensatory and/or punitive damages is definitely a deterrent. North Carolina law provides that when there is proof of adultery in alienation of affections or criminal conversation claims, the plaintiff's case goes to the jury on

punitive damages. Judges instruct juries that the two purposes for their awarding punitive damages, if any, are (1) to punish the defendant, and (2) to act as a deterrent for adultery by other people in our state with married individuals who are not represented. Family law and domestic hearings are rarely publicized; however, alienation of affections and criminal conversation verdicts are often reported in newspapers, on television, and via other media. Because of the deterrent effect, experienced lawyers who defend defendants in these cases share with their clients the stress and fear of adverse monetary verdicts, whether compensatory or punitive.

f. The two torts are gender neutral. In present-day society, women and men have equal standing under the law, and both men and women bring these actions. Experienced attorneys handling these cases represent husbands and wives, just as they do in their domestic cases.

g. That wealthy people are the targets. Opponents argue that these cases are costly to defend, and that wealthy people are the targets of these actions. To the contrary, these contentions apply to all tort cases, and are not valid reasons for doing away with the laws. These cases are typically not contingency cases, and they are

costly for a plaintiff to bring as well. Whether a defendant has any assets is a consideration in any tort action. These torts should not be abolished simply to protect the wealthy and provide them immunity from the consequences of their wrongful acts.

In conclusion, notwithstanding attempts by North Carolina family law attorneys to convince the North Carolina Legislature to declare the torts of alienation of affections and criminal conversation unconstitutional, and notwithstanding defendants in these actions have filed numerous affirmative defenses in their answers to complaints, the tort claims for alienation of affections and criminal conversation continue to be filed, litigated, mediated, and determined by NC Superior Courts (and occasionally district courts), juries, and/or judges (in non-jury trials) at the same consistency as they have proceeded in the past many decades. ■

*The author is a senior partner in the law firm of Crumpler Freedman Parker & Witt located in Winston-Salem, North Carolina, where he has practiced since 1972. He was a member of the first group of North Carolina State Bar Board Certified Family Law*

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## IMPORTANT NOTICE REGARDING STATE BAR EMAILS

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# I Lost a Client

BY BILL POWERS

**L**et's call him Andrew. We spent some time together last week. Quick to smile, self-deprecating, and genuinely appreciative as a client, I've liked him from the start. I could immediately see Andrew was agitated, but most people wouldn't have picked up on that. I gave him a head nod, and we silently walked out of the courtroom and into the hallway to talk.

Andrew didn't start this conversation with his usual smile. He was polite as ever, immediately apologizing for the purpose of our being there. This time, things were different.

Andrew was more distracted than normal. He fidgeted, barely able to stand in one spot.

It didn't help that it was a madhouse on the fourth floor of the Mecklenburg County Courthouse. Courtrooms are generally sterile, uncomfortable public spaces within. The hallways outside courtrooms are pandemonium, where the river of humanity and problems overflow.

That's where we met, in the middle of the panoply of psychosis, substance abuse, bad choices, and angst. I would have preferred a conference room. There were none available.

I saw but hardly noticed the ubiquitous tears on random cheeks and faces buried in hands. Several young mothers played with their babies, encircled by paintings of long-

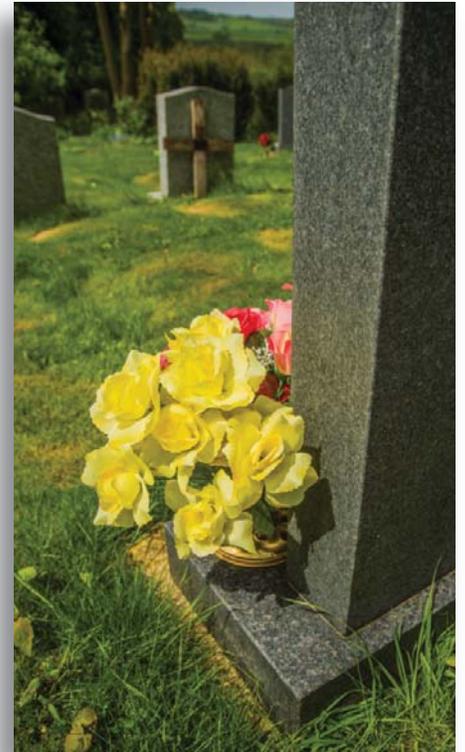
forgotten jurists still passing judgment, if only through oil on canvas.

Nearby, a woman insentient from a heroin-Fentanyl concoction, slumped over in a mouth agape stupor. Periodically, voices raised in anger briefly disturbed the already cacophonous surroundings, requiring intervention by deputies to avoid an all-out donnybrook.

Court that morning was loud, bustling, and for the uninitiated, completely discombobulating. For this 26 year veteran of the courtroom, it was Tuesday.

We quickly got to the point. Andrew had just been busted again, and in my mind, this arrest was ominous. It was emblematic of a person hurtling towards more and more pain.

While only a misdemeanor, when I heard my paralegal and associates talking about his newest set of charges, I told them I'd handle the appearance myself. It didn't matter how apparently minor it was on the depth chart of criminal offenses. This one worried me. I



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needed to talk to Andrew face to face. I was going to court, come hell or high water.

I'm generally not a touchy-feely guy, at least while standing there in the hallway of criminal court, surrounded—if not engulfed—by troubles. I wanted to reach out and connect with Andrew. Given my Sasquatch-like frame and his more slight build, hugging Andrew would have freaked him out. He could barely stand still, rocking back and forth, eyes darting and rarely making contact. Instead, I drew close, waiting for the chance for Andrew to hear me.

I think he did.

Andrew's dad, I'll call him Tom, stood there with us, saying almost nothing. That's Tom: never volunteering much, but always by Andrew's side supporting him. Tom looked tired, heartbroken—it had been a

long time since he worried about the embarrassment of it all.

Tom is a loving father. He's caring without being an enabler. If only more parents were like that instead of the near maniacal helicopter moms and dads we manage in most cases nowadays.

For them, it's only about shame—their shame—because it always has been and will remain about them, not their kids. They focus on the symptom, not the cause.

With no patience for Kabuki theatrics, I bluntly asked, “What's up with this huffing stuff?” If you know nothing about huffing, good for you. Pray no one you love gets hooked on it.

Huffing today is when kids inhale keyboard cleaner to get a temporary but intense high. Yes, keyboard cleaner. It comes in an aerosol spray bottle. They call it “air duster.” You can get it by the case at any Office Depot.

Huffing, purposely abusing inhalants, displaces oxygen in the lungs, causing hypoxia. It is chemical suffocation. You normally pass out. Maybe you wake up.

It's dirt cheap and easily obtained. There are no dealers. There are no secret rendezvous. Walmart sells it.

And no one pays attention when you plop a can down on the counter, although they should. It's against the law to sell it if you have reasonable cause to suspect it's for huffing.

In the thousands of legal matters I've handled during my career, I've never seen or heard of a single criminal prosecution for illegally selling inhalants.

Describing users, I use the term “kids” purposely because no one is a life-long huffer. You don't live long enough. In my humble but educated opinion on drug addiction, huffing almost always ends with a funeral.

It was for that reason I had to see Andrew. We all knew he was a poly-substance abuser. I'd previously asked him, “What are your drugs of choice? Cocaine, crack, bars (Xanax), Molly (ecstasy), weed, booze?” His answer was basically, “Yes.”

Andrew's arrest record reflected his hydra-headed addictions. I knew immediately he was trying to, what I call, “turn off your brain.” He couldn't stop thinking. “Some” of an intoxicant was never enough.

Whether it was alcohol or a benzodiazepine, Andrew consumed not just until he would pass out, but consumed so he could

pass out.

If one drink is good, ten is better. It's not about the taste or the buzz or getting a bit crazy. The whole point of the exercise is to shut down.

I understand that type of substance abuse. It's one reason I don't drink anymore. I too have trouble turning off my brain. Frankly, it's a common problem with a lot of courtroom lawyers I know and love. It doesn't matter whether they're defense attorneys or prosecutors.

What makes them good in court can be difficult to live with. It's not OCD, or ADD, or some other acronym. It's different.

In my legal journey, I deal with the inability to stop thinking, processing, and working through problems. I see myself as a problem solver and a lawyer who, above all, truly wants to help people.

Unfortunately, some cases don't have answers. Some matters can't be won and some clients can't be saved. That drives me nuts. I take losses hard.

That's great for the client. No one will outwork or “out-prepare” that type of lawyer. Mix in any sense of empathy for your fellow human and you have the makings of a true advocate for justice.

Sometimes that level of dedication and intensity can be confused as ego. Trust me, it's anything but that. Indeed, it's the exact opposite of what you might expect, which is the very definition of irony.

At 53, I have found ways to slow down and turn off my brain with mindful meditation, working out, and faith. During our meeting last week, I shared that and more with Andrew.

He gave me a knowing look. Despite the noise around us, I felt we had a genuine connection. He opened up, and to some extent he shared his pain.

I'm no Pollyanna. I didn't expect immediate change. I tend to be a worrier. It's both in my nature and comes from years of experience as a criminal lawyer.

Recognizing an issue is not the same as addressing an issue. Andrew and I knew and recognized his problem. He promised nothing, other than telling me, “I'll try.”

Andrew at 27 years old found treatment to be a hassle and to some extent useless. He was ashamed of taking anything more from his dad. He felt compelled to work, to take care of himself, and to stop hurting his parents.

A full-time job isn't necessarily conducive to recovery. Andrew was fine when he was with people and in meetings. He suffered when he was by himself, when he couldn't shut down or sleep. It was only a matter of time before he looked for ways to turn off the noise.

Andrew wasn't some “lowlife drug addict” or whatever judgmental, ignorant idiots call people like him. Andrew was a nice kid, who felt terrible for his parents and apologized to his lawyer for being a difficult client.

I shared my walk in life with Andrew, making sure to point out it was my walk, not his. I stressed he had to find his own path. I begged of Andrew one thing, “Please, please, don't make me go to another funeral. I just can't. Not for you.”

I shook Tom's hand and held it a bit longer than normal. I said nothing and just looked him in the eye. In retrospect, it was a courthouse hug. It likely made him a bit uncomfortable.

I don't remember how I reached out and touched Andrew. It probably was something lame like a fist-bump. I truly try to connect with these kids I call clients.

Despite my obviously inept approach, I hope they understand I'm trying to speak their language of love and friendship. I strive to meet them at their point of need. I want them to know I relate with and care for them.

I sent Andrew a couple follow-up texts, asking for an update on treatment. I didn't get a response.

So when I got an email Thursday night from Tom, letting me know Andrew had been killed in a car accident most certainly caused by impairment, I was both heartbroken and unsurprised.

I went downstairs and hugged Mookie, my 17-year-old daughter. I wanted to cry, but she already has to live with a man who shares too much about the dangers of youth and life.

This isn't the first client I've lost and it most certainly won't be the last. And while I'm not a “hugger” around the courthouse or even among friends, I am with my family. I wanted to hold her close and never let her go.

I'm not big on sleeping. Apparently, neither is my DA friend who is a wonderful person in addition to being a fabulous trial lawyer. She most certainly is included in my “best lawyers I know” list.

So at 3:15 a.m. I shared Andrew's death

with her via email. She and one of her co-workers immediately responded, telling me they'd dismiss Andrew's cases in short order. That was completed the same day. The value of their compassion cannot be overstated; nor will it ever be forgotten.

I understand this article may come as a surprise to some, but if you're a courtroom lawyer with any level of experience, it's a familiar tale.

Lawyers survive in an adversarial process through kindness, professionalism, and lasting friendships, especially those shared with your adversary across the aisle in the courtroom. If you think being an attorney is all about posturing, arguing, and self-aggrandizement, please don't go to law school. Do something else to feed your ego.

The legal practice for folks who handle criminal and family law cases is a tremendously difficult way to make a living. I don't always get it right.

Just this week I reacted to something in anger, without knowing all the facts. I'd forgotten my favorite motto, one often repeated by my maternal grandfather, RL: It's nice to be nice. I've added to his mantra: Apologize immediately and mean it. I did and do.

Mind you, I am not complaining about being a lawyer. It's the best way I personally know how to help people. It is deeply fulfilling work for me, but I didn't always see it that way. I am an accidental advocate.

If you want to know what it's really like to be a lawyer, go to a treatment center, talk to someone facing their life struggle, and just listen without judgment.

I dread going to Andrew's funeral this Monday. I don't want Tom to have to see me, knowing I am nothing more than a reminder of Andrew's suffering.

But just like court, I feel compelled to be there for Andrew and his family. Andrew's loss is my loss. I've decided when that stops

happening, I'm going to do something other than practice law.

I lost a client. His name was Andrew.

The way I'm going to settle my mind with this tragedy, because there truly is no solution to this problem, is to talk about it, to hopefully teach and thank others as appropriate, and to apologize if I ever forget to be nice.

I'm also going for a long walk right now.

My deepest condolences are with Tom and his family. ■

*Bill Powers, a former president of the North Carolina Advocates for Justice and courtroom lawyer who focuses on DWI, criminal defense, and family law litigation, is dedicated to helping attorneys address mental health and substances abuse issues. He is available for CLE presentations on issues involving work-life balance and addressing substance abuse in the profession.*

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## It Was a Wonderful Life (cont.)

effort was enormously successful, allowing the inclusion of many features that make the building extraordinary, including the acquisition and installation of a collection of North Carolina art that would rival anything found in our state's museums. Included in that collection, by way of donation not purchase, was a set of amazing large-format photographs of wildlife taken by Mr. McMillan while on some of his many trips to east Africa. The images are among the most popular works of art in the collection. Of course, John McMillan didn't think of himself as an artist, but he was.

John also carried a lot of water for the organized Bar in the legislature. An acknowledged expert in the practice of government relations, he unofficially represented the State Bar's interests for many years in regard to a host of matters, not because he needed another *pro bono* client, but because he believed in the State Bar and professional self-regulation. Because his personal views generally aligned with the policies of the council, he typically appeared in matters of interest to the State Bar on his own behalf as a member of the Bar, never asking for or accepting compensation. As important as his advocacy for the profession was in the

General Assembly, it was no more valuable than his good counsel concerning legislative matters. On numerous occasions in recent years, his political wisdom effectively guided decisions made and actions taken by the council in reference to legislation concerning the State Bar's regulatory charter. Now that he is longer available to consult, I trust that those who continue to wrestle with such matters will occasionally pause in their deliberations to ask themselves, "What would John have to say about this?"

