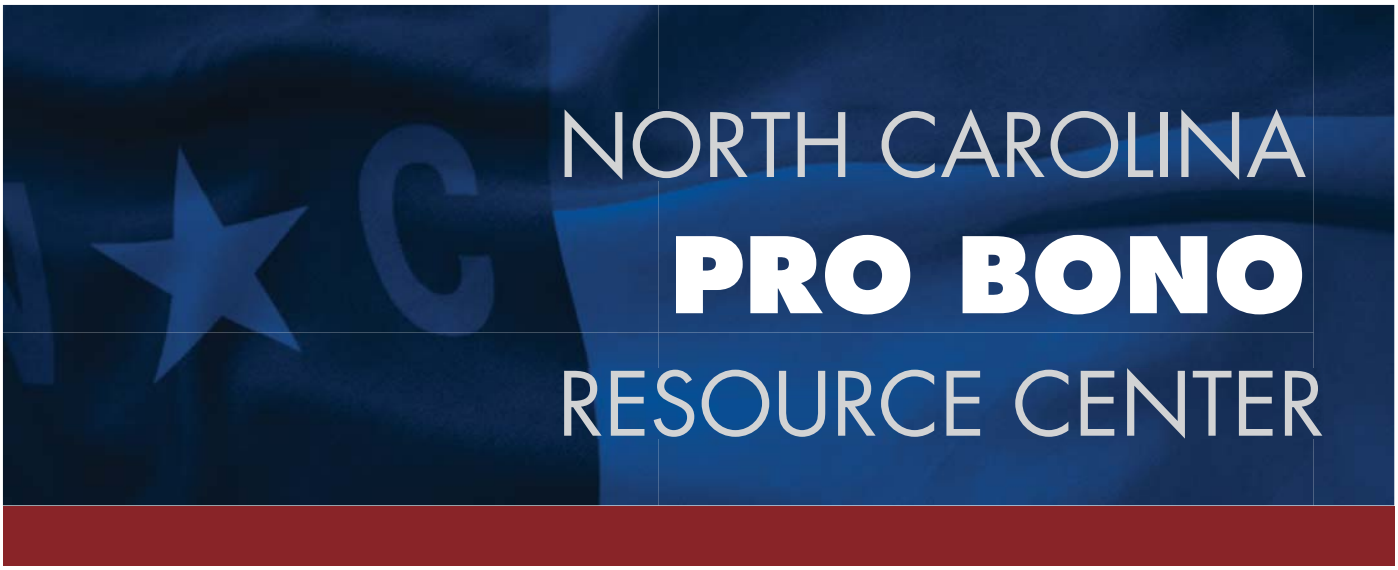
THE NORTH CAROLINA STATE BAR

JOURNAL

SPRING
2020

IN THIS ISSUE

Incarcerated Mentally Ill - Legal and Ethical Issues *page 6*
Sexism: The Elephant in the Courtroom *page 10*
The Middle Finger *page 15*



NC PRO BONO REPORTING DEADLINE: MARCH 31, 2020

WHAT SHOULD I REPORT?

The North Carolina Pro Bono Reporting Form collects information about all the activities encouraged in North Carolina Rule of Professional Conduct 6.1: pro bono legal service; legal service at a substantially reduced fee; activity that improves the law, the legal system, or the legal profession; non-legal community service; and financial support of legal service providers. You are also able to share optional information about your legal volunteerism and organizations or associations you would like to be aware of your involvement.

HOW DO I REPORT?

Visit **ncprobono.org/report** and provide information about the activities included in North Carolina Rule of Professional Conduct 6.1. You will need to report the total number of pro bono legal service hours you provided in 2019 – this is the only activity from Rule 6.1 that leads to recognition through the North Carolina Pro Bono Honor Society. Questions about other activities from Rule 6.1 only require general information about participation. You will also need your North Carolina State Bar ID Number to submit your entry. You may elect to remain anonymous if you prefer.

WHY SHOULD I REPORT?

There are four major reasons to report your pro bono legal service: (1) it's a way to showcase attorney volunteerism in NC – we want to share the good work being done by the legal profession in our state; (2) it's an opportunity to encourage your peers to grow their pro bono involvement by sharing about your own engagement; (3) it's a mechanism to identify areas to grow pro bono efforts in North Carolina; and (4) it's an opportunity for recognition – attorneys who report at least 50 hours of pro bono legal services in a year will be inducted into that year's cohort of the North Carolina Pro Bono Honor Society and receive a certificate from the Supreme Court of North Carolina recognizing their achievement.

CONNECT WITH US

ncprobono.org
PO Box 2448
Raleigh, NC 27602

facebook.com/ncprobono
twitter.com/ncprobono
linkedin.com/company/ncprobono

THE
NORTH CAROLINA
STATE BAR
JOURNAL

Spring 2020
Volume 25, Number 1

Editor
Jennifer R. Duncan

 Periodicals postage paid at Raleigh, NC, and additional offices. Opinions expressed by contributors are not necessarily those of the North Carolina State Bar. POSTMASTER: Send address changes to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The *North Carolina Bar Journal* invites the submission of unsolicited, original articles, essays, and book reviews. Submissions may be made by mail or email (jduncan@ncbar.gov) to the editor. Publishing and editorial decisions are based on the Publications Committee's and the editor's judgment of the quality of the writing, the timeliness of the article, and the potential interest to the readers of the *Journal*. The *Journal* reserves the right to edit all manuscripts. The *North Carolina State Bar Journal* (ISSN 10928626) is published four times per year in March, June, September, and December under the direction and supervision of the council of the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. Member rate of $6.00 per year is included in dues. Nonmember rates $10.73 per year. Single copies $5.36. The *Lawyer's Handbook* $16.09. Advertising rates available upon request. Direct inquiries to Director of Communications, the North Carolina State Bar, PO Box 25908, Raleigh, North Carolina 27611, tel. (919) 828-4620.

ncbar.gov
Follow us at:
Twitter: @NCStateBar
Facebook: facebook.com/NCStateBar

Contents

FEATURES

6 Legal and Ethical Issues Concerning the Incarceration of the Mentally Ill
By Sarah A. See, Eric S. See, and Christopher M. Bellas

10 Sexism: The Elephant in the Courtroom
By Judge Ashleigh Parker Dunston

12 Go East: Views from an NC Bar Member and an NC LL.M. in Munich, Germany
By Sarah L. Büthe and Dr. Henning H. Krauss

15 The Middle Finger: Disrespect to a Law Enforcement Officer
By Charles A. Jones

18 Five Lessons Learned from #31daysofprobono
By Sylvia Novinsky

Contents

DEPARTMENTS

20 The Disciplinary Department
21 Upcoming Appointments
22 Legal Ethics
25 Trust Accounting
26 Legal Specialization
28 IOLTA Update
29 Lawyer Assistance Program
32 Pathways to Wellbeing
34 Proposed Ethics Opinions
36 Rule Amendments

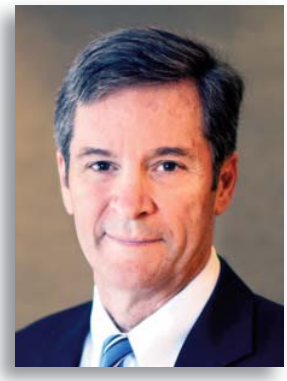
BAR UPDATES

42 Client Security Fund
43 In Memoriam
44 Law School Briefs
46 Distinguished Service Award

Making Sure We're All Part of the Golden Age of Practicing Law

By C. Colon Willoughby

As we look forward to the 87th year of the North Carolina State Bar, I think back over past experiences of practicing law. Over the years, I have had the good fortune of practicing in a small firm, a large firm, and a government agency. Most of the time I was able to choose the colleagues with whom I worked, although in a large firm in the 21st century you mostly choose the culture. What a great experience it has been. Regardless of the functional titles, from the newest associate or youngest assistant district attorney to the most senior curmudgeon, I have felt they were all partners in this endeavor. By choice and necessity, we trusted and relied on each other—granted, some more comfortably than others. I think those experiences have greatly influenced my positive feelings about our profession. It really has been the golden age of practicing law.



The golden age of practicing law. We would all like to believe that during our professional lives we have enjoyed the golden age of lawyering. And I believe most lawyers do. A good indication of lawyers' opinions can be gleaned by listening to their stories. Lawyers are notorious for regaling stories of notable moments of their practices, when they have witnessed particularly interesting or entertaining events. Sometimes the anecdotal evidence gets adjusted to fit the purpose—or audience—for the story. Whatever the reason, the stories usually demonstrate that the lawyers have enjoyed the practice of law and their interactions with colleagues. Even in the most heated or stressful situations, it is usually obvious that the storyteller counts the moment as indicative of the delight of being involved in a great profession.

During the past 40 years of practicing law in Wake County, I have been fortunate to have been in the company of lawyers telling and retelling stories. Whether in the courtroom, in the Hudson Belk cafeteria, in the courthouse coffee shop, at bar functions, or at social events, these stories have been a staple of practicing law. They made me feel as though I was fortunate to be part of the profession of practicing law, and that I was living in the golden age. Occasionally, it was dampened by a more senior lawyer lamenting about how the profession was going to the dogs, and the future would not be as bright for the next generation of practitioners. But that is like parents reminiscing of their youth and expressing doubt for the future of the next generation. Sometimes these doubts about the future are bestowed on the next generation with a description of the past that looks rosier the further we get from it.

Remarkably, despite the significant changes that have come to the practice of law and our world, the profession has flourished, and each successive generation of lawyers has accomplished good things that previous generations may have only imagined. Changes in science, communication, culture, and technology have allowed and sometimes compelled us to do things differently from previous generations. Whether it was the conversion to electric typewriters and computers, or the internet and social media, new methods and tools have paved the way for change. Those changes have permitted lawyers to provide their clients with a greater quality of service, and with more flexibility. While some may pine for the old days of having Wednesday afternoons off as was once the custom, most conveniently forget about having Saturday morning office hours. We complain about the constant accessibility that email and cell phones now provide, but enjoy being able to communicate and work from pleasant locations. Many lawyers now have the freedom to attend to family or personal matters during the day and still get their work done remotely or at non-standard times. This allows many lawyers who are young parents, older caregivers, physically disabled, or have other unique situations to balance their work and life in a different way from previous generations. Many of today's law firms and clients recognize how this flexibility has improved lawyers' lifestyles, and made them better and more productive.

Historically, many lawyers have provided legal services *pro bono* or for reduced fees for those who otherwise would have been unable to obtain those services. For the most part, that work was done discretely and without public recognition. It was simply done because that was what being a lawyer meant to that lawyer. Often, opposing lawyers and parties had no idea a client was a *pro bono* client because the service was indistinguishable from that given to the paying clients. Today, both lawyers individually and organized bars have recognized the unmet need for these services—especially in civil matters—and have responded to address the deficit. Hundreds of

CONTINUED ON PAGE 19

Legal and Ethical Issues Concerning the Incarceration of the Mentally Ill

By Sarah A. See, Eric S. See, and Christopher M. Bellas

In 2016, there were approximately 45 million Americans diagnosed with a mental illness. This means that 18.3% of the population, or one in five Americans, have a mental illness (The National Institute of Mental Illness, 2017). The percentage of mentally ill is even higher in the nation's prisons and jails—approximately 20% to 25% of incarcerated individuals in the United States have been diagnosed with a serious mental illness (Segal et al., 2018).

©iStockphoto.com/xijian

Currently there are over two million people incarcerated in the United States. There are approximately 1.3 million people in state prisons, 600,000 in local jails, and 225,000 in federal prisons. While estimates vary, housing an inmate can cost anywhere from $30,000 to $60,000 per year (Wagner & Sawyer, 2018). This figure is for the average inmate and assumes no particular additional needs.

As total institutions, jails and prisons are legally and ethically responsible for meeting all of the basic needs of the inmates. This includes mental health needs. Individuals may enter jail or prison with an existing mental illness, or one may develop as they are serving time. In any event, they are entitled to treatment. Too often, adequate treatment options are substandard or nonexistent. The current legal standard of care for mentally ill inmates (which will be addressed) is unacceptable and well below the standard of care available in the community. Along with an inadequate legal standard, society is failing in its ethical duty to meet the needs of mentally ill inmates.

Society as a whole has historically struggled to care for the mentally ill. Caring for them at home was a daunting task. As a result, the institutionalization movement began in the late 1800s and peaked in the 1950s. According to Bloom (2010), there were a total of 558,289 psychiatric beds available within state and county facilities in the United States in 1955. After 1955, however, the movement to treat the mentally ill in hospitals and institutions began to rapidly decline. In 1980 there were 156,713 beds, and in 2005 there were only 52,539 psychiatric beds available within state and county facilities. As of 2016, there was reported to be a total of 37,679 state hospital beds in the United States (Treatment Advocacy Center).

As noted by Geller (2006), several trends began forming in the 1950s that lead to the downfall of the institutionalization move-

ment. The first trend was cost. Hospitals were unable to charge patients enough money to cover the cost of care and to make a profit. Second, a lack of psychiatrists for both the general population and for institutionalized patients made long-term treatment a challenge. Third, the widespread use of new medications made treatment outside of the hospital setting a possibility for many. As a result of these and other factors, the number of patients receiving care for mental issues in public and private hospitals would reach a peak in 1955, yet decrease by 95% over the next 50 years (Fisher, Geller, and Pandiani, 2009). Finally, budget cuts also caused a substantial reduction in the number of facilities that offer mental health services. Agencies that relied on government funding have been forced to close their doors. This has reduced access to treatment options for the mentally ill within their communities (Markowitz, 2006). The consequences of the lack of community resources have impacted the criminal justice system negatively (Markowitz, 2006).

Since the decline in the number of psychiatric care facilities, there has been an increase in the homeless population (Lamb & Weinberger, 2001) and a huge increase in the number of the mentally ill being incarcerated in jails and prisons (Amory Carr, Amrheim, and Dery, 2011). These populations are related. The country began to see an increase in the number of mentally ill in jails and prisons around the 1980s. However, these numbers began to dramatically increase in the early 2000s. It was then that the country started to see the impacts of the deinstitutionalization of the mentally ill. There are ten times as many mentally ill individuals incarcerated as opposed to receiving treatment in psychiatric hospitals (Montross, 2016). What was once viewed as a public health crisis, prompting the last piece of major legislation from President Kennedy, has transformed into a criminal justice emergency resulting in the use of jails and prisons as a means to warehouse the mentally ill. Institutionalization has transformed into deinstitutionalization, which has morphed into mass incarceration.

Jails

As of 2016, approximately 20% of inmates in jail were estimated to have a serious mental illness (Treatment Advocacy Center, 2016). According to the Bureau of Justice Statistics, in 2016 midyear, county and city jails had a population of 740,700 inmates in custody (BJS, 2018). This translates to approximately 148,140 inmates with a serious mental illness. Mentally ill inmates in jail face unique circumstances. They typically have a longer stay in jail, often twice as long or more depending on the jurisdiction. Reasons for this include their lack of understanding or complying with jail rules, and their awaiting evaluations or restoration for competency to stand trial. Inmates with a mental illness in the jail system have difficulty not only receiving initial mental health services, but also receiving ongoing services (Segal, Frasso, and Sisti, 2018). Jails are not designed to provide long term mental health care. They are often a revolving door for individuals with a mental illness.

The cost of providing mental health services is a serious problem. Jails are local facilities that rely on county funding. County facilities do not have the budgets of state operated prison facilities. With mentally ill inmates spending more days in jail than non-mentally ill inmates, the costs of incarceration often increase substantially. The costs depend upon the level of care that is required, which can vary based upon diagnosis, therapy, and medication needs (if any). Therapy needs can vary by the forum (individual, group), the type (behavioral therapy, substance abuse therapy, etc.), and the frequency (one time a week, once every two weeks, one time a month, etc.).

Jails are required to provide psychiatric care; however, the level of care varies greatly based upon the jail's regulations, policies, and the security needs of the institution. This is problematic because no one single accepted standard of care exists for inmates with a mental illness. This makes meeting the legal and ethical responsibilities of the criminal justice system nearly impossible as no one individual, agency, state, or government is ultimately held accountable.

Prisons

Of the 1.3 million inmates incarcerated in state prisons, approximately 17% have a serious mental illness (Wagner & Sawyer, 2018). That translates to approximately 221,000 inmates affected. These individuals tend to have committed more violent offenses or have a habitual history of incarceration. This population also tends to be found more frequently in segregation units for disciplinary reasons and in more secure long term segregation units due to ongoing behavior problems (Galanek, 2015). However, segregation itself can be detrimental to inmates diagnosed with mental illnesses such as schizophrenia, bipolar disorder, major depression, and post-traumatic stress disorder. Trestman (2014) notes the detrimental effects of solitary confinement and how it is often compared to torture. The impacts of such confinement are devastating. Inmates with a mental illness who have been placed in segregation for prolonged periods of time have reported increased levels of fear, agitation, and suicidal thoughts.

There are substantial costs and issues involved in housing and treating a mentally ill person in prison, above and beyond the cost

estimate provided above. Psychotropic medications alone can cost thousands of dollars per month per inmate. Then there are the psychologists, psychiatrists, therapists, and nurses that all become a cost factor. Treatment issues can include, but are not limited to, access to treatment, irregularity of continuous care, medication compliance, medication management, forced medication, and even confidentiality. Access to treatment can involve the ability to receive counseling, medication management, and appointments with a psychologist or psychiatrist. An inmate on psychotropic medication needs to have guaranteed routine doctor's appointments to ensure that the medications are not creating any additional medical problems. Some appointments may require that an inmate leave the prison and go to a hospital. All of these are potential issues for litigation.

Prisons are on a strict schedule. There are specific times for meals, recreation, lock down, etc. That schedule is important for the safety and security of those in the institution and is not easily changed or modified. Therefore, mental health needs must work around those schedules. Inmates do not have immediate access to their medication as needed. They must wait for "pill call" to receive psychotropic medications. They must also wait to be seen for counseling when a therapist, psychologist, or psychiatrist is available at the institution. Mental health needs become secondary to safety and security needs, real or imagined, of the institution.

The primary function of jails and prisons is to punish and rehabilitate offenders while keeping the community safe. The criminal justice system has become the primary system for providing mental health services in the United States. Jails and prisons have unfortunately taken the place of psychiatric hospitals to house the mentally ill. What is the legal and ethical standard of care to which inmates are entitled?

The Eighth Amendment of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment be inflicted." There has been considerable debate about the interpretation of cruel and unusual punishment with regard to the incarceration of mentally ill inmates. What justifies the placement of mentally ill individuals who engage in minor, non-violent crimes in the criminal justice system? Can these individuals be punished while they are receiving treatment? Regarding the Eighth Amendment, at what point does punishment of the mentally ill become cruel and unusual?

The Eighth Amendment was at issue in the US Supreme Court case of *Estelle v. Gamble* 429 U.S. 97 (1976). This case established that inmates have a constitutional right to medical care. Inmates are dependent upon the prison institutional staff to provide them with treatment of medical needs because they have been deprived of liberty and the ability to care for themselves (*Spicer v. Williamson*, 1926; *Estelle v. Gamble*, 1976). Although this sounds like a victory for inmates, it is not. While *Gamble* established that inmates are entitled to adequate medical care, what has been developed is best described as minimum levels of care (Hartman et al., 2016).

A minimum level of care describes mental health services in some of the nation's jails and prisons, but sadly, greatly overstates the level of care typically offered to inmates. The legal standard of concern is one of deliberate indifference. Deliberate indifference is defined as: "the conscious or reckless disregard of the consequences of one's acts or omissions. It entails something more than negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result" (US Legal, n.d.). Deliberate indifference can apply to jail or prison staff if they intentionally ignore safety concerns that can lead to imminent risk of harm either physically or mentally. However, there is often disagreement as to what deliberate indifference means in practice. What is knowledge of harm? A threat? An action? In theory, deliberate indifference is an act greater than malpractice. In practice, the standard of deliberate indifference officially sanctions the mistreatment and neglect of the mentally ill in custody.

The American Psychiatric Association (APA) recommends that "psychiatric care in jails and prisons be held to the standard of what 'should be available' in the community as opposed to the standard of what actually is available" (APA, 2000, p.6). Mental health services in the community are inadequate. While this is true, at least those in the community can control their treatment plans. They can shop for services and make basic choices about their own care. Inmates are unable to do the same. The holding in *Estelle v. Gamble* harms the mentally ill inmate because he or she is unable to seek other mental health services and must rely upon what the jail or prison system provides. Community services are inadequate. The standard of care that exists in jails and prisons across the country is significantly lower than what can be accessed in the community, and clearly fails to meet the spirit or intent of the American Psychiatric Association.

Recommendations

There are several potential solutions that can be utilized to reduce the number of mentally ill offenders in jails and prisons. First, in order to reduce the number of inmates with a mental illness, society must find a way to help those in need before they break the law. There must be increased access to mental health services in the community. Mental health services in general are lacking, particularly those designed for the homeless or those in extreme poverty. Roadblocks to treatment such as the lack of permanent residency, transportation, proper identification, and birth certificates must be eliminated as requirements for service. In addition, the high costs of psychotropic medications must be subsidized and recognized by the larger society as the last line of defense in keeping individuals in the community and out of correctional institutions.

Second, law enforcement needs to use more discretion and focus on diversion when dealing with minor offenses. As opposed to the go-to option of charging and locking up mentally ill individuals for offenses such as vagrancy or loitering, referring them to established community resources would be more appropriate. This includes mental health courts. Mental health courts have been around since the late 1990s. These courts oversee mentally ill individuals with an individualized treatment plan monitored by a judicial officer along with community mental health services. Their purpose is to divert offenders from the traditional criminal justice system to minimize the number of people with a mental illness in jails and prisons (Mental Health America, 2018)

Third, mental health care must improve for inmates in jail and prison. Providing a minimum level of care is a disservice to those in need. Medical services that barely rise above malpractice standards would not be acceptable if provided to any other population of people in this country. Inmates are entitled to competent professionals, appropriate medications, proven treatment plans, and follow-up care. These individuals are coming

back into the community, and we must treat them as though they will be living in our communities.

Finally, for those leaving an institution, specific, individualized re-entry plans are essential in reducing recidivism among this specialized population. Including mental health services in the re-entry process is an integral part of reducing the chances of re-incarceration. Mental health services must include: initial and follow-up appointments, monitoring, counseling, medication management, and case management services. Re-entry must assist with and monitor housing and employment.

Conclusions

The treatment of the mentally ill is cyclical. If those in need would have received the necessary mental health treatment in the community, it is possible that they may not have become involved in the criminal justice system in the first place. In a similar vein, mentally ill inmates are often released from the institution back into a community that is no more equipped to meet their mental health needs than when the initial criminal act was committed. Society must ensure that only those mentally ill offenders who have committed serious crimes are incarcerated and use appropriate diversion programs for more minor offenders. Upon release from the system, mentally ill individuals need to be referred to receive mental health services in the community into which they are released.

Society as a whole has a legal and ethical responsibility to help care for individuals who are unable and/or unwilling to care for themselves due to severe mental illness. Jails and prisons were not designed to take the place of psychiatric hospitals. Mentally ill offenders are perhaps the most vulnerable segment of a population already discarded and abandoned by society. How they are treated and cared for is a reflection on the entirety of the criminal justice system and the larger society. There is still time to right this historical wrong and develop an ethics centered correctional system. ■

Sarah A. See is an instructor in the Criminal Justice Department at Methodist University in Fayetteville, North Carolina. She teaches at both the undergraduate and graduate level, and specializes in research methods and statistics. Her past positions include eight years spent working in the Ohio prison system as an activities therapist and correctional case manager working with mentally ill and mentally challenged offenders.

Eric S. See, Ph.D., is a professor and the chair of the Criminal Justice Department at Methodist University in Fayetteville, North Carolina. His recent publications include works on methamphetamine, terrorism, and constitutional issues surrounding the Second Amendment.

Christopher M. Bellas, Ph.D., is an associate professor of criminal justice and graduate coordinator in the Department of Criminal Justice and Forensic Science at Youngstown State University in Ohio. His research focus is on the death penalty, law, and society, victimology, and criminology. He also earned an ABA approved paralegal certificate from Kent State University.

References

This article is a condensed version of the following book chapter: See, S. A., See, E. S., & Bellas, C. M. (2020). *Ethical Issues with the Incarceration of the Mentally Ill.* In D. A. Mackey & K. M. Elvey (Eds.), *Society, Ethics, and the Law: A Reader* (pp. xx-xx). Burlington, MA: Jones and Bartlett Learning.

American Psychiatric Association. (2000). *Psychiatric Services in Jails and Prisons*, 2nd ed. Arlington, VA: American Psychiatric Association.

Amory Carr, W., Amrhein, C., & Dery, R. (2011). *Research Protections for Diverted Mentally Ill Individuals: Should They be Considered Prisoners?,* Behavioral Sciences and the Law, 29,796-805.

Bloom, J. D. (2010). *The Incarceration Revolution": The Abandonment of the Seriously Mentally Ill to our Jails and Prisons,* Journal of Law, Medicine and Ethics, Winter, 727-734.

Bureau of Justice Statistics (2018), *Jail Inmates in 2016*, bit.ly/37V5G5W.

Estelle v. Gamble 429 U.S. 97 (1976).

Fisher, W. H., Geller, J. L., & Pandiani, J. A. (2009). *The Changing Role of the State Psychiatric Hospital*, Health Affairs, 28, 676-684.

Galanek, J. D. (2015), *Correctional Officers and the Incarcerated Mentally Ill: Responses to Psychiatric Illness in Prison*, Medical Anthropology Quarterly, 29, 1. 116-136.

Geller, J.L. (2006). *A History of Private Psychiatric Hospitals in the USA: From Start to Almost Finished,* Psychiatric Quarterly. 77, 1. 1-41.

Hartman, L.E., Cook, G., Persky, E. (2016), *Standards and Guidelines for Correctional Health Care Facilities*, Academy of Architecture for Justice, bit.ly/2FEcrNg.

Lamb, H.R. & Weinberger, L.E. (Eds) (2001), *Deinstitutionalization: Promise and problems*, Jossey-Bass: San Francisco.

Lamb, H.R. & Weinberger, L.E. (2005), *The Shift of Psychiatric Inpatient Care from Hospitals to Jails and Prisons*, Journal of the American Academy of Psychiatry and the Law, 33,529-534, available from jaapl.org.