Among the themes offered by Frank Capra in his immortal film *It's a Wonderful Life* were the notions that a person may be fairly reckoned as rich if he or she has an abundance of true friends, poverty notwithstanding; and that an ordinary person's life can positively and profoundly affect the world in which he or she lives, if that person is good. John McMillan lived a much larger life than Capra's fictional hero, George Bailey, but I submit that the central precepts of the story well apply in his case, too. If, indeed, friends are wealth in its purest form, John accumulated a great fortune. Everyone who knew him liked him and wanted him to like them. More than that, he was genuinely admired by most of the people who knew him well. In fact, several distinguished lawyers with whom I spoke as I prepared to

write this essay told me that their highest professional aspiration was to "be" John McMillan.

So, he was a rich man. Of that there can be no doubt. But he was also an essential man. Like George Bailey, John did a great many fine things that almost certainly would not have been done had he not been around to do them. But his importance can't be measured merely in terms of the good deeds for which he alone was responsible. His real significance inhered in the value he added to whatever he undertook. Just as Bedford Falls would have been Pottersville in the absence of George Bailey, North Carolina would be a much different and much diminished place had John McMillan never been born. The symphony's music wouldn't be as sweet, the animals at the zoo wouldn't be as interesting, the water we drink wouldn't be as clean, the justice we need wouldn't be as accessible, and the State Bar's new executive director might still be working in a dump. The point is that the people of our state, and especially the members of the State Bar, are much better off today than they would have been if John McMillan hadn't had a such a wonderful life. ■

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

# To Wire or Not to Wire

BY LEANOR BAILEY HODGE, TRUST ACCOUNT COMPLIANCE COUNSEL

...that is the question, or it should be. As trust account compliance counsel, I receive the reports of trust account fraud that lawyers make to the State Bar. Lawyers are required to make these reports pursuant to Rule of Professional Conduct 1.15-2(p). I receive, on average, at least one such report each week. This means that at a minimum, there are 52 reported instances a year of fraud on lawyers' trust accounts. I am confident that this figure is not indicative of the total number of such occurrences each year.

In 2018 the FBI's Internet Crime Complaint Center (IC3) received 351,936 complaints about internet crime. According to IC3, these complaints were associated with losses that exceeded \$2.7 billion dollars. Cybercrime is clearly big business. The complaints to IC3 include reports about internet scams such as Business Email Compromise (BEC), extortion, tech support fraud, and payroll diversion. The reports of fraud I receive from lawyers suggest that BEC is the scam that is most frequently perpetrated against North Carolina lawyers. IC3 defines BEC as a scam targeting, among other things, businesses regularly performing wire transfers. This likely explains the prevalence of the BEC scam among the lawyer population. According to IC3, BEC scams are sophisticated scams that are conducted by criminals who compromise email accounts through social engineering or computer intrusion techniques to conduct unauthorized transfers of funds.<sup>1</sup>

According the FBI, the following are the most frequent BEC scenarios:

- **Business Executive:** Criminals spoof or compromise email accounts of high-level business executives, including chief information officers and chief financial officers, which results in the processing of wire transfer to a fraudulent account;
- **Real Estate Transactions:** Criminals impersonate sellers, realtors, title companies, or law firms during a real estate transaction

to ask the home buyer for funds to be sent to a fraudulent account;

- **Data and W-2 Theft:** Criminals, using a compromised business executive's email account, send fraudulent requests for W-2 information or other personal identity information to an entity in an organization that routinely maintains such information;

- **Supply Chain:** Criminals send fraudulent requests to redirect funds during a pending business deal, transaction, or invoice payment to an account controlled by a money mule or bad actor;

- **Law Firms:** Criminals find out about trust accounts or litigation and impersonate a law firm client to change the recipient bank information to a fraudulent account.<sup>2</sup>

It is helpful to understand how BEC scams are conducted. Accordingly, my column last quarter highlighted the BEC scam commonly seen among the lawyer population, one in which the scammer tricks the lawyer into believing that a party to a real estate transaction has changed wire instructions. Although there is benefit in knowing how the scam usually operates, the true value is in awareness that you may be a potential target. This is because scammers are always updating their scams. In fact, several recent reports suggest that in North Carolina, buyers in real estate transactions are being tricked into believing that a spoofed email is actually an email from the lawyer with new wire instructions for the buyer. The constant changes to the manner in which internet scams are conducted mean that it will always be important to be attentive and vigilant when you wire funds from your trust account. The goal is to ensure that the funds are wired to the intended recipient and not to the criminals. The most effective way to achieve this goal is to always be certain that the wire instructions you use are those actually provided to you by the client and not instructions sent by a cybercriminal using a spoofed email address.

In 2018 IC3 received 20,373 BEC complaints with adjusted losses in excess of \$1.2 billion dollars. Significantly, North Carolina ranks among the top five states when it comes to victim monetary loss, with losses

CONTINUED ON PAGE 37

## Escrow Consulting & Accounting, LLC

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# Grievance Committee and DHC Actions

*NOTE: More than 29,000 people are eligible to practice law in North Carolina. Some share the same or similar names. All discipline reports may be checked on the State Bar's website at [ncbar.gov/dhcorders](http://ncbar.gov/dhcorders).*

## Disbarments

**Mary March Exum** of Asheville surrendered her law license and was disbarred by the Disciplinary Hearing Commission. In June 2017 the DHC suspended Exum for five years after concluding that she engaged in a variety of misconduct, including mishandling entrusted funds. While she was suspended, Exum held herself out to the public and to former clients as able to practice law through Exum Consultants. Exum collected fees for legal services she said would be performed through attorneys hired and supervised by Exum Consultants.

**John O. Lafferty Jr.** of Lincolnton surrendered his law license and was disbarred by the DHC. Lafferty acknowledged that he did not file federal and state tax returns and did not pay federal and state income taxes for 17 years.

**Darin P. Meece** of Durham surrendered his law license and was disbarred by the Wake County Superior Court. Meece admitted that he misappropriated fiduciary funds totaling \$15,000.

**James M. Zisa** of Wilmington surrendered his law license and was disbarred by the Wake County Superior Court. Zisa admitted that he had sex with two clients, disclosed confidential client information, charged excessive fees, did not act with diligence and did not communicate with multiple clients, made a false statement to the State Bar, and did not respond to the Grievance Committee.

## Suspensions & Stayed Suspensions

**Gavin A. Brown** of Waynesville forged a notary's signature and affixed the notary's seal to a deed without authorization. He was suspended by the DHC for two years.

**Meredith Ezzell** of Wilmington aban-

doned her law practice for several months, did not provide legal services for which she was retained, did not communicate with her clients, collected excessive fees, did not protect her client's interests, misrepresented the services she would provide, engaged in conduct prejudicial to the administration of justice, aided a paralegal in the unauthorized practice of the law, and violated trust account rules. The DHC suspended her for three years. The suspension is stayed for three years upon Ezzell's compliance with enumerated conditions.

**James Goard** of Charlotte was twice convicted of driving while impaired and committed a third driving while impaired offense involving a collision, advised and assisted an individual in drafting an affidavit while his law license was suspended, made misrepresentations to a client, and made misrepresentations during a disciplinary inquiry. The DHC suspended him for five years. After serving two years active suspension, Goard will be eligible to apply for a stay of the balance upon showing compliance with enumerated conditions.

**Carl D. Lee** of Glendale, Arizona, mismanaged entrusted funds, did not reconcile his trust account, and did not maintain required trust account records. The DHC suspended him for one year. The suspension is stayed for two years upon Lee's compliance with enumerated conditions.

**Christopher A. Stella** of Winston-Salem committed criminal acts by patronizing a prostitute and filing a false police report about the incident. The DHC suspended him for three years. After serving 18 months of active suspension, Stella will be eligible to apply for a stay of the balance upon showing compliance with enumerated conditions.

## Interim Suspensions

The chair of the DHC entered an interim order suspending the law license of Hendersonville lawyer **H. Trade Elkins**. Elkins pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343, a class C

felony. Elkins was sentenced to 24 months in prison followed by supervised release, and was ordered to make restitution in the amount of \$545,738.90.

The chair of the DHC entered an interim order suspending the law license of Mayodan lawyer **Hayley C. Sherman**. Sherman pled guilty to the state felony offenses of possession of marijuana with intent to manufacture, sell, or deliver in violation of N.C. Gen. Stat. § 90-95(a) (three counts); sale or delivery of marijuana in violation of N.C. Gen. Stat. § 90-95(a) (two counts); conspiracy to sell or deliver marijuana in violation of N.C. Gen. Stat. § 90-98 (two counts); maintaining a store, dwelling, vehicle, boat, or other place for use, storage, or sale of controlled substances in violation of N.C. Gen. Stat. § 90-108(a)(7) (three counts); and one count of possession of a Schedule IV substance with intent to manufacture, sell, or deliver in violation of N.C. Gen. Stat. § 90-95(a); and to the state misdemeanor offense of possession of marijuana paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(a) (two counts).

## Censures

The Grievance Committee censured Asheville lawyer **Jennifer Nicole Foster**. Foster made false and misleading social media postings concerning the local district attorney and the court-appointed criminal defense attorney for one of her friends, and communicated and met with the friend in prison while misrepresenting herself to prison personnel as his attorney.

**Larry G. Hoyle** of Gastonia made false statements to the court and engaged in conduct that was dishonest and prejudicial to the administration of justice by submitting an improper designation of secured leave. Hoyle also falsely represented to the court that a defendant for whom he took action in a criminal case at the behest of a bail bondsman was his client. He was censured by the DHC.

The Grievance Committee censured

**Tonza D. Ruffin** of Windsor. Ruffin did not timely obtain a client's informed consent to a conflict of interest, made a misleading statement to opposing counsel, and engaged in conduct prejudicial to the administration of justice by taking action that was intended solely to delay trial and ensure that a different judge presided over her client's case.

**Ryan Shoaf** of Raleigh facilitated the unauthorized practice of law by a domestic limited liability company. He was censured by the DHC.

**Leslie Van Der Have** of Greenville was censured by the Grievance Committee for her conduct as guardian of an estate, in which capacity she improperly allowed the guardian of the person access to fiduciary funds, allowed the guardian of the person to write checks to cash and to use a debit card on an account containing fiduciary funds, did not timely file annual accounts, and established financial arrangements that made it impossible to account accurately for fiduciary funds.

The Grievance Committee censured **Steven Wright** of Wilmington. In one case, Wright did not reasonably communicate with his client and with court officials and did not comply with the court's scheduling order. In another case, Wright did not properly wind down his practice when his law license was administratively suspended. Wright misrepresented to the State Bar that he was paid in full by his client before the effective date of his suspension when he actually accepted installment payments of his fee during the suspension. Wright's website represented that he was admitted to practice law in the state of Vermont at a time when his Vermont law license was administratively suspended.

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### Reprimands

**Richard Batts** of Edgecombe and Nash Counties did not communicate with his client, did not notify his client of her duly-noticed deposition, did not cooperate in scheduling mandatory mediation, did not appear at a scheduled court hearing, did not respond timely to discovery requests, and did not comply with discovery orders. He was reprimanded by the DHC.

**Jerry Braswell** of Goldsboro was reprimanded by the Grievance Committee for providing legal advice while his law license was suspended.

The Grievance Committee reprimanded

**Sean Dillenbeck** of Gastonia. Dillenbeck neglected and did not communicate with his client and did not respond timely to the Grievance Committee.

The Grievance Committee reprimanded **Rachel Kiblen** of Mooresville. While she was representing a client in a domestic case, Kiblen left her law firm without notifying her client and without providing her client new contact information. She did not make reasonable efforts to serve the opposing party. Kiblen did not maintain regular communication with her client, resulting in a missed opportunity to settle the client's case, did not respond for extended periods to her client's requests for status updates, and did not respond to the Grievance Committee.

The Grievance Committee reprimanded **Jeffrey Patton** of Winston-Salem. Patton pursued frivolous claims, misrepresented facts, and filed an amended complaint for an improper purpose.

The Grievance Committee reprimanded **Steven Wright** of Wilmington. In 2015, Wright told his client that the client's misdemeanor charge was dismissed. In 2017, his client learned, while applying to increase his security clearance, that the charge had not been dismissed and that a warrant for his arrest was outstanding for failing to appear on the charge. When the state eventually dismissed the charge, Wright agreed to deliver documentation of the dismissal to his client but did not do so, knowing that his client had a short timeframe in which to submit the documentation.

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### Reinstatements from Disability Inactive Status

In June of 2017 the chair of the Grievance Committee entered a consent order transferring **Elisabeth Murray-Oberte** of Morganton to disability inactive status. In December 2018 the DHC entered an order that would reinstate her to active status if she satisfied enumerated conditions. She was reinstated to active status on March 11, 2019.

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### Reinstatements from Disbarment

**Theodore G. Hale** of Wilmington was disbarred in 2004 for misappropriating entrusted funds. After a hearing on February 7, the DHC denied his petition for reinstatement.

**Geoffrey H. Simmons** of Durham was disbarred in 2013 for misappropriating

entrusted funds. On April 8, Simmons withdrew his petition for reinstatement.

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### Orders to Show Cause

In February 2016 the DHC suspended **Katherine Pekman** of Hickory. Pekman neglected and did not communicate with a client, did not promptly refund an unearned fee, did not account for entrusted funds, and did not respond to the Grievance Committee. The suspension was stayed for three years. The DHC concluded that Pekman did not comply with the conditions of the stay and therefore granted the State Bar's motion to lift the stay and activate the suspension. After serving six months of active suspension, Pekman may apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

In November 2016 the DHC suspended **Darryl G. Smith** for three years for violating trust account rules. The suspension was stayed for three years. The State Bar filed a petition alleging that Smith did not comply with the conditions of the stay and seeking to lift the stay and activate the suspension. The DHC entered a consent order continuing the stayed suspension under a plan of compliance that is acceptable to the State Bar. ■

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### Alienation of Affections (cont.)

*Specialists. He has represented Plaintiffs and Defendants in Alienation of Affections and Criminal Conversation cases since the early 1970s. He has tried many Superior Court jury trials of these tort claims, and has sub-specialized in representing plaintiffs and defendants in alienation of affections and criminal conversation cases. He represented the plaintiff in the Forsyth County alienation of affections and criminal conversation case of Falls v. Noah, which was appealed by the defendant and affirmed by the court of appeals, N.C. App. 152 (1998), unpublished, which was the first verdict in these types of cases in North Carolina totaling more than one million dollars.*

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### Endnote

1. The other states having alienation of affections and criminal conversation laws are Hawaii, Mississippi, New Mexico, South Dakota, and Utah.

# Dealing with Client Perjury

BY THOMAS SPAHN AND ALICE NEECE MINE

What should a lawyer do when...?

- Before trial, the client's version of the facts continually changes.
- The client testifies in a deposition to something the lawyer never heard before.
- The client tells the lawyer her answers in a deposition were "based on what I understood to be best for me at the time."
- The client tells the lawyer he lied on the witness stand about an immaterial matter.
- The client tells the lawyer he lied on the witness stand about a material matter.