Markowitz, F.E. (2006), *Psychiatric Hospital Capacity, Homelessness, and Crime and Arrest Rates,* Criminology, 44, 1. 45-72.

Mental Health America (2018), *Position Statement 53: Mental Health Courts*, bit.ly/35K28lg.

Montross, C. (2016), *Hard Time or Hospital Treatment? Mental Illness and the Criminal Justice System*, New England Journal of Medicine, 375; 15. 1407-1409.

Segal, A., Frasso, R., Sisti, D. (2018), *County Jail or Psychiatric Hospital? Ethical Challenges in Correctional Mental Health Care*, Qualitative Health Research. 28, 963-976.

Spicer v. Williamson No. 225 March 31, 1926. 191 NC 487 Supreme Court of North Carolina.

The National Institute of Mental Health (2017), bit.ly/37SaN6L.

Treatment Advocacy Center (2016), *Serious Mental Illness Prevalence in Jails and Prisons*, Office of Research and Public Affairs, bit.ly/2TcSG7i.

Treatment Advocacy Center (2016), *Going, Going, Gone. Trends and Consequences of Eliminating State Psychiatric Beds*, 2016, bit.ly/2tOk1SC.

Trestman, R.L. (2014), *Ethics, the Law, and Prisoners: Protecting Society, Changing Human Behavior, and Protecting Human Rights*, Bioethical Inquiry. 11,311-318.

US Legal (n.d.), retrieved from bit.ly/30gDqYQ.

Wagner, P. & Sawyer, W. (2018), Mass Incarceration: The Whole Pie 2018, Prison Policy Initiative, bit.ly/2uACH8V.

Sexism: The Elephant in the Courtroom

By: Judge Ashleigh Parker Dunston

My dad always told me that I can be anything I put my mind to. He actually encouraged me to be a doctor instead of a lawyer, which is ironic since he retired as a prosecutor. He also made it very clear to me that I would be treated differently because of two "strikes" against me: my gender and my race. One common misconception is that the higher the profession, the less likely that sexism and racism exists. Even in light of the recent #metoo movement, we, as professionals, tend to distance ourselves from having this difficult conversation because we don't believe that sexism is a problem in our field; hence, the elephant in the room.

©iStockphoto.com/gremlin

Sexism is defined by Merriam-Webster as prejudice or discrimination that fosters stereotypes of social roles based on sex. Sexism is also one of the least discussed topics when we talk about attorney professionalism. In fact, when I attempted to research applicable Rules of Professional Conduct that directly relate to inappropriate comments or actions not occurring in the courtroom to fellow attorneys, the closest that I found was Rule 3.5: Impartiality and Decorum of the Tribunal, comment 10; Rule 4.4: Respect for Rights of Third Persons, comment 2; and Rule 8.4: Misconduct, comment 5. I encourage you to take a look at these rules and determine for yourself whether you deem them directly on point.

In my experience as an assistant district attorney and assistant attorney general, I have been asked in open court if I am "Mr. _____'s secretary," asked if I am an intern, ignored during calendar call, discouraged from applying for positions, so on and so forth. But this article isn't about me, it's about all of the women throughout our bar who have experienced sexism and misogyny in their professional careers. The following are true accounts from women throughout the 10th Judicial District Bar. I solicited their stories because I wanted to ensure that we all understand that this is a problem that we cannot avoid talking about. It's the elephant in the courtroom, boardroom, and breakroom that is negatively affecting your colleagues every day. My hope is that through sharing these experiences, we can begin to discuss ways to change this dynamic and speak up when we see instances of sexism taking place. To those women in Wake County who bravely shared—thank you. To those who wanted to share, but couldn't—thank you. And to those who stood up for these women—thank you!

(These stories have been edited for brevity, clarity, and, in some cases, to protect the victims.)

• Several years ago, a male colleague called and berated me over the phone in the presence of another colleague for over five minutes. It was allegedly because of an email where he believed that I had belittled him, although I hadn't. I was in complete shock, and so busy trying to find a rational answer for his behavior that I didn't call him out for his unprofessionalism and verbal abuse, which still makes me mad at myself today. I'm now aware of several other times when he has yelled at others, but like my interaction, most have been unreported or, if reported, not really dealt with.

• I've never been treated differently by those in my firms because of my gender, but I have encountered issues from third parties.

I've been asked if I was my boss' paralegal. Once my boss found out that it was an issue, he made sure to always introduce me as an attorney to try to prevent it. I've also had opposing counsel who has had an issue with the fact that he was litigating against a woman.

• When I was a brand-new attorney, I handled a motion in court extremely well. An older male partner in my firm was with me, and when I and opposing counsel finished our arguments, the judge proceeded to ignore me for the rest of the proceedings although I was the one who handled the case. I felt offended and confused, but it gave me energy and motivated me to not only continue to excel in my field, but also to never treat other people the way I'd been treated that day.

• I have had a male attorney approach me and ask me to stand up and turn around in a circle so that he could see what kind of "little dress" I was wearing that day and what it looked like on me. He then told me to not be surprised when he sent all of the other attorneys in to come and look at me. Later, when I was looking at something on a colleague's computer, he proceeded to tell my superior that the reason he was stopping by was so that he could watch me bend over. I'm a curvier woman who tries to clothe myself appropriately for my shape and age; however, I've noticed that men use that as an opportunity to pass judgment and make crude or inappropriate gestures to me.

• When I walked into the courtroom with my older, white, male paralegal, the judge asked him if he was ready to proceed, despite my name being on every pleading filed in the case. I stood, smiled, and advised him that I was the attorney for the department and was ready to proceed.

• When I was a new attorney, I was working on a case against an older male attorney who called my male boss to complain that I was referring to him by his first name instead of Mr. ___. He believed this to be disrespectful, although he had referred to me as, "honey, darling, sweetie," etc. in our phone conversations. Thankfully, my boss gave him a lesson in professionalism, informing him that, as colleagues, he expected we would all call each other by our first names regardless of years of practice—or gender.

• While at a firm retreat, a male associate groped my private parts without my consent. When I later confronted him, he claimed to be drunk. It caused me significant pain because I felt like, as an attorney, how could I advocate for anyone when I couldn't advocate for myself?

• I have been consistently called "aggressive" and a "ball buster" by men.

• I worked at a law firm where men were constantly scoping out new female hires to "grade" them on their looks. If there was one who was deemed to be less attractive, they'd give the woman a nickname like "Fat So and So." I once heard them state that a very competent and kind female attorney had legs that looked like "pigs wrestling under her skirt."

• Once, while in the attorney room, several male attorneys started complaining about prosecutors and began to demean one female prosecutor in particular. One referred to her as a c**t, and others chimed in using a variety of four and five letter words. It was as if I was invisible, so I eventually picked up my folders to make it evident that I was present and walked out.

• When my client's name was called out, I went to the defense desk as my client made her way to the front. The male judge asked me where *my* lawyer was.

• I am a Wake County retired emergency judge. I graduated from UNC School of Law in 1975 and immediately went to work as the first female assistant district attorney in Wake County. There were only a handful of female attorneys in the county at the time. So few, in fact, that I used to say we could all meet in a courthouse elevator and still have room to spare!

Several years into my job as a prosecutor, there was a vacancy on the district court bench. A rumor was going around that I was interested in it, which, at the time, I wasn't. A white male prosecutor, who was interested, dropped by my office and asked if I was going to pursue an appointment to the vacant position. Apparently, just because I was female, he thought the appointment would be given to me because, he said, "I'm tired of Anglo Saxon males being discriminated against." I have no recollection of how I responded to that, but I do remember thinking "You've got to be kidding. You have no idea what discrimination is!"

A few weeks later, I was attending a Wake County Bar Association Christmas party. I was approached by a middle aged white male attorney who asked if I was going to try to get appointed to the vacant judgeship. I said no, and he said "Good. I don't think women should be judges." I'm sure this was just an offhand comment to him, but I was shocked, offended, and speechless. I quietly walked away, wishing I had been quick enough to come up with an appropriate response to his remark. I was surprised by what these two men had said to me, particularly since most of the men in the Wake County bar had been welcoming to me when I started working in the District Attorney's Office.

I doubt that the two lawyers who made these comments even remember them, but they have stuck with me all these years. In the 1980s, I became a judge after running one time and losing, and then being on four separate appointment lists that went to two governors. It was obviously not as easy for me to get appointed to the bench as that male prosecutor thought it would be! I can't begin to tell you how proud I was as we added one female judge after another to the Wake County District Court bench. With each new addition, I remembered the lawyers' comments. The poetic justice in the number of women on the bench now is much better than any response I could have given when those sexist remarks were made to me so many years ago.

These are certainly not the only personal examples I could share, as there have been others over the years, but these comments made a lasting impression on me. Fortunately, these experiences have been greatly outweighed by the tremendous support and kindness shown to me by numerous other male attorneys.

If you experience or witness these or similar acts of sexism, please find someone you trust and confide in them and remember that these experiences do not define you. Sexist and misogynistic comments and actions hurt, distract, and erode the profession. So now that we're aware of the elephant, we should all do our part to end sexism and raise the bar of professionalism throughout our state. ■

Judge Ashleigh Dunston is a district court judge in the 10th Judicial District which encompasses Wake County. For more information about Judge Dunston or to request for her to present a CLE on this topic, please visit her website JudgeAshleigh.com.

This article was originally published in the Wake County Bar Flyer, Third Quarter 2018.

Go East: Views from an NC Bar Member and an NC LL.M. in Munich, Germany

By Sarah L. Büthe and Dr. Henning H. Krauss

After over a decade of practice in Raleigh, a North Carolina bar member moved to Munich, Germany, and became friends with a German lawyer who had studied at Duke. Our shared experience of masters degrees focusing on each other's respective legal systems and practicing internationally led to some interesting comparing and contrasting, North Carolina versus Germany.

©iStockphoto.com/beyhanyazar

There is no shortage of striking differences between the two systems, one case-based with its roots in England, the other code-based with its roots in the Roman tradition. To share these insights, here is our "top-ten," featuring ten of the most notable differences we have observed in (particularly civil) law and practice, Germany versus North Carolina.

1. No Judges by Popular Election in Germany

In North Carolina, judges from the district court to the Supreme Court are subject to popular, partisan elections. The very notion that judges are popularly elected, not to mention with partisan labels, tends to shock Germans and conflict with the German notion of judicial independence.

German judges are generally appointed through a relatively apolitical, merit-oriented process in which academic performance plays a dominant role. Once appointed for life, most serve as permanent professional technocrats.[1]

At Germany's Federal Constitutional Court, things look somewhat different: Judges are selected by supermajorities of the two chambers of the federal legislature for only one term capped at 12 years.[2] At this level, the German appointment process, too, is politically tinged, with political parties playing an active role in candidate selection.[3] Last fall, for example, some eyebrows were raised in response to the appointment of a new Federal Constitutional Court judge who immediately previously had been serving as a partisan member of Germany's federal legislature and who had long been actively

involved in party politics. Nevertheless, no one took to the streets, and there were no public probes into the candidate's personal life. Instead, the debate surrounding the candidate took place in venues like the op-ed pages of elite newspapers.[4]

2. Dedicated Judge(s) for the Life of the Case at the German Trial Court

In North Carolina state courts, unless you are in a special venue like the business court, you can anticipate arguing your motion to dismiss, your motion for summary judgment, and your motions *in limine* before different judges.

Not so in Germany. Here, most cases are heard by one judge, more complex cases by a panel of three.[5] Either way, the judges generally remain the same for the life of a case at the trial court, from the opening briefs to the ultimate judgment. [6]

3. The German Judge in the Driver's Seat

In North Carolina and other common law jurisdictions, lawyers often experience the judge as a relatively passive observer of the adversarial show the lawyers put on. In Germany, by contrast, the judge drives the course of the proceedings.[7]

German judges shape the litigation, testing *sua sponte* the sufficiency of the claims,[8] setting briefing and hearing schedules,[9] examining witnesses,[10] ordering the production of evidence,[11] and appointing independent experts.[12] German judges generally share with counsel their views on salient issues and indicate how they are inclined to rule.[13] German judges must push for settlement throughout the life of a case.[14] If the case does not settle and a judgment on the merits must be rendered, they fashion opinions that must include the names of the parties and their legal representatives, the names of the court and the judges involved in the decision, the date on which the hearing was closed, the judgment, the facts, and the legal reasoning.[15]

4. No Discovery in Germany

It is difficult to imagine civil litigation in North Carolina, or anywhere else in the US, without discovery. Shockingly, discovery essentially does not exist in German civil litigation. The parties generally must support their assertions with the facts and evidence they manage to muster on their own.

Narrow exceptions exist. For example, where a party to German litigation has, in its pleadings, relied on documents it did not submit, the court may order production.[16] And the European Union recently forced Member States, including Germany, to enact legislation allowing for discovery in cartel damages cases, not least due to the extreme information imbalance in that context.[17] In the ordinary course of civil litigation, however, much more so than their North Carolinian counterparts, German lawyers and litigants are on their own when it comes to fact development.

5. No German Juries, Though Sometimes "Lay Judges"

In North Carolina and the US more broadly, the presence of juries informs how trials are conducted. Elaborate evidentiary and procedural rules restrict what the jury sees and hears so as to protect the jury, and the case is generally tried in one concentrated proceeding.

In Germany, the court, in a single-judge or three-judge constellation, decides the facts.[18] Juries simply do not exist—and neither do the byzantine rules meant to insulate them. The court thus can—and often does—take evidence in writing and orally over an extended period of time leading up

to the final judgment.

The German public generally holds the German civil justice process and its reliability in high regard. The centrality of a professional judiciary, with essentially no lay person involvement in the decision-making, may well be one of the reasons. Indeed, this may explain the waning popularity of Germany's specialized commercial litigation chambers, where the professional judge decides the case with input from two business professionals acting as "lay judges."[19]

6. Burden of Proof in German Civil Cases Similar to US Criminal Burden

In the US, the burden of proof in the typical civil case boils down to "more likely than not." In Germany, the preponderance-of-the-evidence standard simply does not exist.

Instead, the burden of proof even in straight-up civil cases feels more like that in an American criminal context. It requires that the court be convinced of the truth, i.e., to be convinced of the facts with such a high degree of probability as to quiet reasonable doubts.[20] That is no small feat, particular in conjunction with the absence of civil discovery: German plaintiffs must meet this high hurdle with few tools for acquiring the evidence potentially necessary for doing so.

7. Hearing Minutes, Not Verbatim German Transcripts

For a North Carolina litigator, it may be hard to imagine a fact-finding hearing or trial resulting in anything other than a verbatim transcript. In Germany, even evidentiary hearings are documented with minutes dictated by the judge, not verbatim reproductions of what was actually said.[21]

The contents of hearing minutes are prescribed by law.[22] They must include formal basics like the time, place, and date of the hearing. The minutes also must include the substance of the hearing, such as motions made or ruled on, evidence such as testimony taken, and settlement efforts undertaken.[23]

Typically, a judge dictates the minutes from the bench during short breaks in the course of the hearing itself. The judge's minutes establish facts of the case and frame the case going forward. Judges often paraphrase or re-phrase in their own words what witnesses actually said, however, rendering such minutes interpretations of facts rather than plain facts. Counsel must therefore pay great attention to the dictation of the minutes and can request on the spot that certain information be included or certain interpretations be omitted. The court, however, retains broad discretion as to what to include and how to phrase things. Counsel also has the opportunity to move for correction *ex post* and thus typically carefully combs through the written minutes after their receipt to ensure that everything important to the case is correctly recorded.[24]

8. German Case Law Persuasive, Not Precedential

In North Carolina and common law jurisdictions more broadly, case law is law, and holdings often bind courts and parties well beyond those in any particular case.

In Germany, case law plays a lesser role. Here, the focus is squarely on the codified law laid out in statutes. Case law is used to interpret code sections, especially those dealing with relatively broad concepts, such as tortious conduct in violation of public policy or good faith and fair dealing in contracts.[25] Generally, however, such case law may be persuasive to, but is not binding on, other courts.[26] The one big exception: Germany's Federal Constitutional Court. Its rulings expressly have the force of law.[27]

9. In Germany, the Loser Pays (within Limits)

In North Carolina and elsewhere in the US, litigants generally must pay their own legal bills, regardless of whether they win or lose. The burden of the so-called American rule is ameliorated by mechanisms like contingency fees, burdening parties with their attorneys' fees only if they succeed.

In Germany, by contrast, the loser generally must foot the bill for the winners' costs and fees (with some exceptions, such as employment law cases).[28] Further, contingency fees are generally prohibited.[29] Notably, though, the fees the loser must pay are codified in a statutory fee schedule generally based on the amount in controversy and capped at—by US standards—relatively low levels.[30] In cases where, for example, a party has entered into an engagement agreement for specialized counsel at a higher, hourly rate, everything that exceeds the statutory cap does not get reimbursed by the loser, but instead must be carried by the party who entered into the agreement.

10. German Notion of "Open Courts" Not So Open

North Carolina lawyers have the good fortune of publicly accessible state and federal court files as well as hearings not only open to the public, but often also widely available through recordings and transcripts.

German lawyers (and citizens), by contrast, may attend most hearings, many of which are open to the public.[31] But that is essentially where "openness" stops. Recordings are forbidden, verbatim transcripts are virtually never produced, and court files are, as a general rule, not available for public inspection.[32] ■

Sarah Lindemann Büthe, JD (Stanford), LL.M. (Munich), is a member of the North Carolina Bar living in Munich, Germany. Dr. Henning H. Krauss, LL.M. (Duke), is a German lawyer and member of the Munich Bar specializing in complex litigation and also living in Munich, Germany.

Endnotes

1. *See generally* German Judges Act §§ 9, 10.
2. German Federal Constitutional Court Act §§ 4, 6, 7.
3. *See, e.g.*, Hasso Suliak, *Unabhängig und doch auf Linie*, Legal Tribune Online, bit.ly/39Y1tQM/ (last visited October 2, 2019).
4. Heinrich Wefing, „*Etwa zu politisch?*", in: DIE ZEIT, November 14, 2018, Nr. 47/2018, bit.ly/2NeCcI1 (last visited October 2, 2019).
5. German Code of Civil Procedure §§ 348, 348a.
6. German Code of Civil Procedure § 309.
7. German Code of Civil Procedure §§ 136, 139, 272, 273.
8. *Cf.* German Code of Civil Procedure § 331(2) (requiring judges to test the sufficiency of the complaint even in the default judgment context).
9. *See, e.g.*, German Code of Civil Procedure § 214, 273, 274.
10. German Code of Civil Procedure § 136.
11. German Code of Civil Procedure § 144.
12. German Code of Civil Procedure § 144.
13. German Code of Civil Procedure § 139.
14. German Code of Civil Procedure § 278.
15. German Code of Civil Procedure § 313.
16. German Code of Civil Procedure § 142.
17. German Act Against Restraints on Competition § 33g.
18. German Code of Civil Procedure §§ 348, 348a.
19. *Rechtsstandort Deutschland im Wettbewerb: Impulse für Justiz und Schiedsgerichtsbarkeit* (Beck 2017), pp. 195-205.
20. German Code of Civil Procedure § 286.
21. German Code of Civil Procedure § 159.

CONTINUED ON PAGE 41

The Middle Finger: Disrespect to a Law Enforcement Officer

By Charles A. Jones

When I was a Marine Corps judge advocate, I was first and foremost a Marine Corps commissioned officer, and as such Article 89 of the Uniform Code of Military Justice (UCMJ) protected me as it does any commissioned officer from disrespectful actions or words from subordinates.

Article 89 reads as follows: "Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct."[1]

Similarly, Article 91 of the UCMJ protects marine warrant officers and certain enlisted marines (noncommissioned officers) from disrespect; it provides punishment for anyone who "treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office...."

Additional protection from disrespect can be found in Article 117 of the UCMJ, which prohibits one service member from using provoking or reproachful words or gestures towards another service member.

The question of disrespect toward civilian law enforcement officers arose recently because I write, on a volunteer basis, the newsletter for the Guilford County Sheriff's Office, and I recently included in the newsletter a case about a defendant who made the middle finger gesture to a North Carolina state trooper, which drew my attention as an action of someone exhibiting very poor judgment. The case made me wonder if a North Carolina Law Enforcement Officer (LEO) enjoyed legal protection from disrespectful conduct from a member of the public in a manner similar to the protections Articles 89, 91, and 117 of the UCMJ afforded certain military members. The case involving the trooper and the middle finger gesture, which was from the North Carolina Court of Appeals (NCCOA), led me to some answers.

©iStockphoto.com/CatLane

The LEO: Disrespect by Action—the Middle Finger Gesture

The NCCOA issued an opinion on the subject filed August 6, 2019: *North Carolina v. Ellis*. The case held that a North Carolina State Trooper had a reasonable suspicion to stop a vehicle from which the defendant had made the middle finger gesture. The NCCOA decided the case without deciding whether the extension of the middle finger was a crime. The reasonable suspicion was that a crime was impending: disorderly conduct, in violation of Section 14-288.4(a) (2) of the North Carolina General Statutes, which outlaws gestures likely to provoke violent retaliation and thus create a breach of the peace.

For reasons unexplained, on August 14, 2019, the clerk of the NCCOA signed a letter withdrawing the opinion, but the case remained assigned to the same panel that issued the opinion filed August 6.

The NCCOA issued its "new" ruling in the case in an opinion filed August 20, 2019; footnote one of this case indicates that it replaces the case that was filed August 6, 2019, and was withdrawn by order of the NCCOA on August 13, 2019, the withdrawal that was the subject of the clerk's letter of August 14 withdrawing the first *Ellis* opinion.

In the second *Ellis* opinion, the NCCOA began by noting that the key issue in the case was whether the trooper's stop was valid: was it based on a reasonable suspicion that a crime had been or was about to be commit-

ted? The issue was not the legality of aiming a middle finger at the trooper.

The trooper testified that he was standing on the side of the road assisting another driver when a vehicle drove by him with the defendant in the passenger's seat. The trooper at first noticed the defendant waiving his arm outside the window in a distracting manner. When the car was approximately 100 yards from the trooper (who must have had excellent eyesight), the arm gesture changed to that of pumping with the middle finger extended. The trooper was uncertain if the finger was pointed at him or at another person.

The trooper pursued and stopped the vehicle. The defendant initially refused to identify himself, which was a violation of the law: RDO, which is "shorthand" for resisting, delaying, or obstructing a law enforcement officer in the execution of his duties, a violation of Section 14-223 of the North Carolina General Statutes. The defendant finally identified himself and admitted that the object of his extended middle finger was the trooper.

The NCCOA noted that the extension of the middle finger, by itself and without more, at a law enforcement officer was an expression of free speech, and thus not a violation of a law. In fact, the second *Ellis* opinion devoted its third footnote to listing cases holding to that effect. The reasoning is that LEOs are expected to be trained professionals and as such are expected to tolerate disrespectful gestures more so than the average citizen.

The NCCOA, however, distinguished the cases in the footnote from the case at hand by observing that the trooper did not know the object of the defendant's finger: the trooper or a member of the public. An objectively reasonable LEO could have concluded that the finger was directed at a member of the public—specifically, at another motorist—and would cause a disturbance in the form of a breach of the peace (possibly "road rage"), and thus disorderly conduct that violated the law. Accordingly, the trooper had a reasonable suspicion for stopping the vehicle, so the defendant's conviction for RDO committed during that stop (the failure to identify himself to the trooper) could stand.

In finding a reasonable suspicion, the NCCOA recited the usual comments about reasonable suspicion. It is a belief stronger than a mere hunch, but less than probable cause, that a crime has been or is about to be committed. It is an objective and particularized basis the LEO can articulate concerning potential or realized criminal activity.

The State had argued in the alternative that the "community caretaking" exception to the Fourth Amendment justified the stop. That exception permits a LEO to stop a vehicle if the driver appears to need aid or to be in distress; it also allows a stop if a public safety matter is apparent. The classic example is stopping a vehicle that has hit an animal in the road. The NCCOA disagreed with the State's argument that the community caretaking exception applied; it did so with a classic summary of the case in its footnote five: "There is no basis to believe that the middle finger gesture is a sign of distress in Stanly County."

The LEO: Verbal Disrespect—"MF" Shouted from a Vehicle

The subject of the *Ellis* case was disrespect by action—the extension of the middle finger. What about verbal disrespect?

The law governing disrespect by words differs from the law governing disrespect by action.

The seminal North Carolina case about verbal abuse seems to be *In re V.C.R.*[2] In this case, a juvenile (V.C.R.) spoke an obscenity ("What the f--k, man?") loudly toward a LEO on a public street. While the yelling of obscenities in public may be speech protected by the First Amendment, that characterization of the speech did not preclude a judicial determination that the LEO had a reasonable suspicion to detain the juvenile since such conduct could lead to a breach of the peace, in violation of Section 14-288.4(a) (2) of the North Carolina General Statutes. One of the trial court's conclusions of law was that the language "certainly exceed[ed] the bounds of social toleration."

Another of the trial court's conclusions of law was that the status of the object of the language, a LEO, was irrelevant: abusive language directed at a LEO constituted an offense notwithstanding the status of the object of the language. The NCCOA agreed, noting that while obscenity may be protected speech, an officer may approach the defendant who utters it since the obscenity may lead to a breach of the peace.

But a LEO merely hearing an obscenity shouted in or from a passing vehicle does not give the LEO a reasonable suspicion to stop the vehicle when in the circumstances the LEO cannot determine if the obscenity is directed at him or her, and he or she cannot assume it is so directed. The case here is *North Carolina v. Brown*, a NCCOA opinion filed on April 16, 2019.

In *Brown*, a deputy was standing outside his patrol car at approximately 2:30 AM when he saw a car drive by him. He heard yelling and "motherf--ker" coming from the car. The deputy, concerned that an altercation may be occurring inside the car, stopped it and cited the driver for driving while impaired. The NCCOA disagreed with the trial judge, who held that the LEO had a reasonable suspicion, solely based on the word he heard coming from the car, to stop it. The trial judge also held that the "community caretaking" exception to the probable cause and warrant requirements of the Fourth Amendment justified the stop.

But the problem was that the sole basis for the stop was an "undifferentiated" uttering of " motherf--ker." The NCCOA noted that the LEO did not know if the driver or a passenger said it. The LEO did not know the object of the word, so he did not know if it was him (the LEO) or someone else. In fact, it could have indicated that people inside the car were fighting or that someone said the word in a conversation on a mobile telephone.