Responding to client perjury, or the prospect that a client intends to commit perjury, is one of the most difficult ethical dilemmas a lawyer can face. NC Rule 3.3, the key rule on client perjury, provides some guidance, but not definitive instructions for professional conduct. Monroe Freedman,<sup>1</sup> a law professor and nationally recognized scholar on professional responsibility, describes it as a "trilemma." Freedman observes that there are three conflicting obligations of a lawyer in the adversary system. First, there is the duty to represent the client competently which requires thorough investigation including learning everything the client knows about the case. Second, there is the duty to hold in confidence what the client reveals which, coupled with assurances to the client that the lawyer will do so, encourages the client to trust the lawyer and be forthcoming with the information needed to represent the client. And third, there is the duty to act with candor toward the tribunal so that the lawyer does not participate in a judicial system that makes decisions on the basis of false testimony.

[a]s soon as one begins to think about these responsibilities, it becomes apparent that the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.

Monroe H. Freedman, *Perjury: The Lawyer's*

*Trilemma*, 1 *Litigation* 26 (No. 1, Winter 1975).

Professor Freedman answers "yes" to the "trilemma" question of whether it is proper for a criminal defense lawyer to put a witness on the stand who the lawyer knows will commit perjury because the duty of confidentiality

does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself. What that means—necessarily, it seems to me—is that, at least the criminal defense attorney, however unwillingly in terms of personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.

*Id.*

Although there is a continuing academic debate on whether a lawyer—and specifically a criminal defense lawyer—may offer perjured testimony, the NC Rules, the ABA Model Rules, and the rules of most jurisdictions have resolved the issue in favor of prohibiting a lawyer from offering perjured testimony and, upon learning that perjured testimony has been offered, requiring the lawyer to take reasonable remedial measures including, if necessary, disclosure to the court.

NC Rule 3.3(a)(3) and ABA Model Rule 3.3(a)(3) provide one of the few instances in the Rules of Professional Conduct that is "anti-client" in the sense that the duty of confidentiality to the client is trumped by the duty of candor to the court. As stated in the comment to NC Rule 3.3 and ABA Model Rule 3.3,

[t]his Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting

as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

NC Rule 3.3, cmt. [2]; ABA Model Rule 3.3, cmt. [2].

## North Carolina Rule 3.3(a)(3)

NC Rule 3.3(a)(3) states that:

[a] lawyer shall not knowingly...offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

First, note that the provision contains distinct professional obligations that take place at different junctures in litigation.

Before testimony is offered, the lawyer is admonished not to offer evidence that the lawyer knows to be false, and is advised that he may refuse to offer evidence that he reasonably believes is false other than the testimony of a criminal defendant. After testimony is offered, upon learning that the lawyer offered false evidence (presumably "unknowingly" at the time), the lawyer is required to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

**Second**, note that the meanings of terms in the rule are critical to its interpretation and application.

The rule governs the conduct of a lawyer who is representing a client in the proceedings of a “tribunal.” NC Rule 1.0(n) defines “tribunal” as

a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party’s interests in a particular matter.

If the body does not have the authority to “render a binding legal judgment” affecting a party’s interests, it is not a “tribunal” and NC Rule 3.3 would be inapplicable.

The prohibition on offering false evidence in NC Rule 3.3(a)(3) hinges on a double knowledge requirement. The lawyer is prohibited from “knowingly” offering evidence that he “knows to be false.” The duty to take remedial measures only arises if the lawyer “comes to know” that the offered evidence was false. NC Rule 1.0(g) defines “knowingly,” “known,” and “knows” as denoting “actual knowledge of the fact in question,” but that “a person’s knowledge may be inferred from the circumstances.” The obligation to protect confidential client information remains unless the lawyer “knows” the testimony is false.

**Third**, note that the duty applies not only in litigation, but also in other matters under the jurisdiction of a tribunal, including ancillary proceedings conducted pursuant to the tribunal’s authority, such as a deposition. Comment [1] specifies

[this rule] applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

NC Rule 3.3, cmt. [1]

### The Knowledge Requirement

As noted above, “knowingly” means that the lawyer “actually knows” that the offered evidence is false, but knowledge can be

inferred from the circumstances. Comment [8] states that

[a] lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact...[but] although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

NC Rule 3.3, cmt. [8]. One standard for evaluating whether knowledge can be inferred from the circumstances is to ask whether a reasonable lawyer would believe the evidence in light of the other evidence known to the lawyer. *See, e.g., Patsy’s Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 CIV 10175 (JSM) 202 WL 59434 (S.D.N.Y. Jan. 16, 2002)(law firm sanctioned by court for permitting client to submit false affidavit).

Actual knowledge is not required, however, for a lawyer to refuse to offer testimony if the lawyer reasonably believes the testimony will be false. However, this discretion does not allow a lawyer to decline to offer the testimony of a criminal defendant because of the defendant’s due process right to testify in his own behalf. *See Nix v. Whitesides*, 474 U.S. 157 (1986). Even if a criminal defense lawyer reasonably believes that the client’s testimony will be false, the lawyer must allow the defendant to testify unless the lawyer “knows” that the testimony will be false. NC Rule 3.3, cmt. [9].

### What to Do Before and During Client Testimony

NC Rule 3.3(a)(3) prohibits a lawyer from knowingly offering any false evidence regardless of its materiality. If a lawyer knows that the client intends to testify falsely, the comment to NC Rule 3.3 provides the following guidance:

the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

NC Rule 3.3, cmt. [6].

In seeking to persuade the client not to offer false evidence, the lawyer may advise the client that he will seek to withdraw from the representation if the client persists. If the

lawyer concludes that the client will persist in a course of action that the lawyer believes is criminal or fraudulent, the lawyer may seek permission of the court to withdraw. NC Rule 1.16(b)(3).

If the lawyer must call the client as a witness, as in the case of a criminal defendant who insists upon testifying, the lawyer should structure the examination to elicit as little false testimony as possible. Note that the comment does not recommend the use of the “narrative approach” to testimony by a client that may be perjured. The narrative approach allows the client to testify in a narrative fashion without benefit of direct examination questions from the lawyer, but the lawyer is prohibited from using the testimony in closing argument. *Annotated Model Rules of Professional Conduct* (Sixth Ed.), p. 317. The narrative approach is rejected by the Model Rules and in ABA Formal Ethics Opinion 87-353 (1987) (since *Nix v. Whitesides*, lawyer can no longer use narrative approach to insulate himself from charge of assisting a client’s perjury). *Id.* Nevertheless, the narrative approach is not specifically prohibited by the North Carolina Rules or formal ethics opinions and it may be “one of the imperfect options available in the client perjury dilemma.” *Id.*

### After the Client Testifies: Reasonable Remedial Measures

Rule 3.3(a)(3) requires a lawyer to take remedial measures upon discovering that materially false evidence has been offered by the lawyer, by the client, or by a witness called by the lawyer during either direct examination or cross examination by opposing counsel. If the false evidence is immaterial, the lawyer is not required to take action.

Reasonable remedial measures do not have to be taken as soon as the lawyer learns that the offered evidence was false, but they must be taken before a third party relies upon the false evidence to his detriment. As explained in comment [10] to NC Rule 3.3, [t]he lawyer’s action must also be reasonable: depending upon the circumstances, reasonable remedial measures do not have to be undertaken immediately; however, the lawyer must act before a third party relies to his or her detriment upon the false testimony or evidence.

NC Rule 3.3, cmt. [10]. Note that the comment to ABA Model Rule 3.3 does not

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# IOLTA Releases 2018 Annual Report

## Annual Report

IOLTA is pleased to release our 2018 Annual Report, *Opening Doors: Supporting Access to Justice for All*. The Annual Report contains an overview of grantmaking, data and stories about the impact of IOLTA grantees, a summary of 2018 financials, and a recognition of Prime Partner Banks, those banks that go above and beyond the IOLTA eligibility requirements in their commitment to improving access to justice in their communities.

Visit [nciolta.org](http://nciolta.org) to read IOLTA's 2018 Annual Report and learn more about our impact.

## Income

Interest income from participating banks that hold lawyers' trust accounts continues to be the primary source of income for the IOLTA program. Income in 2018 from participant accounts totaled over \$3 million, a 67% increase compared to 2017. Increases in income in 2018 are due both to positive interest rate adjustments and larger balances held in lawyers' trust accounts.

IOLTA will continue efforts initiated last spring to review eligible banks across the

state. In 2018, IOLTA reviewed 16 banks that hold IOLTA accounts to ensure compliance with State Bar rules regarding IOLTA. As part of the review, banks submit materials regarding their current available products and, if necessary, update their IOLTA compliance certification statement.

While IOLTA income is still well below that in 2008, when income from participant accounts exceeded \$5 million, this positive income trajectory will enhance future availability of funds for grantmaking, if maintained.

The IOLTA trustees approved a 2018 year-end contribution of \$800,000 to the reserve fund. The fund now totals \$1,178,836.57. Since 2009, IOLTA has drawn from the reserve fund nearly every year to supplement available funds for grantmaking. The reserve fund was established in 1995 to moderate the impact of drastic swings in income.

## Grants

At its meeting on April 23, the IOLTA Board of Trustees approved Community Redevelopment Grant awards to six grantees. Awards total \$2,778,750 and will

be utilized from October 1, 2019 through December 31, 2021.

Funded projects employ a range of community redevelopment legal assistance strategies including:

- Support to nonprofits regarding formation, governance, transactional, and other issues;
- Research, technical assistance, and support to community groups seeking to ensure equitable and inclusive economic development and revitalization;
- Legal assistance to homeowners in targeted neighborhoods regarding title issues, heirs property, eligibility for home repair programs, and property tax relief;
- Community education on legal barriers to economic opportunity, predatory financial products and practices, wealth building, state and local policy impacting economic development, and other issues;
- Minority business support through training, technical assistance, and support for Historically Underutilized Business (HUB) certification;
- Support to nonprofits, farm-based

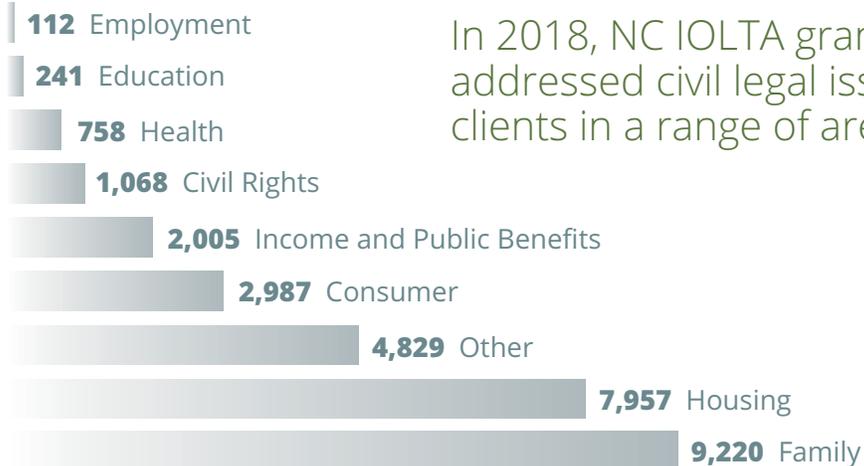
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In 2018, NC IOLTA grantees addressed civil legal issues for clients in a range of areas.

Total cases closed: 29,177

# The Power of Perspective to Heal and Transform

BY ROBYNN MORAITES

*Most of the great problems of life are never resolved. They're just outgrown.*

— Carl Jung

The truth of this Carl Jung quote resonated when I first read it. The process of recovery (from anything) seems to follow a certain similar path for most people. It is a paradox that while our individual journeys are totally unique and never duplicated, there are some big themes that seem universal. It is also paradoxical that while our individual journeys are never linear (they tend to jump around a lot), there are similar stages of recovery for all. One of the reasons education about our condition is so crucial in any kind of treatment or counseling (for alcoholism, depression, anxiety, trauma, anger, etc.) is that having a basic understanding of the process of dis-ease (hyphen intentional) empowers us to make better choices and informs our recovery process for the rest of our lives. For example, knowing that depression and alcoholism thrive in isolation (and the contributing psychological, physical, and sociological causes and effects) helps empower someone to say “yes” when asked to join a discussion group or engage socially (when that may be the last thing someone wants to do). There are so many big themes in recovery. One of the big themes in recovery involves perspective.

It is not uncommon to hear discussed “the disease of perception” in an AA meeting. It is always so fascinating to hear the various experiences people have had with major shifts in perception and perspective, and the relief and personal growth that occur as a result. Or maybe it is the other way around—maybe the growth happens first and then the shift in perspective results. It is a classic chicken-egg mystery.

One of the great gifts in LAP is the opportunity to see this growth and shift in perspective as a lawyer’s recovery unfolds. I recall early in my tenure at LAP the first in-

depth conversation I had with a FRIENDS volunteer who was recovering from depression. He expressed how his recovery had opened his eyes to what he could only describe as a three- (or maybe four-) dimensional world, and it shattered his prior linear-frame-of-mind way of thinking. While he used different words and concepts to frame his experience, I too had a similar ‘shift in perspective’ or ‘awakening’ or ‘opening’ experience (whatever one chooses to call it) in my recovery that very much paralleled his. I listened to him and was struck by the similarity of his path and process to those who are recovering from alcoholism.

Often the shift in perspective can only be measured or observed in hindsight. And as Carl Jung so astutely points out, much of the shift involves outgrowing a certain perspective, or moving to a higher level of understanding and insight. Over the years in LAP, I have heard lawyers share some profound things. These may not seem profound in the retelling, but given the stalwart defense mechanisms of our egoic structures, these are monumental shifts in insight and indicators of a lot of personal growth.

One lawyer observed that during his early sobriety, had he been given a polygraph test asking whether he was an alcoholic, he would have answered, “No,” and he would have passed the test with flying colors—despite the fact he was a severe alcoholic. He observed that recovery slowly opened his eyes. The unfolding process of self-honesty was more of a journey of growing self-awareness—the more self-aware he became, the more honest he could become. And through education and hearing the experiences of others, he gradually came to see that he indeed was an alcoholic. And as the years passed, he could look back with increasing clarity. He joked that at 25 years sober he seemed like a much worse alcoholic than he did at one year sober (at which time he was still reeling from the consequences his disease



had wrought).

Another lawyer observed, with some disbelief and wonder, that the problems, fears, and concerns that consumed him upon entry to LAP a mere six months prior, now seemed laughable in hindsight. He could not fathom that “those problems” had him so wound up. He laughingly observed that he now had a different set of problems, fears, and concerns that consumed him, but he suspected that one day down the road, these problems might also seem laughable. There is something magical and freeing about the big lesson in perspective—on some level we know that whatever problems are consuming our thoughts and energy today, they will be seen and understood with a different lens down the road. Seen with a lens informed by growth and expanded perspective. We begin to intuitively understand and believe in our hearts (not just our heads) that “this too shall pass.” And we can begin to trust the unfolding process of recovery, life, awareness, and growth.