In short, the mere yelling of profanity inside a vehicle, which was the sole basis for the stop, did not establish a reasonable suspicion supporting the stop under any basis, including the community caretaking doctrine, which the NCCOA held did not apply in this circumstance.

Thus, North Carolina courts will not tolerate disrespectful remarks aimed at a LEO in public.

Obscenity: Irreconcilable Differences

But holding that obscenities shouted at a LEO is actionable is difficult to reconcile with the rationale in the middle finger case. If a LEO is presumed to be a professional capable of "withstanding" a middle finger gesture, one would think that a LEO would likewise be capable of "withstanding" obscenities directed at him or her in public. Justifying a distinction between the two instances of disrespect is difficult: "f--k you" as expressed by waving the middle finger at a LEO (disrespect by action or actions) and "f--k you" as said to a LEO (disrespect by word or words). The former is not action-

able; the latter is. And while a LEO may stop a car when he is uncertain as to the object of the middle finger, he may not stop a car when he is uncertain as to the object of a shouted obscenity.

Summary: Military Versus Civilian Worlds and Gestures Versus Verbal Abuse

No sane member of the military would extend his or her middle finger (or make any other disrespectful gesture) at a superior officer or enlisted member. No sane member of the military would utter disrespectful words to a superior officer or enlisted member. And no sane member of the military would use provoking words or gestures toward a superior officer or enlisted member.

The middle finger gesture and disrespectful words directed toward a superior in the military as well as provoking words and gestures directed toward a superior would never pass muster as "freedom of speech" in the military world, while they might be so categorized in the civilian world. The military and civilian courts have long held that the freedom of expression by a military member in uniform may be restricted, restrictions that would never be acceptable if placed on civilians. The United States Supreme Court has recognized the essential differences in military and civilian societies, observing that the military is a specialized society separate from civilian society with rules different from those in the civilian world. The business of the military is to fight wars, and in that context discipline and duty are paramount and may override the individual rights of military members. No question can be left open concerning the right of the officer to command and the duty of the subordinate to obey. In this context, the status of the officer must be protected from disrespectful words and actions.[3]

For example, the requirement for good order and discipline in the military environment forbids disrespectful conduct, by words or by actions, toward a superior while that very same conduct would be permitted in the civilian environment. Thus a civilian can give his or her boss the middle finger gesture or tell his or her boss to "go to hell" without legal sanction, assuming the gesture or words do not lead to a breach of the peace. The sanction against the employee would likely be demotion or loss of employment.

So while the middle finger gesture aimed at a military superior could result in disciplinary action under the UCMJ[4], the outcome is different for the gesture aimed at a LEO. To reiterate, LEOs are expected to be trained professionals and as such are expected to tolerate disrespectful gestures more so than the average citizen. That disrespect includes being the object of an extended middle finger.

But the LEO may arrest a citizen who shouts obscenities at him or her in public, with the basis of such arrest not being to punish the speech but to thwart a breach of the peace, which falls under the rubric of "disorderly conduct" in the North Carolina General Statues. ■

Charles A. Jones served as a judge advocate (military lawyer) in the Marine Corps and Marine Corps Reserve for a combination of 30 years and retired in 2011 as a colonel in the Marine Corps Reserve.

Endnotes

1. The Uniform Code of Military Justice, the "UCMJ," is Chapter 47 of Title 10, U.S. Code.
2. *In re V.C.R.*, 227 N.C. App. 80, 742 S.E.2d 566 (2013). While the NCCOA upheld the basis for approaching and detaining the juvenile—her behavior—the NCCOA found that the officer's seizure of marijuana from her was improper because probable cause was lacking; the search of the juvenile was not pursuant to arrest; and a frisk was inappropriate. The *V.C.R.* case cited another NCCOA case in which the NCCOA upheld a conviction of a woman for using "profane, racist, and vulgar epithets" at LEOs and "remonstrated in a loud and boisterous manner" against another person's arrest, all in violation of the disorderly conduct statute, conduct likely to cause a breach of the peace. *State v. McLoud*, 26 N.C. App. 297, 215 S.E.2d 872 (1975).
3. A seminal case, if not the seminal case, outlining the differences in military and civilian societies is *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547 (1974). Although the case did not involve Articles 89, 91, or 117, the principles the Court recited concerning restrictions on the rights of military members apply equally to those Articles.
4. The forum for adjudicating a charge of disrespect or provoking words and gestures under the UCMJ can be nonjudicial or judicial. Article 15 of the UCMJ authorizes nonjudicial punishment, which is administrative punishment and does not involve judicial forums (courts-martial). The judicial forums are the summary court-martial (least severe punishment, UCMJ Article 20); the special court-martial (intermediate severity of punishment, UCMJ Article 19); and the general court-martial (greatest severity of punishment, UCMJ Article 18). The one charge of disrespect I prosecuted in the military was heard at a navy special court-martial and involved a US Navy Sailor throwing her headgear down in disgust or defiance in front of her commanding officer.

Five Lessons Learned from #31daysofprobono

Sylvia Novinsky

Each October, the American Bar Association hosts the National Celebration of Pro Bono, a nationwide opportunity to honor the good work being done by attorney *pro bono* volunteers. October 2019 saw the tenth anniversary of the celebration, with more than 1,400 volunteer, training, and recognition events held across the country—35 of those from North Carolina.

Not all celebration took place through events, however. Niya Fonville, associate director of the Career Center of the Norman Adrian Wiggins School of Law at Campbell University, took to Twitter and Facebook to share her #31daysofprobono challenge, a resolution to participate in at least one *pro bono* legal service project every day during the month of October. Each day brought a new post from Niya, announcing her participation in *pro bono* projects with a variety of partner organizations, encouraging her lawyer friends to do the same, and including a fun meme or two along the way.

After a month full of daily *pro bono* legal service, Niya knows from experience how an attorney can make *pro bono* a regular part of practice. These five lessons in particular can help any lawyer to volunteer more frequently.

1. Find the Fun. One of the reasons that Niya began her #31daysofprobono challenge was to make a game out of providing *pro bono* in honor of the National Celebration of Pro Bono. This concept quickly extended to answering legal questions through the North Carolina Bar Foundation's Free Legal Answers platform. Waiting between sessions at a conference, waiting for a program to start, or waiting for her flight at the airport—each became an opportunity for Niya to review questions that real North Carolinians who are unable to afford legal counsel needed answered, to claim an issue on which she was competent to advise, and to provide help—right from her phone!

2. Don't Be Afraid of Small Steps. Not every *pro bono* engagement needs to involve full representation. For example, through Legal Aid of North Carolina's Lawyer on the Line Project, Niya supervised a North Carolina Bar Association Paralegal Division member to provide legal information to clients in need. Since she was not taking the case herself, supervising a paralegal in delivering legal information did not feel like as much of a commitment as direct representation might. Additionally, she could set her own availability, and resources, guides, and attorney mentors were available to her if she were to need them.

3. You Know More than You Think. One of the most intimidating parts of engaging in a new *pro bono* project is the fear of a new legal topic. After developing expertise in a given area of law, not having that expertise in another can feel like a lack of competence when asked to answer questions outside of that comfort zone. When Niya signed up to supervise law students from the University of North Carolina School of Law through their Juvenile Parole Project with North Carolina Prisoner Legal Services, she felt that nervousness firsthand. As a former Legal Aid attorney, Niya is intimately familiar with a number of civil legal issues, but criminal law falls outside of her wheelhouse. Nevertheless, her work with a client who had been sentenced to life without parole when he was 16—27 years ago—became one of her most meaningful *pro bono* experiences of her month-long challenge.

Niya Fonville advising clients at a Wake County Bar Association Ask a Lawyer event.

Niya reflects: "Remember that no one starts as an expert; we weren't always afraid of exploring new areas of law. I have found success in my legal career because of the tools and skills I have that enable me to learn something new." As she and her supervised law students prepared her client for a Hayden Hearing, where an individual sentenced as a juvenile is entitled to "a meaningful opportunity to obtain release" before the Parole Commission, Niya found the process of training in and exploring an area of law about which she previously had zero knowledge exciting. Further, it gave her an opportunity to see that, while lawyering looks different from client to client and case to case, her role in helping a client tell their story remains a common thread.

4. Consider *Pro Bono* as Self Care.

Sometimes, becoming enmeshed in day-to-day work can leave an attorney feeling stressed and on the way to burnout. However, by making a difference in someone else's life, it can help to put your own problems into perspective. According to Niya, "Helping others through *pro bono* is a way to find relief and rejuvenation by doing some good—after volunteering, the world isn't as difficult as it may have seemed a few moments ago."

This sentiment was especially evident in a short client call Niya held during the month. She spoke with a woman whose daughter was injured in the 9/11 attacks and eventually passed away three years ago. Because of her grief, the client was unable to focus on what practical steps she should take in response to a legal issue. During that phone conversation, Niya gave the woman vital legal assistance—helping the client understand her legal rights, making a written game plan for how to respond, and setting priorities during different stages of litigation—but she also embodied her role as "counselor at law." Niya shares, "I only gave an hour out of my day, but that hour was invaluable to her—the person who got off the telephone was different than the person that initially answered, making our conversation worth it."

5. Just Begin! One of the most difficult things about getting involved in *pro bono* legal service is knowing how to get started. If an attorney is struggling with how to begin, Niya's advice is to ask, "How can I serve my community?" She continues, "*Pro bono* is more than just giving away a legal service for free. It is about access, about looking at who does not have access to our courts, and considering how I, despite the issues that I think exist, can help bridge that gap." By making *pro bono* more personal, it can help in identifying the gaps that need bridging.

If finding a community's needs seems difficult, consider broadening the understanding of community beyond friends, family, or immediate geography. For example, letting the staff of a house of worship or child's school know that an attorney is available as a resource for families in need can be a way to help neighbors who would otherwise have to go it alone. For Niya, an avid reader and book lover, she feels the library is a source of community for her, making the Wake County Bar Association's Ask a Lawyer *pro bono* initiative in partnership with Wake County Public Libraries and the North Carolina Pro Bono Resource Center a natural fit. Through this program, Niya is able to be surrounded by books while also using her legal skills—how to spot issues, ask probing questions, and access additional legal information—to help a client in a limited-scope consultation.

During her #31daysofprobono, Niya relied on these lessons to provide *pro bono* every day of the month. While not every attorney can take on a daily *pro bono* challenge, every attorney can challenge themselves in some way to increase their support for access to justice for all, an ideal central to the oath attorneys take to join this noble profession. Just begin!

For more information about the projects described in this article, or to find other available *pro bono* opportunities to volunteer, visit ncprobono.org/volunteer. ■

Sylvia Novinsky is the director of the North Carolina Pro Bono Resource Center.

President's Message (cont.)

lawyers around the state have publicly stepped up and helped bridge the gap with thousands of hours of *pro bono* work. The amount of *pro bono* work done not only for individuals and small businesses, but also for civic and charitable organizations, is huge and growing. Many members of our bar have taken on this issue with great enthusiasm. In Wake County, in addition to giving substantial amounts of their time and talents freely, the local bar is now raising over $100,000 a year of direct financial support for Legal Aid. That's just one example of how our profession is improving to meet the needs of the public, and there are more.

Lawyers have also recognized that the public and our profession benefit when our ranks and the ranks of those who oversee us resemble those we serve. We have become more conscious of the value of having different points of view in delivering legal services and in improving our system. One size doesn't always fit all well. While some demographics of our legal profession have become more representative, others have lagged, and some may have declined. Our lawyer population has become increasingly more urban and concentrated geographically in our cities, and we must be careful that doesn't limit our perspective. With over 46% of our resident lawyers living in Wake and Mecklenburg Counties, we must be mindful of needs and concerns of all practitioners and prospective clients in both rural and urban North Carolina. Our bar organizations have realized this and have intentionally sought to broaden involvement from a wider range of sources, and from this we have benefitted.

We are indeed fortunate to live and practice in North Carolina, where there are growing opportunities. Our cultural and economic climates have attracted business and been a boost for many, including lawyers. In state government, the four leaders of our legislative, judicial, and executive branches—Representative Moore, Senator Berger, Chief Justice Beasley, and Governor Cooper—are all North Carolina lawyers from different parts of the state who have practiced here for years. Their varied perspectives have all been shaped by their education and experiences, and those perspectives can be beneficial as we refine our regulatory framework. These leaders are uniquely qualified and positioned to aid us in our task. Governance of the bar must be dynamic to be effective in protecting the public during changing times. The tools and methods we use must keep pace with changes in society. We should be proud that North Carolina enjoys a national reputation for being a leader in transparency in the bar regulatory process. Even though some of our high profile disciplinary actions have been painful for lawyers to watch, we have conducted those proceedings with the fairness, dignity, and openness that has helped maintain public confidence in our profession.

With all this being said, the responsibility to ensure that the future continues to be bright, both for the consumers and providers of legal services, lies with us. We must hold on to some valuable time-tested ideals and be responsive to the changing requirements and expectations of those needing legal services. If we do, the next generation of lawyers may believe they too have been part of the golden age of practicing law. We must ensure that the public will feel it has been golden for them as well. ■

C. Colon Willoughby is a partner with the Raleigh firm McGuire Woods.

Grievance Committee and DHC Actions

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

Disbarments

Mark L. Bibbs of Raleigh surrendered his license and was disbarred by the Wake County Superior Court. On January 23, Bibbs pled guilty to four counts of lobbying without registration, one count of obstruction of justice, and one count of criminal contempt, all misdemeanors.

Lisa Blalock of Laurinburg surrendered her license and was disbarred by the State Bar Council on January 24. She admitted that she misappropriated entrusted funds totaling at least $11,892.90.

Suspensions & Stayed Suspensions

Mark L. Bibbs of Raleigh did not prepare accurate quarterly trust account reconciliations and did not maintain proper client ledgers for at least four years. The Disciplinary Hearing Commission suspended him for 18 months. The suspension was stayed for three years upon numerous conditions. After the order of discipline was entered, Bibbs was disbarred by the Wake County Superior Court for unrelated misconduct. See entry above.

Frank W. Erwin of Jacksonville had improper communication with an unrepresented party, did not disclose his representation of an interested party, made false statements to the Grievance Committee, and filed false documents with the court. He was suspended by the DHC for 18 months.

Karen C. Wright of Charlotte neglected many estate matters for many years, paid legal fees to her firm without obtaining required court approval, did not accurately report fees she paid to her firm, did not file required accounts, did not timely close estates, and violated multiple trust account rules. She was suspended by the DHC for five years. After serving two years of active suspension, Wright may apply for a stay of the balance upon demonstrating compliance with numerous conditions.

Wire Fraud Alert

In 2015, the State Bar began receiving reports of criminals hacking into the email accounts of lawyers and real estate brokers to alter wiring instructions, thereby stealing disbursements from real estate and other transactions. The State Bar has written and spoken extensively about this danger in its *Journal*, on social media, and in continuing legal education programs. Lawyers Mutual Insurance Company and title insurance companies have broadcast warnings and educational information about these scams. The Grievance Committee opened numerous grievance files to investigate allegations that respondent lawyers did not take appropriate precautions to protect entrusted funds. Initially, the committee issued dismissals accompanied by letters of warning, emphasizing to respondent lawyers their professional obligation to protect entrusted funds. After extensive education, members of the State Bar should now be fully aware of the danger posed by these fraudulent schemes. Accordingly, at its July 2019 meeting, for the first time, the Grievance Committee issued permanent discipline to three lawyers who did not adequately protect entrusted funds from email scams. The committee issued one admonition, which is private discipline, and two reprimands, which are public discipline. At its October 2019 meeting, the committee issued one reprimand and three admonitions. At its January 2020 meeting, the committee referred one lawyer to the Disciplinary Hearing Commission for trial and dismissed one file with a letter of caution. When lawyers participate in transactions in which entrusted funds are to be wired, they must proceed with caution, explain the dangers to their clients, and verify any purported changes in wiring instructions. Please contact the State Bar with any questions. The following links contain important information about handling entrusted funds in light of these dangers:

bit.ly/WireFraud1

bit.ly/WireFraud2

bit.ly/WireFraud3

bit.ly/WireFraud4

bit.ly/WireFraud5

Completed Motions to Show Cause

In April 2018, the DHC suspended **Philip S. Adkins** for two years for numerous violations of the Rules of Professional Conduct governing trust accounts. The suspension was stayed for two years. In response to the State Bar's motion to lift the stay and activate the suspension, Adkins brought his conduct into compliance with the conditions. By consent of the parties, the DHC extended the stay an additional 18 months.

In August 2019, the Wake County Superior Court enjoined **Douglas P. Connor** of Mount Olive from handling entrusted funds and from serving in any fiduciary capacity. Connor did not resign as trustee of a testamentary trust when the injunction was entered. The court ordered Connor to show cause why he should not be held in civil contempt. After hearing, the court found that Connor's lack of compliance was not willful and directed him to resign from the trusteeship within ten days of entry of the court's order.

Petitions for Reinstatement

In September 2018, the DHC suspended

Frederick Owens of Wilmington because he charged and/or collected an illegal or clearly excessive fee, violated multiple trust account rules, did not properly supervise his nonlawyer assistant, and did not respond to the Grievance Committee. After serving 30 days active suspension, the order of discipline allowed Owens to seek a stay of the balance upon demonstrating compliance with numerous conditions. In December 2019, the DHC denied his petition for a stay.

Completed Grievance Noncompliance Actions before the DHC

Upon the State Bar's motion, the chair of the DHC ordered **Richard C. Poole** of Greenville to show cause why his law license should not be suspended pursuant to 27 N.C. Admin. Code 1B § .0135 for failure to provide information and trust account records to the Grievance Committee. Poole did not respond to the show cause order. He was suspended by the DHC and will not be eligible for reinstatement until he provides the requested information and records.

Interim Suspensions

The chair of the DHC entered an order of interim suspension of the law license of Charlotte lawyer **Parker Russell Himes**. Himes was convicted of numerous drug offenses and was sentenced to 24 months of supervised probation.

The chair of the DHC entered an order of interim suspension of the law license of **John V. Ivsan**. Ivsan pled guilty to one count of conspiracy to defraud the Internal Revenue Service, in violation of 18 U.S.C. § 371, and one count of tax evasion, in violation of 26 U.S.C. § 7201. He is currently incarcerated.

Reprimands

Joseph "Lee" Levinson of Raleigh did not promptly refund unearned fees as he agreed to do in fee dispute mediation and filed a frivolous counterclaim to the client's resulting complaint in small claims court. He was reprimanded by the Grievance Committee.

Darren Day of Greenville was reprimanded by the Grievance Committee because he did not notify his client that he would not appeal suspension of his driver's license until the deadline for appeal had passed.

Edward Seltzer of Charlotte was reprimanded by the Grievance Committee after a federal court chastised him for failing to attend scheduled hearings.

Shawntae R. Crews of Charlotte was reprimanded by the Grievance Committee. She did not promptly deposit entrusted funds into an attorney trust account, disbursed conditionally delivered settlement funds to her client when her client was not then entitled to the funds, and engaged in dishonest conduct by deliberately failing to abide by the conditions under which she received the funds.

Nathan M. Garren of Creedmoor was reprimanded by the Grievance Committee. In a 2017 real estate closing, Garren and his staff followed wiring instructions emailed to his office rather than following the wiring instructions provided by the intended recipient. As a result, his office wired entrusted funds to a fraudster. In 2019, Garren and his staff again failed to verify the authenticity of an email purporting to change wiring instructions and again wired entrusted funds to a fraudster.

Transfers to Disability Inactive Status

Jason D. Hegg, formerly of Jacksonville and currently living in Minnesota, was transferred to disability inactive status by the chair of the Grievance Committee.

Notice of Intent to Seek Reinstatement

In the Matter of Theodore G. Hale

Notice is hereby given that Theodore G. Hale of Wilmington intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Hale executed an affidavit of tender of surrender of license on October 13, 2004, and he filed said affidavit in the offices of the State Bar on October 14, 2004. Based on the affidavit, the chair found that Hale had misappropriated money from his former law partner, charged and collected money from the parents of a criminal defendant whom he was appointed to represent without telling them that he was obligated to represent their son at state expense due to the court appointment, and represented a woman in a divorce/equitable distribution case and collected and converted to his own use the proceeds of an annuity contract in the amount of $15,287.09, most of which belonged to her. An Order of Disbarment was issued against Hale on October 14, 2004, and was effective immediately.

In the Matter of Michael King

Notice is hereby given that Michael King of Salisbury intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. King surrendered his license and was disbarred by the Disciplinary Hearing Commission of the North Carolina State Bar by Order dated October 3, 2005. King's disbarment was the result of a hearing before the Disciplinary Hearing Commission where he was found to have engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit.

Individuals who wish to note their concurrence with or opposition to these petitions for reinstatement should file written notice with the secretary of the North Carolina State Bar, PO Box 25908, Raleigh, NC, 27611, before May 1, 2020 (60 days after publication). ■

Upcoming Appointments to Commissions and Boards

The following appointments are scheduled for consideration at the April 2020 meeting:

Disciplinary Hearing Commission (three-year terms) - There are five appointments to be made. Ronald Brinson (Charlotte), Stephanie Davis (Raleigh), and David Long (Raleigh) are eligible for reappointment. Fred W. DeVore (Charlotte) and R. Lee Farmer (Yanceyville) are not eligible for reappointment.

Legal Services of Southern Piedmont (three-year terms) - There is one appointment to be made. Eben T. Rawls II (Charlotte) is eligible for reappointment.

North Carolina General Statutes Commission (two-year terms) - There is one appointment to be made. Starkey Sharp (Kitty Hawk) is eligible for reappointment.

20 Ethics (and Professionalism) Tips for 2020

By Carmen Bannon and Brian Oten

A new year brings new opportunity to evaluate your practice and participation in the profession. In looking to 2020, we came up with 20 tips for meeting or exceeding ethics and professionalism standards:

1. Freshen Up Your Fee Agreement

How long has it been since you reviewed your fee agreement (and we mean *really* reviewed your fee agreement)? Although Rule 1.5 only requires contingent fee agreements be in writing, it is our humble opinion that, when possible, lawyers should reduce their fee agreements to writing. This benefits not just the client in understanding the scope and fee structure of the representation, but also the lawyer if/when a dispute arises (particularly if that dispute makes its way to the State Bar). That being said, if you use a written fee agreement, make sure that its language clearly and completely describes the fees charged and the services provided. Also be sure to use the correct language in describing your fees, and remove the word "nonrefundable" from the agreement (*see* 2008 FEO 10 for guidance). Putting the time in now to update your agreement could save you a headache—or a grievance—later in the year.

2. Get Involved!

Respectfully, we disagree—you can make time, and you have a lot to offer! Make 2020 the year that you step up to serve in your local bar, participate in a *pro bono* project, or otherwise serve alongside your fellow lawyers and fellow citizens. Contrary to popular opinion, lawyers have an incredible skill set to offer for the public good. Furthermore, working with and getting to know your fellow lawyers outside of the adversarial process tends to make those inevitable moments of disagreement smoother and more professional, which benefits the administration of justice for both the court system and the parties involved. In 2020, step up, and step out—you'll be glad you did.

3. Protect Digital Data

Like it or not, we live in a digital world, and that includes our law practices. The power to access and share client information is literally at your fingertips through the device in your pocket (or perhaps the device you're currently using to read this article). But as Uncle Ben told a young Peter Parker who was discovering his newly acquired superhuman capabilities, "With great power comes great responsibility."

A digital practice can be an effective and convenient thing, but if lawyers are going to use and rely upon technology, we must do so in accordance with our responsibilities to our clients. Lawyers have a duty to protect confidential client information by making "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 1.6(c). Among the factors considered in determining the reasonableness of a lawyer's efforts are: the sensitivity of the information, the cost of employing additional safeguards, the difficulty in employing the safeguards, how additional safeguards may interfere with the lawyer's ability to represent clients, and—perhaps most importantly—the risk associated with failing to employ additional safeguards to protect client information. *See* Rule 1.6 cmt. 19. What constitutes "reasonable efforts" for protecting digital client data is constantly evolving—what was "reasonable" ten years ago may very well be considered unreasonable today. Take, for example, public wi-fi access: Setting up in a local coffee house or in the airport prior to a flight to do some work on your cases using a free public wi-fi network was a normal thing in 2010. Today, considering our significantly expanded knowledge and experience with the dangers associated with public wi-fi, the lawyer who connects her work computer— containing all of her client files, past or present—to that public network without additional safeguards is arguably not making "reasonable efforts" to protect against inadvertent or unauthorized access to client data. Take some time in 2020 to review not just the safeguards you have in place to protect client data on mobile devices, but every way in which you handle confidential digital data, from digital storage, to password integrity, to how such information is accessed.

4. Help a New Lawyer

Once upon a time, you were a new lawyer. Whether that "once upon a time" was one year ago or over 30 years ago doesn't matter. What matters is that, no matter how long you've been practicing, you know more today than you did when you first received that wonderful letter from the Board of Law Examiners informing you of your admittance to the North Carolina Bar. There are hundreds of new lawyers joining our bar each year, and each of them needs to hear about your successes, your failures, your tips, and your pitfalls. Whether through a formal mentoring program or a chance encounter at the courthouse, share your experience and wisdom with a new lawyer, just as an experienced lawyer shared with you when you first started practicing. Professionalism is about more than being courteous; it's also about empowering others to succeed.

5. Listen to an Experienced Lawyer

Spoiler alert for the new lawyers out there: You don't know everything. (Second spoiler: this applies equally to all lawyers.) If, as noted above, professionalism encompasses empowering others to succeed, consider empowering yourself by creating the opportunity to listen to those who came before you. The stories are often entertaining and full of genuine wisdom that can help you and your client. In 2020, be quiet, and listen.

6. Be Confident in Your Conflict-Checking System

Just like your fee agreement, it may be time to review your conflict-checking system in 2020. Today, there are multiple ways to check for conflicts of interest, from a rudimentary Excel spreadsheet to a sophisticated database/case management system. Whatever mechanism you use to check for conflicts, it will be worth the time you invest to ensure that the tool or system is appropriately cap-

turing and analyzing (or enabling you to analyze) all relevant data so that you can efficiently and accurately determine whether an actual or potential conflict exists. Quick tip from the Office of Counsel: Unless you have only one client, conflict-checking systems that exist "entirely in your head" are not reliable and will lead to problems.