Another lawyer recently sent a note to LAP staff thanking them for insisting that he do certain things for his recovery. He had initially been very resistant to all suggestions

CONTINUED ON PAGE 35

# Lawyer Wellness Takes Center Stage at North Carolina Bar Association Annual Meeting

BY LAURA MAHR

Jackie Grant is promoting lawyer wellness as president of the North Carolina Bar Association (NCBA). Under her leadership, the NCBA annual meeting being held at the Biltmore Estate this month focuses entirely on wellbeing in our profession. I sat down with Jackie in a beautiful conference room overlooking downtown Asheville at Roberts & Stevens PA, where she is partner. I asked her about her perspective on lawyer wellbeing and on choosing wellness as the annual meeting theme.

**Laura:** What inspired you to include lawyer wellness as part of your platform as NCBA president?

**Jackie:** Incoming Bar presidents are tasked to address the most pressing issues in our profession. During my year as president-elect at the NCBA, I attended several ABA meetings and the National Conference of Bar Presidents meetings. In each one of those meetings, rising stress among lawyers and administrative staff was a recurring theme. This theme emerged locally as well; our NCBA Leadership Academy survey revealed that lawyers entering the academy are experiencing increasingly higher levels of stress. I chose to build wellness into my platform because this is a perfect time to address lawyer wellbeing. It is important for lawyers to be well in order to provide good service to our clients. To be of value to the public, we have to be well; if we are not well, we can't take care of others.

**Laura:** What is unique about your perspective of wellness?

**Jackie:** In my experience at ABA or National Conference of Bar Presidents meetings, when people talk about wellness, they talk a lot about the stress our profession is under, but rarely about solutions to stress. While there are some great programs to help lawyers—including our NCBA BarCARES program—most of the programs catch you

on the “backend” of stress—once you've already succumbed to it and are dealing with mental health or substance abuse issues. I'm interested in catching stress on the “front end,” so that people learn the tools to manage stress and anxiety so that it doesn't get out of control. I'd like our profession to learn what we can do to keep ourselves well so that we don't have to turn to substances to get through the day, or need to take time away from lawyering to recover from chronic stress.

**Laura:** What do you see as some of the major challenges in our field to lawyer wellbeing?

**Jackie:** There are a number of issues that account for why lawyers are under more stress, including billable hours, the increasing complexity of the law, and the heavy workload for lawyers on account of fewer new lawyers entering the profession. Technology has also changed the expectations for lawyers. When I started practicing law, we did not have cell phones or the ability to work remotely. Now, we can work anytime and anywhere, making it difficult to “unplug.” In addition, there are a lot of lawyers who have high expectations for themselves, and want to “do it all”—graduate law school, get married, start families, get on the partnership track, and be involved in community and professional activities. I'm not saying that you cannot do it all, but you need to find the time to do things that you enjoy and make sure that you're doing what you want to do, and not just doing things



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that somebody else wants you to do.

**Laura:** What do you do to support your own wellbeing?

**Jackie:** [Chuckling] Well, I will say that over these past two years I haven't had a lot of free time. I'm a bit embarrassed to admit this, but I have to schedule an appointment with myself to work out! I try to work out at least three times a week, and every other month or so I spend a couple of hours at a spa. That is my opportunity to have complete quiet, unwind, get a massage, and read a book. We have to unplug; if we are always plugged in, we become exhausted and we burn out. We have to find other things beyond work that we enjoy doing, even if it's just reading a book that gives us a break from thinking about the law.

**Laura:** What kinds of things do you think firms should do in-house to promote and support lawyer wellbeing? Is there anything specific you are doing at Roberts & Stevens that promotes lawyer wellness?

**Jackie:** Law firms should have a culture that supports attorneys' wellbeing, including encouraging them to disengage from work by taking vacations, and not expecting them to be available 24/7. Firms should also offer

more mindfulness courses and encourage younger lawyers to participate in enjoyable things. Here at Roberts & Stevens, we have a more relaxed atmosphere than some firms. We do fun things during the work day like celebrate people's birthdays; this gives us a few minutes away from our desks and time to socialize together. We also have a firm picnic at the baseball game and holiday events with the whole staff. Although we have an expectation when it comes to billable hours, we focus more on the quality of work. When deciding compensation, we take into account things such as activities in professional organizations and community involvement. This helps our lawyers understand that we want them to have outlets that give them joy and support their overall wellbeing.

**Laura:** The NCBA Annual Meeting's theme this year is "wellness." What do you hope the participants experience during the conference and take with them when they leave?

**Jackie:** I hope participants have a mind-altering experience. What I mean by that is: I hope they literally leave with the tools they need in order to better manage their time, their stress, and any other issues they may be having. I'm envisioning a lightbulb coming on for folks who have never thought about wellbeing before. I envision them saying, "OMG, I'm ready to take this on...I'm ready to do this!" I want people to leave the annual meeting feeling relaxed, with a rejuvenated mind and a rejuvenated outlook so

they go forth thinking, "I'm going to spend a little more time doing this; I'm going to work in some time to do that...so that I can be of value to my clients, my firm, my practice, and my community."

\* \* \*

If you'd like to participate in this first-of-its-kind NCBA Annual Meeting, find out more at [ncbar.org/members/annual-meeting](http://ncbar.org/members/annual-meeting). If you are unable to attend the meeting, take a moment to reflect on Jackie's comments. Ask yourself or talk with a colleague about how the legal field has changed since you started practicing:

- What shifts, large and small, have you experienced that have either supported or challenged your wellbeing?

- What changes would you like to see at your workplace in the next two years to support you and move our profession toward greater wellness?

If you do attend the meeting, I'll be delighted to see you there on Saturday, June 22, when I'll present a brand-new CLE called "Tapping into the Intelligence of the Body to Optimize Your Life." During the presentation I will teach three tools designed to help you work from an optimal state of physical calm and cognitive clarity. One tool will involve connecting with your nervous system to feel calmer, another will focus on tapping into your body's wisdom to build your resilience, and a third will help you rewire your brain to optimize your ability to

think clearly. ■

*Laura Mahr is a NC lawyer and the founder of Conscious Legal Minds LLC, providing mindfulness-based coaching, training, and consulting for attorneys and law offices nationwide. Her work is informed by 11 years of practice as a civil sexual assault attorney and 25 years as a student and teacher of mindfulness and yoga, and a love of neuroscience. Find out more about Laura's work at [consciouslegalminds.com](http://consciouslegalminds.com).*

*If you would like to connect with other lawyers who are curious about how mindfulness and meditation builds resilience in the practice of law, join Laura as she presents at these upcoming events:*

*North Carolina Association of Defense Attorneys Annual Meeting, June 15, 2019, Asheville, NC, "Love Your Work. Love Your Life: Five Mindfulness Tools" [ncada.org/event-3034906](http://ncada.org/event-3034906)*

*Charlotte Chapter of the Association of Legal Administrators Meeting, June 19, 2019, Charlotte, NC, "What Every Legal Administrator Needs to Know about Mindfulness" [alacharlotte.com/form.php?form\\_id=13](http://alacharlotte.com/form.php?form_id=13)*

*North Carolina Bar Association Annual Meeting, June 22, 2019, Asheville, NC, "Tapping Into the Intelligence of the Body to Optimize Your Life" [ncbar.org/members/annual-meeting](http://ncbar.org/members/annual-meeting)*

*Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness, Meditation, and Neuroscience (online, on-demand CLE), [consciouslegalminds.com/register](http://consciouslegalminds.com/register)*

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## Lawyer Assistance Program (cont.)

made. It was a sobering note because he reported that he had stayed in touch with everyone with whom he had been in treatment, and they all had relapsed. He was the sole survivor who was still sober a few years later. In his note, which was the inspiration for this article's theme, he said that he was beginning to haltingly glimpse the bigger picture, and in so doing, his perspective had changed radically from feeling imposed upon to feeling immensely grateful for the very things he had resisted and resented.

This kind of shift in perspective is much bigger and more profound than the trite glass half-empty, glass half-full metaphor we often hear. It is the manifestation of inner growth, accompanied as always by a shift in inner priorities, which leads to a different view of the world and our place in it. As William D. Silkworth observed, part of this shift in perspective "appears to be in the nature of huge emotional displacements and rearrangements. Ideas, emotions, and attitudes which were once the guiding forces of the lives of these [lawyers] are suddenly cast to one side, and a completely new set of conceptions and motives begin to dominate them." Anyone engaged in a genuine and committed recov-

ery effort can attest to this shift in priorities, ideas, emotions, and attitudes—and to a change in perception and perspective that recovery brings. And, oh what a relief it is. ■

*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 (western areas of the state) at 704-910-2310, or Nicole Ellington (for eastern areas of the state) at 919-719-9267.*

# Linda Johnson, Board Certified Specialist in Estate Planning and Probate Law

BY DENISE E. MULLEN, ASSISTANT DIRECTOR FOR THE BOARD OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Linda Johnson, a board certified specialist in estate planning and probate law, who practices with Senter, Stephenson, Johnson, PA, in Fuquay-Varina. Linda began her education as a business major at Fairfield University in Fairfield, Connecticut, completing a bachelor of science in business management with a minor in German. She received her law degree from Quinnipiac College School of Law. She is licensed in Connecticut, Hawaii, and North Carolina.

After graduating from law school, Linda worked in the tax departments of regional certified public accounting firms completing tax work for decedent's estates including, but not limited to, estate tax returns, estate and trust income tax returns, and final individual tax returns. She transitioned from corporate employment to private practice, joining the Aguirre Law Office in 1997. Becoming a certified specialist has helped her become a trusted resource for clients and other lawyers. Linda served two consecutive terms on the State Bar's Estate Planning Specialty Committee, chairing the committee for the last two years of her service. Her comments on her legal career and specialty certification follow below.

**Q: Why did you pursue board certification with the State Bar?**

As someone who has dedicated my legal career to estate planning and administration,

it is very important for me professionally to know that I have educated myself to the top of my practice area. The specialty certification and its ongoing continuing legal education requirements enable me to achieve this goal.

**Q: Has earning board certification been helpful to your career?**

Yes, it has. Studying for and passing the estate planning and probate law certification exam, and meeting the on-going requirements to stay certified, assist me in staying on top of my game professionally and providing the most knowledgeable legal advice to my clients.

**Q: How does your certification benefit the estate planning and probate process?**

A specialist must learn and know the specifics as well as some of the more obscure points of law. Being that well educated in

my practice areas allows me to draft documents in the planning process that improve the outcome during the administration process. Poorly drafted documents can add unnecessary complications and delays.

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

Yes. We are waiting on information and decisions about possible exemption changes that can affect the advice we give to clients. We are also seeing changing recommendations for gifts and sales of property, transfer and protection of assets, and the use of trusts in order to take advantage of options in basis planning for income taxes.

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

I attend extensive CLE nationally through the University of Miami School of Law, the Hawaii Tax Institute, and the National Academy of Elder Law Attorneys. I most recently attended The American College of Trust and Estate Counsel (ACTEC) national

meeting. I also attend several excellent programs locally through the Wake County Bar, the North Carolina Bar Association, and the Duke School of Law. I continue to teach courses on estate planning as well.

**Q: How does specialization benefit the public?**

The public is benefited by having the ability to obtain the services of a specialist, usually with very little difference in the cost. Clients benefit from the high caliber of work product.

**Q: Are there any volunteer organizations or other groups with which you enjoy working?**

Yes, I am active with the NC Bar Association as I just finished chairing the



Estate Planning and Fiduciary Law Section, I was co-chair of the Legislative Committee, I still chair subcommittees of the Legislative Committee and co-chair the Ad Hoc Committee. I also serve as a Hospice volunteer attorney and co-chair the Grief Share program at my church.

**Q: What was the best part about serving on the Estate Planning Specialty Committee?**

I really enjoyed the in-depth educational experience in drafting and grading exams. I also appreciated the opportunity to make friends with the other committee members.

**Q: What do you remember most about working on the exams, or attending the board retreat/annual luncheon?**

I was always excited by the thrill of grading an exam and knowing that the candidate

would pass by the quality of their answers. At the board retreats and annual luncheons, I always was impressed by how passionate all the attorneys are about improving the specialization system and all of the practice areas.

**Q: How do you see the future of specialization/board certification?**

I think it will continue to grow and expand to other practice areas.

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

It will improve your practice of law. You will be a better attorney. You will meet great attorneys in all practice areas. ■

*For more information on how to become certified, visit our website at [nclawsspecialists.gov](http://nclawsspecialists.gov).*

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## To Wire or Not to Wire (cont.)

in excess of \$100 million dollars, though North Carolina is not among the top ten states with the most victims. When you consider that the number one cybercrime type when ranked by victim loss is the BEC scam (which often targets North Carolina lawyers), thoughtful consideration about whether to wire funds is warranted. To wire or not to wire...that is the question. I hope

this column will encourage you to pause and devote some serious thought to this question each time you consider sending a wire. ■

### Endnotes

1. All statistical information and definitions contained in this paragraph were derived from the Federal Bureau of Investigation Internet Crime Complaint Center 2018 Internet Crime Report.
2. [fbi.gov/news/stories/international-bec-takedown-061118](http://fbi.gov/news/stories/international-bec-takedown-061118).

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## Dealing with Client Perjury (cont.)

include this statement and, presumably, the duty under the Model Rule is to take remedial action as soon as the lawyer knows that material false evidence has been offered.

Reasonable remedial measures include remonstrating with client privately and seeking client's cooperation regarding the correction of the false evidence. NC Rule 3.3, cmt. [10]. The lawyer may threaten to withdraw if the client will not cooperate. Withdrawing from the representation may be the next logical remedial measure, but only if withdrawal will undo the effect of the false evidence and is permitted by the

tribunal. ■

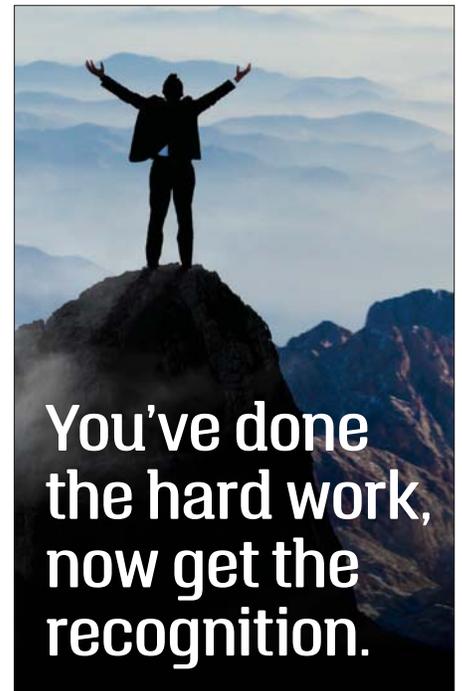
*This column is an excerpt from an article written by Thomas Spahn and Alice Neece Mine and is reprinted with permission.*

*Tom Spahn practices as a commercial litigator in the Northern Virginia office of McGuire-Woods. He has served on the ABA Standing Committee on Ethics and Professional Responsibility, is a member of the American Law Institute, and is a fellow of the American Bar Foundation.*

*Alice Neece Mine is the executive director of the North Carolina State Bar.*

### Endnote

1. Monroe Freedman died on February 26, 2015, not long after this article was originally written.



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**BOARD OF LEGAL SPECIALIZATION  
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# Committee Publishes Proposed Opinions on *Ex Parte* Communications and Accessing Social Network Presence of Represented or Unrepresented Persons

## Council Actions

At its meeting on April 26, 2019, the State Bar Council adopted the ethics opinions summarized below:

### 2019 Formal Ethics Opinion 1

#### *Lawyer as an Intermediary*

Opinion rules that a lawyer may not jointly represent clients and prepare a separation agreement.