7. Hope for the Best, but Plan for the Worst

2020 has already been full of unexpected developments (Harry and Meghan are leaving the royals! Australia is on fire!), reminding us that sometimes life is truly out of our control. As lawyers, with responsibilities to our clients, the court system, the profession, our staff, and our families, we tend to focus on the most imminent deadline and most pressing need, with little thought to longer-range considerations. But when lawyers are unexpectedly unable to practice, our unavailability can cause a ripple effect of difficulty and harm to those we aim to serve. Take some time this year to envision what would happen to your practice if you were one day unable to return, then set up a plan. Who will notify your clients? How will that person know which clients are active or inactive; how will they know which clients need immediate assistance? Can someone clearly identify client property (namely, the client file and entrusted property) so that the property can be promptly returned? Organizing your office in a way that allows someone to pick up where you left off may seem overwhelming, but the time and effort will be well spent.

8. Take Care of Yourself

Simply put, you can't be the best lawyer you can be for your clients if you aren't taking care of yourself. Being a lawyer is a stressful thing. The practice itself can be overwhelming and full of pressure, and that reality can easily seep into and interfere with your personal life. Whether we're talking about sleep deprivation, compassion fatigue, depression, or substance abuse (to name a few common lawyer experiences), your abilities as a lawyer, a spouse, and/or a caretaker will suffer if you don't take care of yourself. In 2020, schedule time each week for a hobby, exercise, or something that brings you joy; take that vacation you wish you had taken in 2019; reach out to a friend to reconnect; call the great people at the Lawyer Assistance Program; or simply take a mental health day and stay home in your pajamas. Things will be fine at the office until you get back.

9. Think Twice (or Ten Times) before Doing Business with Your Clients

Depending on the nature of your relationship with a client or the type of law you practice, business opportunities with clients may arise from time to time that are simply too attractive to pass up. Proceed with caution! Due to the potential for misunderstanding, manipulation, and undue influence inherent in mixing fiduciary and business relationships, Rule 1.8(a) sets forth a series of specific requirements that must be satisfied when pursuing a business opportunity with a client: The agreement must be in writing and the terms must be fair and reasonable; you have to advise your client in writing about the desirability of seeking independent legal counsel and give them an opportunity to do so; your role in the transaction must be clearly communicated (you guessed it—in writing); and your client must give informed consent to the transaction in a signed writing. Many lawyers miss one or more of these requirements when they decide to do business with a client. So think twice. Or ten times.

10. Be Available...

Rule 1.4 requires lawyers to respond to reasonable client requests for information and to keep our clients updated on the status of their cases. Communication (or lack thereof) is one of the top complaints lodged against lawyers in the grievance process. Over the years, many grievance issues could have been avoided if the lawyer had simply taken the time to respond to the client. Amidst the potentially hundreds of active cases on your plate, it is easy to lose sight of the fact that your client has only one active case—and it means everything to him. Some days are harder than others, but try to make time every day to respond to a client's request for a status update.

11. …but Set Some Boundaries

That being said, you are not required or expected to be available to your clients at all times, through all methods of communication. Lack of boundaries is harmful to you personally, in that it requires you to live your clients' crises even during much-needed downtime. If there is no time or space in your life that is insulated from your practice, it will begin to consume you. Lack of boundaries is also harmful to your credibility as a professional. If you are texting, calling, and interacting with clients on social media with the same accessibility as their friends and family, clients are less likely to value your time, and may begin to undervalue your advice. Notwithstanding consumer demands for ever-increasing access, it is appropriate for a professional to only be available in certain ways and at certain times. Can you imagine an orthopedic surgeon who was available 24/7 to all her patients, making diagnoses based on texted photos and talking them through every accident or ailment, even on weekends? Of course not. Establish a policy regarding methods of communication and anticipated response times, including whether your clients will have your cell phone and under what circumstances they should use that number. Then stick to that policy.

12. Consider Your Communications with Judges—"May They Please the Court"

Technology has changed the way we communicate, but it hasn't changed our formalized procedures for communicating with the court regarding a pending case. We know that it's appropriate to communicate with the court in a hearing or through pleadings that are properly filed and served. And we know that it's inappropriate to have *ex parte* communications about a case with the presiding judge. But then there's the murky area of electronic communications that don't fall into either of the categories above. Consider, for example, a group text to the presiding judge and opposing counsel saying that you're sick and won't be able to make it to court, or an email to the judge, cc'ed to opposing counsel, that airs a discovery dispute or comments on the evidence in the case. As we've become accustomed to electronic communication, this type of informal correspondence with judges has become more tempting. Do not assume, however, that it is ethically permissible to communicate about the substance of a case in this informal, off-the-record way. Merely including opposing counsel as a recipient doesn't solve the potential ethical issues: There are serious questions about whether your opponent has adequate notice in the scenarios described above. Moreover, it may be prejudicial to the administration of justice to make substantive arguments regarding a case in a forum that isn't part of the record and isn't subject to evidentiary rules and other procedural restrictions. Given these concerns, the best practice is not to communicate informally with a judge relative to a pending case unless the court has invited you to do so.

13. Ask for Ethics Advice!

In 2019 the State Bar solicited feedback on what other measures the Bar could take to assist lawyers in maintaining our high professional standards. A great number of respondents asked the Bar to create an ethics hotline where mem-

bers could call and receive ethics advice on difficult situations they were facing in their practice. These results were concerning, *because the State Bar already has an ethics hotline* (we typically answer around 5,000 informal inquiries per year). So let us be clear: If you are struggling with a particular situation in your practice and you need guidance on navigating the professional responsibility issues you're facing, you can call the State Bar for ethics advice! Call 919-828-4620 and state that you're a lawyer seeking ethics advice. We'll take it from there.

14. Increase Your Tech-spertise

Comment 8 to Rule 1.1 states that a lawyer's duty of competency extends to her knowledge of the benefits and risks associated with technology relevant to the lawyer's practice. Lawyers need to stay abreast of the ways in which clients' use of technology may affect the representation. For example, is the client communicating with you via an email account to which her employer has access and does that implicate whether the communications are privileged? Does your client have a lively YouTube channel and a podcast on which he vocally expresses his opinions on pretty much everything, and might his public commentary undermine your negotiations? Is your client an active participant on social media, and might that online activity become part of the evidence in the case? Technology has changed communication and has, therefore, changed the practice of law. We have to keep up if we are to represent our clients effectively in 2020 and beyond.

15. Play Nice

Lawyering is hard. Adulting is hard. Life happens. As a result, there are going to be times when all of us, no matter how conscientious, need some leeway from our fellow lawyers and judges. In those times, lawyers who avoid unfair and offensive tactics are going to have an easier time.

In the practice of law, we constantly arrive at forks in the road. Down one path is a course of action that is technically permissible but maximally adversarial. Down the other is a gentler approach, where we temper our advocacy with grace. Those who choose the first path file for default immediately when the answer is past-due, object to every discovery request even though their own requests are far more expansive, and prefer to resolve every disagreement about a case in a motion hearing rather than a phone call. Those who choose the second path play nice. They allow extra time for discovery responses, consent to continuances when it doesn't prejudice their client, and pick up the phone to talk to opposing counsel when a dispute seems to be brewing. (As a reminder, Rule 1.2 empowers lawyers to choose professionalism over a client's request for belligerence.)

Life is relentless. We don't know when it will throw us the next curveball that makes it difficult or impossible to accomplish what we planned in a given day, week, or month. But when it does, those who play nice are much more likely to be forgiven and accommodated by our professional peers.

16. "When in Rome…"—Know Your Local Rules

When was the last time you looked at your district's local rules? Don't forget that these rules are not just suggestions—they are imposed by court order. Failing to comply with local rules could jeopardize your client's case. Moreover, lawyers are ethically obligated to comply with the rules of the tribunal, so lawyers can and do face disciplinary action for knowingly violating local rules.

17. Take Charge! Set Policies and Train Your Staff

Who in your office sets up and maintains client files? Who monitors the trust account? Rules 5.1 and 5.3 require a lawyer with supervisory authority over lawyers and/or nonlawyers to make "reasonable efforts" to ensure the firm or organization has measures in effect that give a reasonable assurance that the employees act in compliance with the Rules of Professional Conduct. A lawyer cannot assume that everyone in the office is aware of his obligations under the Rules; he must establish and periodically review policies to ensure compliance with the Rules. Unfortunately, a number of grievances are born of inadequate staff supervision, and some have involved massive embezzlement by trusted employees. Take a step forward in meeting your professional obligations by setting policies that ensure the entire office's compliance with the ethics rules.

18. Tend to Your Trust Account

The State Bar has a lot to say about trust accounts. In fact, somewhere in this edition of the *Journal* is another article devoted to the topic of trust accounts (as there has been for a number of years). We're going to assume you've heard this message before, so here's your encouragement to continue the hard but necessary work of monitoring your trust account. Review bank statements, examine cleared checks, keep meticulous records, and reconcile those trust accounts (among other things). The quickest way to lose the public's trust in the profession is by messing with the money entrusted to our care. Accordingly, the quickest way to jeopardize your law license is to neglect (if not ignore) your trust account and your corresponding responsibilities in handling entrusted funds.

19. Pay Attention to Professional Regulation

We get it—folks generally don't want to think about the State Bar, let alone interact with the State Bar. This is dangerous to our profession. The State Bar is not just the staff at the Bar building in downtown Raleigh. The State Bar is you and your colleagues. The State Bar Council (the decision-making body of the Bar) is largely made up of lawyers from your local districts that you elected. As a self-regulating profession, we welcome your input on decisions made regarding the interpretation, application, and revision of the ethical standards imposed on our profession. For example, later this year the council anticipates releasing a report containing recommended changes to the Rules of Professional Conduct dealing with lawyer advertising. Whether its amendments to the Rules, the Bar's administrative rules, or a newly published ethics opinion, take time in 2020 to tell the State Bar what it got right and what it got wrong—just participate!

20. Be Kind to Each Other

Of all the things that circulate on the internet, very few deserve attention in the first place, let alone a second view. But one bit of wisdom that crops up in various memes is worth not just a retweet, but an actual repeat: "Be kind, for everyone you meet is fighting a battle you know nothing about." Lawyering can be lonely and stressful and demoralizing. It can be a battle in itself, on top of the other challenges and heartbreaks of being human. We ease the burden of our chosen vocation for ourselves and our fellow lawyers when we are kind to each other. When lawyers treat each other with kindness, camaraderie comes easily. We have a commonality of experience that allows us to connect when we bring compassion rather than suspicion to our interactions. Plus, lawyers are smart and funny and complex and great storytellers. We're worthy of kindness. Make 2020 your kindest year yet. ■

Brian Oten is ethics counsel and director of Legal Specialization and Paralegal Certification at the State Bar. Carmen Bannon is deputy counsel for the State Bar.

North Carolina Rule 1.15—A Super Rule, but Not the Model One

By Leanor Bailey Hodge, Trust Account Compliance Counsel

In a popular song by R&B recording artist India Arie, she proclaims: "And I ain't built like a supermodel." Oddly enough, those lyrics cause me to think about North Carolina Rule of Professional Conduct 1.15 and ABA Model Rule of Professional Conduct 1.15. Our rule is definitely not built like the model rule—it has much more definition (literally, it has a definitions section) and detail, and on the surface appears to impose more duties.

The most obvious distinction between North Carolina Rule 1.15 and ABA Model Rule 1.15 is that the ABA rule is just a single rule with no subparts, whereas our rule has subparts—four of them. The Model Rule imposes the following duties on the lawyer:

1. Keep lawyer property separate from client property;

2. Keep client funds in a separate account maintained in the state where the lawyer's office is situated, unless the client consents to maintenance in an account located elsewhere;

3. Identify other entrusted property and appropriately safeguard it;

4. Keep complete records of account funds for five years after termination of the representation;

5. Keep complete records of other entrusted property for five years after termination of the representation;

6. Deposit legal fees and expenses that have been paid in advance into a client trust account (such fees may be withdrawn by the lawyer only as fees are earned or expenses incurred);

7. Promptly notify the client or third person when entrusted funds or property are received on their behalf;

8. Promptly deliver entrusted property to the client or third persons as they are entitled to receive;

9. Upon request of client or third person, render a full accounting of entrusted property;

10. Keep disputed property separate until the dispute is resolved; and

11. Promptly distribute all portions of the property which is not in dispute.

This rule lays out the general framework for proper safeguarding of entrusted property and funds. As one would expect of a model rule, it is rather generic. Like a fashion model, the model rule is able to change its look to meet the needs of the target audience. It is a streamlined base upon which each state can either dress up or dress down the rule to design a regulation appropriately tailored to the needs of the specific jurisdiction.

By comparison to the model rule, North Carolina's Rule 1.15, with its four subparts and 48 paragraphs, is very elaborate and is replete with intricate detailing. It is quite sophisticated. It is skillfully crafted and extensive.

North Carolina Rule 1.15 includes the following four parts: Rule 1.15-1 - Definitions, Rule 1.15-2 - General Rules, Rule 1.15-3 - Records and Accountings, and Rule 1.15-4 - Alternative Trust Account Management Procedure for Multi-Member Firm. The first section includes definitions the average banker would not need, but which, for lawyers, likely alleviates the need for question about what is intended by the rule regarding funds management.