### 2019 Formal Ethics Opinion 2

#### *Conditions Imposed on Lawyer by Client's ERISA Plan*

Opinion rules that a lawyer may not agree to terms in an ERISA plan agreement that usurp a client's authority as to the representation.

### 2019 Formal Ethics Opinion 3

#### *Engaging in Intimate Relationship with Opposing Counsel*

Opinion rules that an ongoing sexual relationship between opposing counsel creates a conflict of interest in violation of Rule 1.7(a).

## Ethics Committee Actions

The Ethics Committee considered a total of 11 inquiries at its meeting on April 25, 2019. Four of those inquiries were sent or returned to subcommittee for further study, including inquiries on a lawyer's participation in online self-laudatory professional organizations, a lawyer's ability to receive Bitcoin and other cryptocurrency in connection with a law practice, attorney's eyes only discovery agreements, and a lawyer's ability to offer an incentive for interaction with a law practice social media account. The committee also published two ethics decisions to the State Bar Council concerning a lawyer's ability to contest opposing counsel's fee request at the Industrial Commission, and a lawyer's ability to represent parents in DSS matters while simultaneously serving as a foster parent. These proposed ethics decisions will be

reviewed by the State Bar Council over the next quarter. The committee also considered comments submitted by a member of the Bar concerning a previously published proposed formal ethics opinion. Lastly, the committee approved two new opinions for publication, which appear below.

### Proposed 2018 Formal Ethics Opinion 5 Accessing Social Network Presence of Represented or Unrepresented Persons April 25, 2019

*Proposed opinion reviews a lawyer's professional responsibilities when seeking access to a person's profile, pages, and posts on a social network to investigate a client's legal matter.*

#### Introduction:

Social networks are internet-based communities that individuals use to communicate with each other and to view and exchange information, including photographs, digital recordings, and files. Examples of currently popular social networks include, but are not limited to, Facebook, Twitter, Instagram, and LinkedIn. On some forms of social media, such as Facebook, users create a profile page with personal information that other users may access online. Websites that host the social networks often allow the user to establish the level of privacy for the profile page and postings thereon, and to limit those who may view the profile page and postings to "friends"—those who have specifically sent a computerized request to view the profile page which the user has accepted. NYCBA Formal Op. 2010-2 (September 2010).

Lawyers increasingly access social networks to prepare or to investigate a client's

## *Rules, Procedure, Comments*

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at the next quarterly meeting. Any comment or request should be directed to the Ethics Committee c/o Lanice Heidbrink at lheidbrink@ncbar.gov no later than June 28, 2019.

## *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.

matter. However, the use of social networks has ethical implications. Several rules restrict a lawyer's communications with people involved in a client's matter. Rule 4.2 restricts

a lawyer's communications with persons represented by counsel. Rule 4.3 restricts a lawyer's communications with unrepresented persons. Furthermore, all communications by a lawyer are subject to Rule 4.1's prohibition on knowingly making a false statement of material fact or law to a third person and to Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer.

The technology and features of social networks are constantly changing. It is impossible to address every aspect of a lawyer's ethical obligation when utilizing a social network to prepare or to investigate a client's legal matter. Every lawyer is required by the duty of competence to keep abreast of the benefits and risks associated with the technology relevant to the lawyer's practice, including social networks. Rule 1.1, cmt. [8]. Further, when using a social network as an investigative tool, a lawyer's professional conduct must be guided by the Rules of Professional Conduct.

This opinion will address ethical issues that arise when lawyers, either directly or indirectly, seek access to social network profiles, pages, and posts (collectively referred to as "social network presence") belonging to another person. Throughout the opinion, "person" refers to opposing parties and to witnesses.

This opinion does not obviate comment [1] to Rule 8.4. The comment explains that the prohibition in Rule 8.4(a) against knowingly assisting another to violate the Rules of Professional Conduct or violating the Rules of Professional Conduct through the acts of another does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take. *See* 2014 FEO 9 (use of tester in investigation that serves a public interest).

For guidance on communicating with a judge on a social network, *see* 2014 FEO 8. For the restrictions on communicating with a juror or a member of the jury venire, *see* Rule 3.5.

#### **Inquiry #1:**

Regardless of the privacy setting established by a user, some social network sites allow public access to certain limited user information. May a lawyer representing a

client in a matter view the public portion of a person's social network presence?

#### **Opinion #1:**

Yes. The public portion of a person's social network presence refers to any information or posting that is viewable by anyone using the internet or anyone who is a member of the social network. Such information is no different than other information that is publicly available. Nothing in the Rules of Professional Conduct prohibits a lawyer from accessing publicly available information.

As noted by the Colorado Bar Association, "[a] lawyer's conduct in viewing [the public portion of a person's social media profile or any public posting made by an individual] does not implicate any of the restrictions upon communications between a lawyer and certain others involved in the legal system." Colorado Formal Op. 127 (September 2015).

Some social networks automatically notify a person when his or her presence has been viewed. The person whose presence is viewed may receive information about the individual who viewed the presence. Under these circumstances, when a lawyer views a person's public social network presence, it is the social network sending a communication, not the lawyer. Therefore, the notification generated by the social network is not a prohibited communication by the lawyer. *See, e.g.,* ABA Formal Op. 466 (2014) (communication generated because of technical feature of electronic social media service is communication by the service, not the lawyer). However, a lawyer who engages in repetitive viewing of a person's social network presence so as to generate multiple notifications from the network may be in violation of Rule 4.4(a). That rule prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person, and from using methods of obtaining evidence that violate the legal rights of such a person.

Lawyers may view the public portion of a person's social network presence. However, the lawyer may not engage in repetitive viewing of a person's social network presence if doing so would violate Rule 4.4(a).

#### **Inquiry #2:**

May a lawyer use deception to access a restricted portion of a person's social network presence?

#### **Opinion #2:**

No. Lawyers must never use deception, dishonesty, or pretext to gain access to a person's restricted social network presence. Rules 4.1 and 8.4(c). When seeking access to a person's restricted social network presence, a lawyer must not state or imply that he is someone other than who he is or that he is disinterested. Furthermore, lawyers may not instruct a third party to use deception.

#### **Inquiry #3:**

May a lawyer, using his true identity, request access to the restricted portions of an unrepresented person's social network presence?

#### **Opinion #3:**

Yes. A lawyer's duty of competent and diligent representation under Rules 1.1 and 1.3 encompasses the use of readily available forms of informal discovery. A lawyer who seeks informal discovery may request the same access to an unrepresented person's social network presence that is available to any nonlawyer, as long as the lawyer uses his true identity and does not engage in deception or dishonesty. The person contacted is free to accept, reject, or ignore the request, or to ask for additional information. If the unrepresented person asks the lawyer for additional information, the lawyer must accurately provide the information or withdraw the request.

Rule 4.3(b) provides that a lawyer, in dealing on behalf of a client with a person who is not represented by counsel, shall not "state or imply that the lawyer is disinterested." In addition, when the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

By simply requesting access, the lawyer does not violate Rule 4.3. A lawyer who requests access is not making any statement, nor is he implying disinterest. *See* Oregon State Bar, Formal Opinion No. 2013-189 (2016 Revision) ("A simple request to access nonpublic information does not imply that Lawyer is 'disinterested' in the pending legal matter."). The person contacted has full control over who views the information on her social network site. A grant of the lawyer's request, without additional inquiry, does not indicate a misunderstanding of the lawyer's role.

#### **Inquiry #4:**

May a lawyer, using his true identity, request access to the restricted portions of a represented person's social network presence?

#### **Opinion #4:**

No. During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or by court order. Rule 4.2(a). Rule 4.2 contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation. Rule 4.2, comment [1].

Unless the lawyer has obtained express consent from the represented person's lawyer, the request interferes with the attorney-client relationship and could lead to the uncounseled disclosure of information relating to the representation. Therefore, requesting access to the restricted portions of a represented person's social network presence is prohibited unless the lawyer obtains consent from the person's lawyer. Furthermore, the lawyer may not direct a third party to request access to restricted portions of a represented person's social network presence. *See* Rule 8.4(a).

#### **Inquiry #5:**

May a lawyer request or accept information from a third party with access to restricted portions of a person's social network presence?

#### **Opinion #5:**

Yes. Nothing in the Rules of Professional Conduct prevents a lawyer from engaging in lawful and ethical informal discovery such as communicating with third party witnesses to collect information and evidence to benefit a client. Witnesses who have obtained information from the restricted portions of a person's (represented or unrepresented) social network presence are no different in this regard than any other witness with information relevant to a client's matter. Therefore, when a lawyer is informed that a third party has access to restricted portions of a person's

social network presence and can provide helpful information to the lawyer's client, the lawyer is not prohibited from requesting such information from the third party or accepting information volunteered by the third party. Similarly, a lawyer may accept information from a client who has access to the opposing party's or a witness's restricted social network presence.

However, the lawyer may not direct or encourage a third party or a client to use deception or misrepresentation when communicating with a person on a social network site. *See* Opinion #2.

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### **Proposed 2019 Formal Ethics Opinion 4 Ex Parte Communications with a Judge Regarding Scheduling or Administrative Matter April 25, 2019**

*Proposed opinion rules that, except as prohibited by law or court rule, including rules of evidence and rules of procedure, communications with judicial official are within the discretion and preference of the tribunal and the presiding official.*

Relying on previous versions of Rules 3.5 and 8.4 that prohibited *ex parte* communications with judicial officials and conduct prejudicial to the administration of justice, 98 FEO 13 expanded the prohibition on communications with judges to include certain "informal written communications" even if they did not fall within the definition of *ex parte* communications. The rationale for the expanded prohibition was that certain written communications with a judge "may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light."

Since the adoption of 98 FEO 13, several Rules underlying the opinion have been revised:

- Rule 1.0 has been amended to include a definition of "writing" or "written" that now encompasses email, text messages, and any other form of electronic communication.

- Rule 3.5 has been amended to simply state that *ex parte* communications with a judicial official are prohibited, unless authorized by law or court order. The revision also clearly defines an *ex parte* communication as "a communication on behalf of a party to a matter pending before a tribunal that occurs [1] in the absence of an opposing party, [2]

without notice to that party, and [3] outside the record." Rule 3.5(d).

- Comment [4] to Rule 8.4(d) has been amended to clarify the type of conduct that is "prejudicial to the administration of justice."

Under these revised rules, *ex parte* communications continue to be generally prohibited, regardless of their form. In addition to the revised Rules, many such communications are also subject to restrictions established by law or court rule, including rules of evidence and rules of procedure. Pursuant to N.C. Gen. Stat. § 84-36, the Rules of Professional Conduct are not meant to disable or abridge "the inherent powers of the court to deal with its attorneys," which include the manner in which attorneys communicate with the court. Therefore, regardless of form, and except as prohibited by law or court rule, including rules of evidence and rules of procedure, communications that do not fall within the definition of "*ex parte* communications" are within the discretion and preference of the tribunal and the presiding judicial official.

To the extent this opinion conflicts with 98 FEO 13, it is overruled. ■

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## **IOLTA Update (cont.)**

businesses, and farmers on business issues, access to USDA Rural Development programs, and business planning;

- Participation in state, regional, and local taskforces and coalitions working to address community redevelopment needs.

Community Redevelopment Grants were made with funds from the national Bank of America settlement received in 2015 and 2016. IOLTA intends to spend down nearly all remaining funds received from the Bank of America settlement over the next several years.

### **State Funds**

In addition to its own funds, NC IOLTA administers the state funding for legal aid under the Domestic Violence Victim Assistance Act on behalf of the NC State Bar. To date, NC IOLTA has administered \$784,615 in domestic violence state funds for 2018-2019. \$100,000 was appropriated to Pisgah Legal Services for legal services for veterans again in 2018-2019. ■

## Amendments Approved by the Supreme Court

On March 27, 2019, the North Carolina Supreme Court approved the following amendments.

### Amendments to the Rules on Discipline and Disability of Attorneys

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

Amendments to Rule .0113 establish a procedure for imposition of censures that is consistent with the procedures for imposition of reprimands and admonitions. New Rule .0135 establishes a procedure to suspend the license of a licensee who is not in compliance with demands of the Grievance Committee for information or evidence relating to a grievance investigation.

### Amendments to the Minimum Standards for Continued Certification of Specialists and to the Recertification Standards for All Specialties

27 N.C.A.C. 1D, Section .1700, The Plan for Legal Specialization; Section .2100, Certification Standards for the Real Property Law Specialty; Section .2200, Certification Standards for the Bankruptcy Law Specialty; Section .2300, Certification Standards for the Estate Planning and Probate Law Specialty; Section .2400, Certification Standards for the Family Law Specialty; Section .2500, Certification Standards for the Criminal Law Specialty; Section .2600, Certification

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

The amendments reduce the number of peer references required for recertification as a specialist from ten to six for all specialties.

### Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rule 1.15, Safekeeping Property; Rule 3.5, Impartiality and Decorum of the Tribunal; and Rule 5.4, Professional Independence of Lawyer

The amendments to the official comment to Rule 1.15 explain the due diligence required if a lawyer uses an intermediary (such as a bank, credit card processor, or litigation funding entity) to collect a fee. The amendments to Rule 3.5 revise the official comment to specify that gifts or loans to judges are only prohibited if made under circumstances that might give the appearance

### Highlights

- Upon the recommendation of the special committee appointed to study the Rules Governing the Practical Training of Law Students, the Council is publishing proposed rule amendments that will enable North Carolina law schools to provide more opportunities for law students to engage in practical training.
- Amendments to CLE rules that eliminate the annual 6.0 cap on online CLE credit hours will be sent to the NC Supreme Court following the Council's July meeting. If approved by the Court, elimination of the cap will be effective for the 2020 CLE compliance year.

that the gift or loan was made to influence official action. The amendments to Rule 5.4 add an exception to the prohibition on fee sharing with a nonlawyer which allow a lawyer to pay a portion of a legal fee to certain third parties if the amount paid is for administrative or marketing services and there is no interference with the lawyer's independent professional judgment.

## Amendments Pending Supreme Court Approval

At its meeting on April 26, 2019, the North Carolina State Bar Council voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval. (For the complete text of the proposed rule amendments, see the Spring 2019 edition of the *Journal* or visit the State Bar website.)

### Proposed Amendments to the Rules on Election, Succession and Duties of Officers

27 N.C.A.C. 1A, Section .0400, Election Succession, and Duties of Officers

The proposed amendments expressly authorize the president to act in the name of the State Bar under emergent circumstances

when it is not practicable or reasonable to convene a meeting of the council. Actions taken pursuant to this authority are subject to ratification at the next meeting of the council.

### Proposed Amendment to the Rule on Standing Committees and Boards of the State Bar

27 N.C.A.C. 1A, Section .0700, Standing Committees and Boards of the State Bar

The proposed amendment eliminates the requirement that the Grievance Committee establish and implement a disaster response plan to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers.

### Proposed Amendment to the Rules Governing the Organization of the North Carolina State Bar

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

The proposed amendments reflect the elimination of judicial district bar fee dispute programs.

### Proposed Amendments to the Rules on Discipline and Disability of Attorneys

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

The proposed amendments acknowledge the Grievance Committee's authority to

operate the Attorney Client Assistance Program and the Fee Dispute Resolution Program.

### Proposed Amendment to the Rules on Discipline and Disability of Attorneys

27 N.C.A.C. 1B, Section .0200, Rules Governing Judicial District Grievance Committees

The proposed amendment reflects the elimination of judicial district bar fee dispute programs.

### Proposed Amendments to the Rules on Standing Committees and Boards of the State Bar

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

The proposed amendments to numerous rules in Section .0700 accomplish the following: eliminate judicial district bar fee dispute programs; eliminate language that would allow a third-party payor of legal fees or expenses to file a fee dispute petition; state that the fee dispute program does not have jurisdiction over disputes regarding fees or expenses that are the subject of a pending Client Security Fund (CSF) claim or CSF

claim that has been paid in full; provide that, ordinarily, a fee dispute will be processed before a companion grievance; and modernize existing language of Section .0700.

### Proposed Amendments to the Rules and Regulations Governing the Administration of the Continuing Legal Education Program

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program; and Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The proposed amendments to both sections of the rules that govern the administration of the CLE program eliminate the annual 6.0 cap on online CLE credit hours.

### Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rule 1.5, Fees

The proposed amendments to Rule 1.5 expand the information a lawyer must communicate to a client before the lawyer may initiate legal proceedings to collect a disputed fee.

## Proposed Amendments

At its meeting on April 26, 2019, the council voted to publish the following proposed rule amendments for comment from the members of the Bar.

### Proposed Amendments to the Rules Governing the Practical Training of Law Students

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

The proposed rule amendments will facilitate compliance by North Carolina's law schools with the ABA accreditation standards for law schools by supporting the development and expansion of supervised practical training of varying kinds for law students including clinics, field placements, and *pro bono* activities. The proposed rule amendments will also ensure that the clinical legal education programs at the state's law schools satisfy the requirements for legal practice by

law students in N.C. Gen. Stat. §84-7.1.

#### .0201 Purpose

The following rules in this subchapter are adopted for the following purposes: to encourage support the development of clinical legal education programs at North Carolina's law schools to in order that the law schools may provide their students with supervised practical training of varying kinds during the period of their formal legal education; and to enable law students to obtain supervised practical training while serving as legal interns for government agencies; and to assist law schools in providing substantial opportunities for student participation in *pro bono* service.

History Note: Statutory Authority G.S. 84-7.1 and G.S. 84-23

#### .0202 Definitions

The following definitions shall apply to

the terms used in this section:

(a) Clinical legal education program – Experiential educational program that engages students in “real world” legal matters through supervised practice experience. Under the supervision of a faculty member or site supervisor who is accountable to the law school, students assume the role of a lawyer either as a protégé, lead counsel, or a member of a lawyer team.

(+) (b) Eligible persons - Persons who are unable financially to pay for the legal advice or services of an attorney, as determined by a standard established by a judge of the General Court of Justice, a legal services corporation organization, government entity, or a law school clinical legal aid clinic providing representation. education program. “Eligible persons” includes may include minors who are not financially independent; students enrolled in secondary and higher education schools who are not finan-

cially independent; non-profit organizations serving low-income communities; and other organizations financially unable to pay for legal advice or services.

(c) Field placement – Practical training opportunities within a law school’s clinical legal education program that place students in legal practice settings external to the law school. Students in a field placement represent clients or perform other lawyering roles under the supervision of practicing lawyers or other qualified legal professionals. Faculty have overall responsibility for assuring the educational value of the learning in the field. Supervising attorneys provide direct feedback and guidance to the students. Site supervisors have administrative responsibility for the legal intern program at the field placement. Such practical training opportunities may be referred to as “externships.”

(2)(d) Government agencies - The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public defender’s office or a district attorney’s office.

(3)(e) Law school - An ABA accredited law school or a law school actively seeking accreditation from the ABA and licensed by the Board of Governors of the University of North Carolina. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, legal interns may not practice, pursuant to these rules, with any legal aid clinic of the law school.

(4) Legal aid clinic – A department, division, program, or course in a law school that operates under the supervision of an active member of the State Bar and renders legal services to eligible persons.

(f) Law school clinic - Courses within a law school’s clinical legal education program that place students in a legal practice setting operated by the law school. Students in a law school clinic assume the role of a lawyer representing actual clients or performing other lawyering roles. Supervision of students is provided by faculty employed by the law school (full-time, part-time, adjunct) who are active members of the North Carolina State Bar or another bar as appropriate for the legal matters undertaken.

(5)(g) Legal intern - A law student who is certified to provide supervised representation to clients under the provisions of the rules of this Subchapter subchapter.

(6)(h) Legal services corporation organization - A nonprofit North Carolina corporation organized exclusively organization operating as a public interest law firm pursuant to N.C. Gen. Stat. 84-5.1.

(i) Pro bono activity – An opportunity while in law school for students to provide legal services to those unable to pay, or otherwise under a disability or disadvantage, consistent with the objectives of Rule 6.1 of the Rules of Professional Conduct.

(j) Rules of Professional Conduct – The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar, approved by the North Carolina Supreme Court, and in effect at the time of application of the rules in this subchapter.

(k) Site supervisor – The attorney at a field placement who assumes administrative responsibility for the legal intern program at the field placement and provides the notices to the State Bar required by Rule .0205(b) of this subchapter. A site supervisor may also be a supervising attorney at a field placement.

(7)(l) Supervising attorney - An active member of the North Carolina State Bar who satisfies the requirements of Rule .0205 of this Subchapter, or an attorney who is licensed in another jurisdiction as appropriate for the legal work to be undertaken, who has practiced law as a full-time occupation for at least two years, and who supervises one or more legal interns pursuant to the requirements of the rules in this subchapter.

History Note: Statutory Authority G.S. 84-7.1 and G.S. 84-23

#### .0203 Eligibility

To engage in activities permitted by these rules, a law student must satisfy the following requirements:

(1)(a) be enrolled as a J.D. or LL.M. student in a law school approved by the Council of the North Carolina State Bar;

(2) have completed at least three semesters of the requirements for a professional degree in law (J.D. or its equivalent);

(3) (b) be certified in writing by a representative of his or her law school, authorized by the dean of the law school to provide such certification, as being of good character with requisite legal ability and training legal education to perform as a legal intern, which education shall include satisfaction of the prerequisites for participation in the clinic or field placement;

(4)(c) be introduced by an attorney admitted to practice in the tribunal or agency to every judicial official who will preside over a matter in which the student will appear, to the court in which he or she is appearing by an attorney admitted to practice in that court and, pursuant to Rule .0206(c) of this subchapter, obtain the tribunal’s or agency’s consent to appear subject to any limitations imposed by the presiding judicial official; such introductions do not have to occur in open court and the consent of the judicial official may be oral or written;

(5)(d) neither ask for nor receive any compensation or remuneration of any kind from any client eligible person for to whom he or she renders services, but this shall not prevent an attorney, legal services corporation organization, law school, or government agency from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student; and

(6)(e) certify in writing that he or she has read and is familiar with the North Carolina Revised Rules of Professional Conduct and is familiar with the opinions interpretive thereof.

History Note: Statutory Authority G.S. 84-7.1 and G.S. 84-23

#### .0204 Certification as Legal Intern Form and Duration of Certification

Upon receipt of the written materials required by Rule .0203(3)(b) and (6)(e) and Rule .0205(6)(b), the North Carolina State Bar shall certify that the law student may serve as a legal intern. The certification shall be subject to the following limitations:

(a) Duration. The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern’s graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar.

(b) Withdrawal of Certification. The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

(1) notice from a representative of the legal intern’s law school, authorized to act by the dean of the law school, that the legal intern has not graduated but is no longer enrolled;

(2) notice from a representative of the legal intern’s law school, authorized to act

by the dean of the law school, that the legal intern is no longer in good standing at the law school;

(3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern and that no other qualified attorney has assumed the supervision of the legal intern; or

(4) notice from a judge before whom the legal intern has appeared that the certification should be withdrawn.

History Note: Statutory Authority G.S. 84-7.1 and G.S. 84-23

#### .0205 Supervision

(a) Supervision Requirements. A supervising attorney shall

(1) ~~be an active member of the North Carolina State Bar who has practiced law as a full-time occupation for at least two years;~~

(2) for a law school clinic, concurrently supervise no more than two legal interns concurrently, provided, however, there is no limit on the number of an unlimited number of legal interns who may be supervised concurrently by an if the supervising attorney who is a full-time, or part-time, or adjunct member of a law school's faculty or staff whose primary responsibility as a faculty member is supervising legal interns in a legal aid law school clinic and, further provided, the number of legal interns concurrently supervised is not so large as to compromise the effective and beneficial practical training supervision of the legal interns or the competent representation of clients that an attorney who supervises legal interns through an externship or out-placement program of a law school legal aid clinic may supervise up to five legal interns;

(2) for a field placement, concurrently supervise no more than two legal interns; however, a greater number of legal interns may be concurrently supervised by a single supervising attorney if the appropriate faculty supervisor determines, in his or her reasoned discretion, that the effective and beneficial practical training of the legal interns and the competent representation of clients will not be compromised;

(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;

(4) assist and counsel with a legal intern in

the activities permitted by these rules and review such activities with the legal intern, all to the extent required for the proper practical training of the legal intern and the ~~protection~~ competent representation of the client; and

(5) read, approve and personally sign any pleadings or other papers prepared by a legal intern prior to the filing thereof, and read and approve any documents prepared by a legal intern for execution by a client or third party prior to the execution thereof;

(6) ~~prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar a signed notice setting forth the period during which supervising attorney expects to supervise the activities of an identified legal intern, and that the supervising attorney will adequately supervise the legal intern in accordance with these rules; and~~

(7) notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern ceases.

(b) Filing Requirements.

(1) Prior to commencing supervision, a supervising attorney in a law school clinic shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the supervision of identified legal interns, (ii) stating the period during which the supervising attorney expects to supervise the activities of the identified legal interns, and (iii) certifying that the supervising attorney will adequately supervise the legal interns in accordance with these rules.

(2) Prior to the commencement of a field placement for a legal intern(s), the site supervisor shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the administration of the field placement in compliance with these rules, (ii) identifying the participating legal intern(s) and stating the period during which the legal intern(s) is expected to participate in the program at the field placement, (iii) identifying the supervising attorney(s) at the field placement, and (iv) certifying that the supervising attorney(s) will adequately supervise the legal intern(s) in accordance with these rules.

(3) A supervising attorney in a law school clinic and a site supervisor for a legal

intern program at a field placement shall notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern concludes prior to the designated period of supervision.

(c) Responsibilities of Law School Clinic in Absence of Legal Intern. During any period when a legal intern is not available to provide representation due to law school seasonal breaks, graduation, or other reason, the supervising attorney shall maintain the status quo of a client matter and shall take action as necessary to protect the interests of the client until the legal intern is available or a new legal intern is assigned to the matter. During law school seasonal breaks, or other periods when a legal intern is not available, if a law school clinic or a supervising attorney is presented with an inquiry from an eligible person or a legal matter that may be appropriate for representation by a legal intern, the representation may be undertaken by a supervising attorney to preserve the matter for subsequent representation by a legal intern. Communications by a supervising attorney with a prospective client to determine whether the prospective client is eligible for clinic representation may include providing immediate legal advice or information even if it is subsequently determined that the matter is not appropriate for clinic representation.

(d) Independent Legal Practice. Nothing in these rules prohibits a supervising attorney in a law school clinic from providing legal services to third parties outside of the scope of the supervising attorney's employment by the law school operating the clinic.

History Note: Statutory Authority G.S. 84-7.1 and G.S. 84-23

*Note: The following three rules are all new rules; therefore, bold, underlined font is not used.*

#### .0208 Field Placements

(a) A law student enrolled in a field placement at an organization, entity, agency, or law firm shall be certified as a legal intern if the law student will (i) provide legal advice or services in matters governed by North Carolina law to eligible persons or government agencies outside the organization, entity, agency, or law firm or (ii) appear before any North Carolina tribunal or agency on behalf of an eligible person or a government agency.

(b) Supervision of a legal intern enrolled in a field placement may be shared by two or

more attorneys employed by the organization, entity, agency, or law firm, provided one attorney acts as site supervisor, assuming administrative responsibility for the legal intern program at the field placement and providing the notices to the State Bar required by Rule .0205(b) of this subchapter. All supervising attorneys at a field placement shall comply with the requirements of Rule .0205(a).

#### **.0209 Relationship of Law School and Clinics; Responsibility Upon Departure of Supervising Attorney or Closure of Clinic**

(a) Relationship to Other Clinics. The clinics that are a part of a clinical legal education program at a law school may each operate as an independent entity (the “independent clinic model”) or they may operate collectively as one entity with each clinic acting as a department or division of the entity (the “unified clinic model”). In the independent clinic model, clinics function independently of each other, including the maintenance of separate offices and separate conflicts-checking and case management systems. In the unified clinic model, clinics may share offices as well as conflicts-checking and case management systems.

(b) Application of the Rules of Professional Conduct. For the purposes of applying the Rules of Professional Conduct, each law school clinic operated pursuant to the independent clinic model shall be considered one law firm and clinics operated pursuant to the unified clinic model shall collectively be considered one law firm.

(c) Relationship with Law School. The relationship between law school clinics and the law school in which they operate shall be managed in a manner consistent with the requirements of the Rules of Professional Conduct. Procedures shall be established by both the clinics and the law school that are reasonably adequate to protect confidential client information from disclosure including disclosure to the law school administration, non-participating law school faculty and staff, and non-participating students of the law school. The rule of imputed disqualification, as stated in Rule 1.10(a) of the Rules of Professional Conduct, shall not apply to the law school administrators, non-participating law school faculty and staff, and non-participating law school students if reasonable efforts are made to prevent the inadvertent or unauthorized disclosure of, or unauthorized

access to, information relating to the representation of clients. See Rule 1.6(c) of the Rules of Professional Conduct.

(d) Responsibility for Maintenance of Client Files. Client files shall be maintained and safeguarded by a law school clinic in accordance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. Closed client files shall be returned to the client or shall be safeguarded and maintained by a law school clinic until disposal is permitted under the Rules of Professional Conduct. See RPC 209.

(e) Engagement Letter. In addition to the consent agreement required by Rule .0206(d) of this section for any representation of an individual client in a matter before a tribunal, a written engagement letter or memorandum of understanding with each client is recommended. The writing should state the general nature of the legal services to be provided and explain the roles and responsibilities of the clinic, the supervising attorney, and the legal intern. See Rule 1.5, cmt. [2] of the Rules of Professional Conduct (“A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.”)

(f) Responsibility upon Departure of Supervising Attorney. Upon the departure of a supervising attorney from a law school clinic, the administration of the law school and of the clinic shall promptly identify a replacement supervising attorney for any active case in which no other supervising attorney is participating. In such cases, the departing attorney and the clinic administration shall protect the interests of all affected clients by taking appropriate steps to preserve the status quo of the legal matters of affected clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the departing attorney will not continue the representation after departure from the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation. Affected clients shall be notified and advised that (i) they have the right to counsel of choice (which may include the departing attorney if the departing attorney intends to engage in legal practice outside of the law school clinic); (ii) their file will be transferred to the new supervising attorney in the absence of other instructions from the client; and (iii) they may instruct the clinic to mail or deliver the file to the

client or to transfer the file to legal counsel outside of the clinic. If instructed by a client, a file shall be promptly returned to the client or transferred to authorized legal counsel outside of the clinic.

(g) Responsibility upon Closure of a Law School Clinic. If a law school clinic is closed for any reason, the supervising attorney, with support from the law school, shall take appropriate steps to preserve the status quo of the legal matters of clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. The administration of the law school and of the clinic shall promptly notify all affected clients that (i) they have the right to counsel of choice (which may include the supervising attorney if the supervising attorney will engage in legal practice after closure of the clinic); (ii) the file will be mailed to or delivered to the client and the supervising attorney will withdraw from representation in the absence of other instructions from the client; and (iii) they may instruct the clinic to transfer the file to authorized legal counsel outside of the clinic (which may include the supervising attorney). If the supervising attorney will not continue the representation after closure of the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation.

#### **.0210 Pro Bono Activities**

(a) Pro Bono Activities for Law Students. Pro bono activities for law students may be facilitated by a law school acting under the auspices of a clinical legal education program or another program or department of the law school. As used in this rule, “auspices” means administrative or programmatic support or supervision.

(b) Student Certification Not Required. Regardless of whether the pro bono activity is provided under the auspices of a clinical legal education program or another program or department of a law school, a law student participating in a pro bono activity made available by a law school is not required to be certified as a legal intern if

- (1) the law student will not perform any legal service; or
- (2) all of the following conditions are satisfied: (i) the student will perform specifically delegated substantive legal services for third parties (clients) under the direct supervision of an attorney who is an active

member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal services to be undertaken (the responsible attorney); (ii) the legal services shall not include representation of clients before a tribunal or agency; (iii) the responsible attorney is personally and professionally responsible for the representation of the clients and for the law student's work product; and (iv) the role of the law student as an assistant to the responsible attorney is clearly explained to each client in advance of the performance of any legal service for the client by the law student.

(c) Law School Faculty and Staff Providing *Pro Bono* Services Under Auspices of a Clinical Legal Education Program. Any member of the law school's faculty or staff who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal work to be undertaken may serve as the responsible attorney for a *pro bono* activity if the activity is provided to eligible persons under the auspices of the law school's clinical legal education program and the responsible attorney complies with the relevant supervision requirements set forth in Rule .0205(a)(2)-(5) of this subchapter.

(d) Responsibility for Client File. Unless otherwise specified in this rule, if a client file is generated by a *pro bono* activity, it shall be maintained and safeguarded by the responsible attorney in compliance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the *pro bono* activity is provided under the auspices of a clinical legal education program and the responsible attorney is a member of the law school's faculty or staff, the client file shall be maintained and safeguarded by the clinical legal education program in compliance with the Rules of Professional Conduct and the Rule .0209(d). If the *pro bono* activity is sponsored by a legal services organization or government agency, the legal services organization or government agency shall maintain and safeguard the client file. If the *pro bono* activity is sponsored by more than one legal services organization or government agency, the co-sponsors shall determine which entity shall maintain and safeguard the client file and shall so inform the client.

**Proposed Amendments to the CLE Rules**

27 N.C.A.C. 1D, Section .1500, Rules

Governing the Administration of the Continuing Legal Education Program

The proposed amendment eliminates the requirement that all attendees of the Professionalism for New Admittees program must complete a course evaluation to receive CLE credit.

**.1518 Continuing Legal Education Program**

- (a) Annual Requirement.
- ...
- (c) Professionalism Requirement for New Members.
- (1) Content and Accreditation...

~~(2) Evaluation. To receive CLE credit for attending a PNA Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar when reporting attendance pursuant to Rule .1601(c)(1) of this subchapter.~~

- ~~(3)(2) Timetable and Partial Credit...~~
- ~~(4)(3) Online and Prerecorded Programs... ■~~

**In Memoriam**

**Eugene Moore Anderson Jr.**  
Davidson, NC

**Susan Pfleeger Andre**  
Holly Springs, NC

**Alexander Hall Barnes**  
Durham, NC

**Donald Lee Beci**  
Apex, NC

**Alfred Cameron Brinson**  
Greenville, NC

**Louis Franklin Burleson Jr.**  
Ahoskie, NC

**Sherwood Johnson Carter Jr.**  
Hickory, NC

**James Murrel Cooper**  
Fayetteville, NC

**John Jay Covolo**  
Rocky Mount, NC

**James Donald Cowan Jr.**  
Raleigh, NC

**Joseph Powell Creekmore**  
Supply, NC

**Ronald Gene Edmundson**  
Oxford, NC

**Dale D. Glendening Jr.**  
Decatur, GA

**Charles H. Harp II**  
Lexington, NC

**John Burchfield McMillan**  
Raleigh, NC

**David Scott Melin**  
Charlotte, NC

**James Curtis Moffatt**  
Potomac, MD

**Arthur Eugene Morehead IV**  
Charlotte, NC

**George William Coan Mountcastle**  
Winston-Salem, NC

**John Rodwell Penry Jr.**  
Lexington, NC

**Susan E. Rhodes**  
Clover, SC

**Ross Hall Richardson**  
Charlotte, NC

**Paul Alan Rodgman**  
Raleigh, NC

**Norman Vincent Schaich**  
Black Mountain, NC

**Paul Allan Sheridan**  
Raleigh, NC

**John Shorter Stevens**  
Asheville, NC

**William Johnson Waggoner**  
Davidson, NC

**Robert W. Wilson**  
Edwardsville, IL

**N. Hunter Wyche Jr.**  
Raleigh, NC

## Client Security Fund Reimburses Victims

At its April 24, 2019, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$27,827.05 to 11 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$1,400 to a former client of Craig O. Asbill of Charlotte. The board determined that Asbill was retained to handle a client's personal injury matter. Asbill received two med-pay checks totaling \$5,000 from the client's insurance carrier and failed to pay the client \$1,400 of what he collected. Asbill was suspended on September 23, 2017.

2. An award of \$758.65 to a former client of Paul N. Blake III of Wilson. The board determined that Blake was retained to handle a client's personal injury matter. Blake settled the client's matter and received a settlement check which he did not deposit into his trust account because Blake had been enjoined from handling clients' funds by the State Bar. Blake failed to make payments to the lien holders from the settlement funds. Blake was disbarred on April 7, 2017. The board previously reimbursed one other Blake client a total of \$66,027.18.

3. An award of \$1,370 to a former client of Paige C. Cabe of Sanford. The board determined that Cabe was retained by a client to file two adoption petitions. Cabe failed to provide any meaningful legal services to the client for the fees paid. Cabe was disbarred on November 25, 2018. The board previously reimbursed three other clients a total of \$41,046.48.

4. An award of \$518 to a former client of David H. Caffey of Winston-Salem. The board determined that Caffey handled a real estate closing for a client. From the closing proceeds, Caffey issued checks on the client's behalf, but the check to the HOA was not honored due to his misappropriation of funds. Caffey was disbarred on May 10, 2018.

5. An award of \$2,280.40 to former

clients of H. Trade Elkins of Hendersonville. The board determined that Elkins was retained by a couple to file an adversary proceeding in a bankruptcy proceeding and to handle a closing for the couple. At Elkins' suggestion, the couple left their sale proceeds with Elkins after the closing to avoid the proceeds being caught up in the bankruptcy court. Elkins misappropriated their sale proceeds. Elkins was suspended on September 25, 2017, on an interim basis until the conclusion of his criminal proceeding. Elkins paid a portion of the clients' loss in criminal restitution. The award was for the balance. The board previously reimbursed two other applicants a total of \$165,271.60.

6. An award of \$5,000 to a former client of Susan Franklin of Chapel Hill. The board determined that Franklin was retained to advise a client about possibly getting a divorce. The client signed the fee agreement and paid the funds, but then decided to get marriage counseling prior to Franklin having provided any services. Franklin failed to respond to the client's request for a refund prior to her disability and eventual death. Franklin died on October 20, 2018.

7. An award of \$4,650 to a former client of David E. Gurganus of Williamston. The board determined that Gurganus was retained to handle a client's personal injury claim from an auto accident. Gurganus received \$2,000 in med-pay and \$2,650 in settlement funds from the insurance company without the client's consent. Gurganus failed to pay any of the client's medical providers and misappropriated the funds. Gurganus was suspended until further order of the court on August 30, 2018.

8. An award of \$1,850 to a former client of Charles R. Gurley of Goldsboro. The board determined that Gurley was retained to handle serious criminal charges for a client. The client began making payments towards Gurley's quoted fee just prior to Gurley being suspended from the practice of law. Gurley failed to provide any meaningful legal services for the fee paid. Gurley was enjoined from

practicing law on November 22, 2017, but the injunction was lifted effective November 6, 2018. The board previously reimbursed 71 other Gurley clients a total of \$66,359.

9. An award of \$7,500 to a former client of Jason Hegg, who formerly practiced in Jacksonville. The board determined that Hegg was retained to handle a client's criminal charge of insurance fraud. After the client paid the fee in full, Hegg abandoned his practice and moved to Colorado with no notice to his clients. Hegg failed to provide any meaningful legal services for the fee paid prior to abandoning his practice.

10. An award of \$500 to a former client of Nikita Mackey of Charlotte. The board determined that Mackey was retained to handle a client's two misdemeanor charges. The client paid \$500 towards the \$1,000 quoted fee. Mackey failed to provide any meaningful services for the fee paid.

11. An award of \$2,000 to a former client of Christi Misocky of Monroe. The board determined that Misocky was retained to get a credit card balance reduction in the negotiations of his domestic matter concerning equitable distribution. Misocky failed to provide any meaningful legal services to the client for the fee paid. The board previously reimbursed two other Misocky clients a total of \$5,455.

In addition to the awards listed above that will be paid by the fund, the board directed its counsel to seek to have an applicant paid \$1,240 from the funds the State Bar received from Charles Medlin's trust account on behalf of unidentified clients. Medlin died on August 28, 2008. ■

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## Law School Briefs

### Campbell University School of Law

Campbell University Norman Adrian Wiggins School of Law advocates made history this spring by bringing home three new national championships and one world championship, among other accolades. Their most recent victory was at the American Association of Justice (AAJ) Student Trial Advocacy National Competition on April 11-14 in Philadelphia, Pennsylvania. Second-year students Lydia Stoney, Kevin Littlejohn, and Ethan Carpenter and third-year student Anna Claire Turpin worked with coach Jacob Morse '17 to defeat 15 regional champions to bring home the top prize for the first time. It was the third time Campbell Law has competed at the AAJ national competition since 2011, but Campbell Law's first national title. It is the third national competition the law school has won this year, which is also a first, according to Professor Dan Tilly, director of the law school's advocacy program. Campbell Law students also made history April 3-6, besting 23 teams to become world champions at the Brown Mosten International Client Consultation Competition in Dublin, Ireland. The same Campbell Law duo—Tatiana Terry ('19) and Katie Webb ('19)—who won the National ABA Client Counseling Championship became the only team from a North Carolina law school to win the world competition. Campbell Law is only the seventh law school from the US to win since the competition's inception in 1986. They were coached by Professors Melissa Essary and Jon Powell. Campbell Law advocates also came out on top at the Constance Baker Motely National Trial Competition in Little Rock, Arkansas, to win the law school's first national championship in that competition. Campbell Law third-year students Nichad Davis, Maurizo Lewis-Streit, Tatiana Terry, and Ashley Urquijo were named national champions of the National Black Law Students

Association (NBLSA) competition on March 16. Kimberly Dixon '15 coached the team to victory.

### Duke Law School

US Supreme Court Justice Anthony M. Kennedy (Retired) received the first annual Bolch Prize for the Rule of Law awarded by the Bolch Judicial Institute of Duke Law School on April 11. The institute's mission focuses on bettering the human condition by studying and promoting the rule of law, and the Bolch Prize is designed to honor individuals or entities who have distinguished themselves in the preservation or advancement of the rule of law. The recipient is selected by the Advisory Board of the Bolch Judicial Institute. "Over the course of his long and distinguished career on the Ninth Circuit Court of Appeals and the Supreme Court of the United States, Justice Kennedy has been a leader among those dedicated to understanding and preserving the rule of law," said David F. Levi, director of the Bolch Judicial Institute and the Levi family professor of law and judicial studies at Duke Law. Justice Samuel Alito Jr. spoke at the award ceremony at Durham's Washington Duke Inn, as did Justice Kennedy, and both took part in related events with Duke Law faculty and students.

Professor Neil Siegel, the David W. Ichel professor of law and professor of political science, has published *United States Constitutional Law* (Foundation Press, 2019) with Daniel Farber of Berkeley Law School, which explores the dynamic and interactive process between the Supreme Court and a range of actors and institutions who make claims on the Constitution in the sphere of constitutional politics, including social movements, political parties, and governmental institutions. Siegel, a scholar of constitutional law, theory, and politics, was elected to the Board of Directors of the American Constitution Society in December.

### Elon University School of Law

*Regional leaders reflect on impact of Elon Law*—Four civic and business leaders praised Elon Law for its role in helping to revitalize downtown Greensboro when they visited the law school in April for a panel conversation that commemorated a decade of Elon Law graduates. "Elon Law in Greensboro: Past, Present, & Future" welcomed to the law school:

- Jeb Brooks (an Elon Law alum), president & CEO, The Brooks Group
- Jim Melvin, president & CEO, Joseph M. Bryan Foundation
- Tom Ross, president emeritus, University of North Carolina System
- Nancy Vaughan, mayor of Greensboro

The April 2 dinner took place on the eve of the spring meeting of Elon Law's Board of Advisors and served as an opportunity for university leaders to gather insights as Elon moves forward with crafting its next ten-year strategic plan.

*Elon Law students selected for prestigious NCBA internship program*—Four Elon Law students—more than from any other North Carolina law school—were selected this winter for a North Carolina Bar Association program that promotes diversity and inclusion in the legal profession by placing accomplished first-year students into top summer internships. Kia Barrett, Alisha Harris, Timisha Henley, and Cynthia Hernandez accepted invitations for the NCBA's Minorities in the Profession 1L Summer Associate Program, which is coordinated through its Minorities in the Profession Committee.

*Elon Law hosts pre-law advisors conference*—College educators from across the South visited Elon Law in March on the first day of a three-day annual conference organized by a professional group that aims "to provide everyone in the law school admissions process with up-to-date information and expert guidance." Members of the Southern Association of Pre-Law

Advisors convened in Greensboro on March 13 for a program that had been rescheduled from September because of Hurricane Florence.

### North Carolina Central School of Law

On January 30, 2019, North Carolina Central University School of Law hosted Governor Roy Cooper's Commission on Inclusion. NCCU Law Professor Lydia Lavelle '93 and Attorney Christy L. Smith Foster '04 are members of the commission that is led by Machel Sanders, secretary of the NC Department of Administration.

Governor Roy Cooper attended the meeting and discussed the commission's priorities and thanked the members for their service. Afterward, Governor Cooper met with several NCCU law student leaders.

The objective of the commission is to identify and create policies and measures that will promote inclusion while addressing discrimination, harassment, and retaliation. The commission was created pursuant to Executive Order 24, which addresses these objectives under the jurisdiction of the office of the governor. NCCU School of Law Interim Dean Elaine O'Neal provided the commission with an overview of the law school's history. NCCU's Director of Diversity and Inclusion Emily Guzman and NCCU's LGBTA Resource Center Coordinator Jennifer M. Williams discussed NCCU's inclusion efforts.

North Carolina Central University School of Law received top ranking for female enrollment in the Best Law Schools as ranked by *US News & World Report* for 2018.

A February 2019 article in *Enjuris* noted that for three consecutive years, women outnumbered men in law school classrooms across the country. According to data released by the ABA in 2018, women comprise 52.39% of all students in ABA-approved law schools.

NCCU School of Law is now the top law school by female enrollment (66.85%) (previously held by Howard University) followed by John Marshall Law School (66.21%) and Northeastern (65.76%).

### University of North Carolina School of Law

*1L Research, Reasoning, Writing, and Advocacy (RRWA) Program ranks 8th in the nation*—UNC moved up 11 spots to num-

ber 34 out of 192 law schools ranked in the *US News & World Report's* 2020 edition of "America's Best Graduate Schools." Additionally, the school's RRWA program ranked eighth in legal writing, an increase of ten spots from two years ago. Now in its eighth year as a full-year, six-credit program, RRWA's dedicated faculty and staff aim to help 1L students develop and practice legal research, writing, and oral communication skills.

*UNC ranks number 1 in February NC bar exam results*—Among North Carolina law schools, UNC had the highest-ranking bar passage rate for first time test takers (87.5% passage rate) and overall test takers (90% passage rate).

*Donald Hornstein receives Award for Excellence from UNC system*—Donald Hornstein, Aubrey L. Brooks professor of law, is one of 17 faculty members in the UNC system to receive the 2019 Awards for Excellence in Teaching. Awarded by the UNC Board of Governors, the honor recognizes the extraordinary contributions of faculty members. Hornstein has taught at Carolina Law since 1989.

*3L class reaches 100% pro bono participation*—For the second time in the UNC School of Law *Pro Bono* Program's 21-year history, all 206 third-year students, 100% of the graduating class of 2019, has participated in a *pro bono* project.

*SCOTUSblog co-founder and lawyer Tom Goldstein delivers annual Murphy Lecture*—Goldstein is a lawyer and the publisher/co-founder of SCOTUSblog, a website devoted to comprehensive coverage of the Supreme Court.

### Wake Forest School of Law

*Environment law expert Scott Schang to join WFU Law*—Scott Schang, senior director of corporate engagement at Landesa, will join Wake Forest School of Law as professor of practice of environmental law beginning July 1, 2019. In addition to teaching environmental law and natural resources, Schang will develop, launch, and direct a new environmental law clinic that will advise clients, inform transactional work, as well as draft amicus briefs and policy white papers.

*Professor Mark Hall to lead American Law Institute project on medical liability*—Mark Hall, a professor with Wake Forest School of Law and Wake Forest School of

Medicine, was named lead reporter of the medical liability sections of the Restatement Third of Torts by the American Law Institute (ALI). Hall will lead the effort to develop official text that informs all US courts on the legal principles governing medical liability. Wake Forest Law currently has four reporters with the ALI, including Michael Green, Tanya Marsh, Jonathan Cardi, and Mark Hall.

*WFU Law clinics take wrongful conviction case to federal court*—Wake Forest Law's Innocence & Justice, Appellate Advocacy clinics took the John Robert Hayes case to the Fourth Circuit at the end of January. Appellate Advocacy students Raquel Macgregor (JD '19) and Sarah Spangenburg (JD '19) contributed to the case's briefs and oral argument. The clinics are awaiting judgment on the case.

*Ashley DiMuzio (JD '19) named a Law Student of the Year by National Jurist magazine*—Ashley DiMuzio has been a competitive force in trial advocacy since she arrived at Wake Forest Law. Her success in the courtroom has produced four championship titles in just three years, in addition to her own individual accolades. During her first year of law school, DiMuzio was named a 2016 1L Trial Bar Competition Champion as well as a 2017 Kilpatrick 1L Trial Competition Champion. Her 1L winning streak also included a 2017 Zelfiff Competition Championship title. Read more about her at [wfu.law/4ap](http://wfu.law/4ap). ■

## The 2019 Lawyer's Handbook

In early June, the digital version of the 2019 *Lawyer's Handbook* will be available for download, free of charge, from the State Bar's website: [ncbar.gov/news-publications/lawyers-handbook](http://ncbar.gov/news-publications/lawyers-handbook).



## John B. McMillan Distinguished Service Award

### Richard M. Wiggins

Attorney Richard M. Wiggins was presented with the John B. McMillan Distinguished Service Award on January 31, 2019, at his home in Fayetteville, NC. The award was presented by North Carolina State Bar President-Elect Colon Willoughby. On May 4, 2019, Mr. Wiggins passed away in his Fayetteville home.

Mr. Wiggins received his law degree from UNC Chapel Hill in 1958. After graduation he began practicing law with the law firm of Sanford, Phillips, McCoy and Weaver, which later become the firm of McCoy, Weaver, Wiggins, Cleveland & Raper. In a legal profession where it is common for focused practice areas, Richard has remained a generalist with a robust legal knowledge in various areas of the law. He has been a successful advocate for his clients in the trial courts and appellate courts of North Carolina and the Federal Court System. Mr. Wiggins has been

a mentor to many lawyers at his firm and countless other lawyers in his community.

Mr. Wiggins' impact on the legal profession is best evidenced by the civility with which he has practiced law for so many years. He has set the standard for zealously advocating his client's position while simultaneously maintaining a relationship of civility and cordiality with opposing counsel. His approach in handling clients is not unlike his approach with handling opposing counsel. It does not matter if the client is a large corporation involved in a complex commercial lawsuit or an elderly client with a relative minor issue. Mr. Wiggins treats both clients with the same level of attention and respect. He believes that, as an attorney, you should be amenable to foregoing all or a portion of your fee to help a client that needs your services.

Mr. Wiggins has served as the Cumberland County Bar Association presi-

dent and has served on numerous bar-related committees at the local and state level. Mr. Wiggins has been recognized by Legal Services of NC for his outstanding work in the Access to Justice Campaign and honored by UNC Law School for a lifetime of *pro bono* service. He is an NCBA Centennial Award winner and a member of the General Practice Hall of Fame.

Mr. Wiggins has maintained a sterling record of integrity, hard work, and professionalism in all of his 60 years of practice and is a most deserving recipient of the John B. McMillan Distinguished Service Award.

### Nominations Sought

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). ■

## BOARD OF LAW EXAMINERS

## July 2019 Bar Exam Applicants

The July 2019 Bar Examination will be held in Raleigh on July 30 and 31, 2019. Published below are the names of the applicants whose applications were received on or before May 7, 2019. Members are requested to examine the list 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.

Tyler Aagard  
Chapel Hill, NC  
Lalisa Abdul-Malek  
Durham, NC  
Tiwalola Abogunrin  
Durham, NC  
Anais Aguilar-Fabre  
Astoria, NY  
Feza Ajayi  
College Park, MD  
Agatha Akers

Raleigh, NC  
Brian Akers  
Valparaiso, IN  
Carmelle Alipio  
Decatur, GA  
Trent Allard  
Apex, NC  
Daniel Allison  
Hillsborough, NC  
Donald Alston  
Henderson, NC

David Alzamora  
Raleigh, NC  
Elliott Andrews  
Raleigh, NC  
Jacob Andrews  
Cornelius, NC  
Justin Annas  
Hickory, NC  
Samantha Aparicio  
Chapel Hill, NC  
Santiago Arroba Rodriguez

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Winston-Salem, NC  
John Ashby  
Durham, NC  
Jennifer Ashton  
Lake Worth, FL  
Bethany Ashworth  
Lititz, PA  
Cailey Augustin  
Miami, FL

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Alexandra Bachman  
Cornelius, NC  
Brendan Bailey  
Nashville, TN  
Kadeidra Baker  
Earl, NC  
John Baley  
Chapel Hill, NC  
Jacob Balogun

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**Mili Banerji**  
Charlotte, NC  
**Lakeshia Banks**  
Durham, NC  
**Avery Barber**  
Winston-Salem, NC  
**Landis Barber**  
Raleigh, NC  
**Joshua Barfield**  
Whitakers, NC  
**Veronica Barkley**  
Durham, NC  
**Cheyenne Barnes**  
Raleigh, NC  
**Mitchell Barnes**  
Carolina Beach, NC  
**Sontina Barnes**  
Raleigh, NC  
**Nancy Baron**  
Raleigh, NC  
**Joshua Barton**  
Durham, NC  
**Kashi Bazemore**  
Raleigh, NC  
**France Beard**  
Raleigh, NC  
**James Beard**  
Yadkinville, NC  
**Daniel Becker**  
Winston-Salem, NC  
**Quentin Becker**  
Lexington, VA  
**James Beissner**  
Durham, NC  
**Madeline Belford**  
Charlotte, NC  
**Gavin Bell**  
Raleigh, NC  
**Jordan Bernstein**  
Carrboro, NC  
**Kimberley Beyer**  
Glenville, NC  
**Sean Bickford**  
Carrboro, NC  
**Brendan Biffany**  
Durham, NC  
**Tijana Bijelac**  
Durham, NC  
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Elizabeth City, NC  
**Livia Birtalan**  
Durham, NC  
**Rachel Blackburn**  
Asheville, NC  
**Jason Blackmon**  
Apex, NC  
**Aunyai Blackstock**  
Greensboro, NC  
**Matthew Blair**  
Raleigh, NC  
**Tyler Block**  
Durham, NC  
**Lloyd Bolton**  
Northport, AL  
**Lauren Bond**  
St. Louis, MO  
**Kathleen Booras**  
Mount Holly, NC  
**James Borden**  
Carrboro, NC

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Fayetteville, NC  
**Williams Britt**  
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Fort Mill, SC  
**Hugh Brown**  
Roanoke, VA  
**Ian Brown**  
Tobaccoville, NC  
**Kelly Brown**  
Goldsboro, NC  
**Yusuf Brown**  
Zebulon, NC  
**Joseph Bruner**  
Cary, NC  
**John Bruno**  
Waxhaw, NC  
**Chandler Bryant**  
Greensboro, NC  
**Shellie Bryant**  
Winston-Salem, NC  
**Zachary Buckheit**  
Durham, NC  
**Jamie Burchette**  
N Wilkesboro, NC  
**Jasmine Burgess**  
Greensboro, NC  
**Benjamin Burke**  
East Lansing, MI  
**Jordan Burke**  
Winston-Salem, NC  
**Alexandria Burns**  
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**Rowland Burns**  
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**Marian Burroughs**  
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Selma, NC  
**Sara Carter**  
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**Christy Coates**  
Carrboro, NC  
**Gordon Cobb**  
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**Brady Cody**  
Knoxville, TN  
**Cadee Cody**  
Robbinsville, NC  
**Ashley Collette**  
Winston-Salem, NC  
**Hailey Collis**  
Raleigh, NC  
**Gabriela Colon**  
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**Charles Conley**  
Lewisville, NC  
**William Conn**  
Denver, CO  
**Heather Cooper**  
Fayetteville, NY  
**Rebecca Cooper**  
Raleigh, NC

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**Tyler Crawford**  
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**Ryan Crofts**  
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Charlotte, NC  
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**Khari Cyrus**  
Burlington, NC  
**Evan Dancy**  
Chapel Hill, NC  
**Delisa Daniels**  
Greensboro, NC  
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**Kaleigh Darty**  
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**Gregory Davis**  
Wake Forest, NC  
**James Davis**  
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Clayton, NC  
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**Hayden Duncan**  
Raleigh, NC  
**Christy Dunn**  
Raleigh, NC  
**Natasha Durkee**  
Miami, FL  
**Graeme Earle**  
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**Nicolas Eason**  
Carrboro, NC  
**Candace Eaton**  
Silver Spring, MD  
**Lance Edmonds**  
Elkin, NC  
**Robert Ellis-Liang**  
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**Pamela Entrikin**  
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**Lindsay Frazier**  
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**Regina Fulton**  
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**Davis Fussell**  
 Durham, NC  
**James Futrell**  
 Durham, NC  
**Amber Fye**  
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**Lydia Gabbard**  
 Chapel Hill, NC  
**Skylar Gallagher**  
 Raleigh, NC  
**Natalie Galvez**  
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Contact us today: [info@nclap.org](mailto:info@nclap.org) or [WWW.NCLAP.ORG](http://WWW.NCLAP.ORG)



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