Rule 1.15-2 encompasses the general concepts outlined in the model rule. It is the portion of the rule that lists the duties attendant to proper trust account management. However, Rule 1.15-2 does more than just recite the same maxims as the model rule; it has additional provisions that help clarify precepts listed in the model rule. For example, the model rule requires a lawyer to keep complete records of account funds. However, it does not offer any guidance on what constitutes a complete record or identification of what may render a record incomplete. Rule 1.15-2 elaborates on this duty by prohibiting the use of debit cards

CONTINUED ON PAGE 27

Anna Hamrick, Board Certified Specialist in Workers' Compensation Law

By Denise E. Mullen, Assistant Director for the Board of Legal Specialization

I recently had an opportunity to talk with Anna Hamrick, a board certified specialist in workers' compensation law who practices in Asheville. Anna began her education as an English major at the University of North Carolina at Chapel Hill, later completing her law degree at George Washington University. Following law school, Anna worked in a small general practice firm handling a variety of legal issues. She also practiced in a real property firm before moving into a firm handling mostly medical malpractice cases, working with attorney Ike Northup. This led to a natural interest and progression toward workers' compensation law.


Hamrick

Anna currently serves as the State Bar councilor for the 40th Judicial District (Buncombe County). She has long-standing volunteer commitments in her community, including the Junior League of Asheville and Pisgah Legal Services. Anna achieved her board certification in 2019 and currently practices with Grimes Teich Anderson LLP as a partner, focusing on both workers' compensation and social security disability cases.

Q: Tell me about your interest/motivation to become a board certified specialist.

I was initially encouraged by my law partner, Henry Teich, to look into becoming board certified. I really appreciated his encouragement to do this as I think it has improved my legal knowledge and made me a better advocate for my clients. Studying for the exam was a good exercise in reviewing the statute, rules, and case law.

Q: Do you have any advice for newer lawyers considering focusing their practice on workers' compensation?

If you are considering focusing on workers' compensation, I would encourage you to attend CLEs geared toward the specialty. The NC Advocates for Justice just held their 26th Annual Workplace Torts & Workers' Comp Seminar in December. The NCBA puts on its Workers' Compensation Section's Annual Meeting and spring CLE program in Greensboro in February. The North Carolina Industrial Commission recently held its 24th Annual NC Workers' Compensation Educational Conference this past October.

I would also encourage you to connect with lawyers who are experienced in comp and try to look for mentor/mentee relationships you can grow. I have always found it helpful to reach out to more experienced lawyers for advice on situations. The listserves associated with the NCBA and the NC Advocates for Justice are other great resources. Try to build your network of comp attorneys around the state. I should also say that I would not limit it to those who only do plaintiff work if that is what you do, or only do defense work if that is what you do. I think it is a great resource to have friends on the other side of the law you practice. You can represent your client zealously while also having good relationships with opposing counsel.

Q: What do you enjoy about the practice of workers' compensation law?

I really enjoy meeting with a client for the first time to discuss the case. This often gives us both the opportunity to clarify what they can and cannot potentially expect to receive under the Comp Act. I am sometimes the bearer of bad news (such as there is no recovery for pain and suffering under the Comp Act), but whether or not the person retains us, I appreciate the opportunity to tell them certain things they need to do to protect their interests, and to try to help manage expectations. Even if the person is not happy to hear what I have to say, I think they generally like learning about how the system works so they can have some measure of what to expect going forward.

Q: Tell me about the best part of living and/or practicing law in the western part of the state.

My father was from Rutherfordton, my husband is from Boone, and I really love this part of the state. We moved to Asheville in the mid-1990s, and it has really changed over these past years. I enjoy the beautiful scenery and the wonderful people. I also like traveling to other towns in western NC to meet with clients and have hearings. The lawyers who practice comp law here are also great people with whom to work. The plaintiff bar is a wonderful resource to bounce ideas off of and talk about cases, and the defense attorneys represent their clients well, but we are able to get along and do our jobs. Interestingly, several bigger firms have opened offices in Asheville over the past several years, many of whom have comp practices.

Q: What's something most people don't know about you?

I will only eat chocolate with an 85% or higher cocoa concentration. Also, I feel like I was born at a time where I had the chance to see the end of a past world. For example, the babysitter I had when I was little was an older lady who lived on a farm. The house in which she lived and cared for us did not have indoor plumbing, but rather an outhouse and a chamber pot. She loved to sit on her front porch with us to watch the cars go by. Can you imagine getting a child to do that today for entertainment? Although, I have to say it was not very entertaining, even then. The farmhouse she lived in is still there, but

it has been totally remodeled, and all of the farmland has been sold and is now a development in Chapel Hill called Southern Village.

Q: What's your most rewarding professional activity?

I would have to say being the State Bar councilor for my district. Previous to me, Howard Gum held the position, and he told me it would be a very rewarding experience. It really has been. I have had the opportunity to meet great people all around the state, as well as within the State Bar. I have learned a lot, and I hope to have been and continue to be of some use to my fellow lawyers in Buncombe County in this capacity.

Q: Where did you grow up and what were your favorite childhood activities?

I was born and raised in Chapel Hill. As a kid I was on the local summer league and YMCA swim teams. Back in the 1970s I spent a lot of time hanging out in the neighborhood and around Morgan Creek.

Q: What would you say to encourage anyone who might be thinking about applying to become board certified?

I would strongly urge you to do it! I think you will be glad you did. I made three-ring binders to use for studying. I printed off the statutes and put them in one, the rules in another, and tried to include cases from recent CLE case reviews in the third. I also used a program I learned about from my kids called Quizlet. You can input the info you want to study on your computer, and then download the app and it creates quizzes so you can sit there on your phone at the dentist office or wherever to see how well you have learned the material. This was very helpful. I hadn't studied for a test in so long, I really had forgotten how. ■

For more information on board certification for lawyers, visit us online at nclawspecialists.gov.

Trust Accounting (cont.)

and requiring that certain information be included on items disbursing funds from the trust account. Rule 1.15-2(j) prohibits the use of a debit card to withdraw funds from a general or dedicated trust account. At first glance, Rule 1.15-2(j) might appear to impose an additional duty. Actually, it helps a lawyer ensure that the trust account records he or she maintains are complete by prohibiting this method which generates records that are not compliant. Similarly, Rule 1.15-2(h) requires items drawn on the trust account or fiduciary account for the payment of the lawyer's fees or expenses to indicate the client name, file number, or other identifying information of the client from whose balance the item is drawn. Like Rule 1.15-2(j), it helps answer the question of what constitutes a complete record. There are other examples of how Rule 1.15-2 helps amplify or clarify the general duties set out in ABA Model Rule 1.15, but you get the idea.

In addition to expounding upon the general description of duties in the model rule, North Carolina Rule 1.15 also has unique provisions that aid in the safeguarding and protecting client funds. Rule 1.15-2(s) limits check signing and electronic transfer authority to attorneys who have completed a CLE course on trust account management or to properly supervised staff persons who have completed such a course and who are not responsible for performing monthly or quarterly trust account reconciliations. Rule 1.15-3 includes a detailed description of proper trust account records and required reconciliations and reviews. It is the blueprint for appropriate safeguarding of entrusted funds. Perhaps the most unique section of North Carolina Rule 1.15 is Rule 1.15-4, which allows law firms of two or more lawyers to designate a partner to serve as the trust account oversight officer for any general trust account into which more than one firm lawyer deposits trust funds. Only one other state, Florida, has anything comparable to Rule 1.15-4.

Is North Carolina Rule 1.15 more striking than the ABA Model Rule? The answer most certainly depends upon individual preference. For some, the detail in North Carolina's rule provides a welcome sense of assurance in what is required for proper trust account management. For clients, it provides confidence that their entrusted funds are being kept safe. In my experience, lawyers value the guidance our rule provides as they navigate the landscape of trust account management. Regardless of what you think about North Carolina Rule 1.15, there is one thing on which we can all assuredly agree: our rule "ain't built like" the ABA Model Rule. ■

NC LEAF—30 Years of Supporting Public Interest Attorneys

In 2019, the North Carolina Legal Education Assistance Foundation (NC LEAF) marked a significant milestone, their 30th year of supporting public service in the legal profession. Since its formation in 1989, NC LEAF has provided loan repayment assistance totaling more than $7 million to nearly 1,500 public service attorneys in communities across North Carolina.

The law students who gathered together in 1988, when the concept of NC LEAF was born, were motivated by their firsthand experiences working in summer internships in public settings. The group of students saw daily the legal needs within underserved communities that persisted and the demand for attorneys to pursue careers in public interest law to meet those needs. They, along with law school administrators, recognized the potential impact of promoting public service by offering loan repayment assistance to attorneys working in the public sector with wages insufficient to meet their education loan obligations in addition to their basic needs.

At the core, the challenge today remains the same as when NC LEAF was first created: monthly education loan obligations can present a significant barrier to pursuing a career in public sector law with traditionally low salaries compared to the private sector. Last year, the average educational debt of NC LEAF applicants exceeded $150,000. The starting salaries for public interest attorneys working as prosecutors, public defenders, and legal aid attorneys were all at or below $45,000. In recent decades, law school tuition has risen while public sector salaries have also not kept pace with increases in the cost of living.

The goals of NC LEAF are at least two-fold: recruitment of new law graduates to the public sector and retention of well-trained attorneys. By offering loan repayment assistance, NC LEAF helps public sector employers recruit strong candidates, particularly in rural areas or for hard to staff positions, by providing additional funds on a monthly basis to support loan obligations. Further, when attorneys continue to receive this benefit as their careers advance, employers retain experienced professionals and save the costs associated with hiring and training new staff. Notably, student loan debt is a reason cited by both prosecutors and public defenders when leaving their positions.

When NC LEAF was established, it was the first program of its kind in the United States to offer loan repayment assistance to public sector attorneys. Currently, 24 loan repayment assistance programs (LRAPs) exist across the country, providing loans or grants to legal aid and other public sector attorneys. In some instances, these programs enable employers to offer loan repayment assistance to attorneys as part of their compensation package. In North Carolina, NC LEAF administers loan repayment assistance for attorneys that work with Legal Aid of North Carolina, as the organization offers this assistance as a tax-free benefit of employment.

NC IOLTA provides grant funding to NC LEAF for both operating support and loan repayment assistance. Other sources of funding that support NC LEAF include public donations, administrative fees from law schools and participants, and periodic grants from other sources. Previously the General Assembly directed a recurring appropriation to NC LEAF for loan repayment assistance. This funding was eliminated in 2011. NC LEAF continues to seek reinvestment of state funding in loan repayment assistance with the goal of providing support to the many other public interest attorneys that could benefit from assistance. A recurring appropriation of $250,000 was included in the 2019-2021 state budget approved by the General Assembly; however, the budget

CONTINUED ON PAGE 43

IOLTA Update

• Income received in 2019 from participating financial institutions exceeded $5.1 million, an increase of 70% over 2018.

• NC IOLTA continues to work with banks across the state to ensure IOLTA receives a rate on all IOLTA accounts comparable to similar accounts offered by the institution. At the State Bar Council meeting in January, IOLTA trustees and staff met with councilors to discuss strategies to maximize income.

• At the December 4 grantmaking meeting, the IOLTA trustees approved 2020 IOLTA grant awards. Regular 2020 IOLTA grants totaled nearly $3.4 million: $2,602,506 to support providers of direct civil legal services, $325,000 to volunteer lawyer programs, and $471,141 to projects to improve the administration of justice.

• The IOLTA trustees also dedicated $1,250,000 to rebuild IOLTA's reserve fund, which now has a balance of $2,449,133, slightly surpassing the fund's level prior to the economic downturn.

• With the support of NC IOLTA, the NC Equal Access to Justice Commission and Equal Justice Alliance will collaborate to undertake a statewide assessment of civil legal needs in North Carolina in 2020. The purposes of the study include the following:

- Identify legal needs to better understand gaps in availability of services and the resources needed to address those gaps;
- Inform efforts by legal aid providers and stakeholders to expand access to civil legal aid; and
- Educate stakeholders about the justice gap.

Weather Patterns

By Robynn Moraites

Why do some lawyers find it easier to kill themselves than to admit they are unhappy and need to make a change?

This may seem like an overly dramatic opening to an article about lawyer mental health, but it reflects the urgency I feel about bringing to light the importance of an underlying psychological/spiritual malady that affects all of us—our fundamental human condition and the illusions that go with it.

The human condition I'm speaking about is not limited to legal practitioners, but rather affects everyone. The problem for those of us in the legal profession is that we have bought into some of these illusions to a greater extent than others. The lawyers who choose suicide rather than face the truth of their lives are our profession's "canaries in the coal mine," the first to warn of us what lies ahead if we continue to deprive ourselves of the oxygen of mental equanimity and emotional stability.

If you've ever seen me speak at a CLE, you know that I am a big fan of continuums. I often refer to a slide containing a big red line with arrows on each side of a continuum and observe that most of the mental health problems encountered by lawyers are not the either/or propositions that lawyers are so adept at creating. Rather than a simple choice between I'm OK/I'm not OK, I am anxious/I am not anxious, etc. we are all on a continuum somewhere between the "top of our game" and "disabled." We move along this continuum based on various circumstances: life situations, organizational factors, the facts of a particular case or client matter, how passionate we feel about our practice area, whether our practice area has any emotional perks or inherent rewards, heredity/genes, and countless other factors that may feel or actually be beyond our control.

I bring up the continuum because, while it would be easy and reassuring to separate our life situation from that of lawyers who die by suicide, these lawyers actually reside on the far end of the same continuum on which we all sit and on which we all travel. The continuum of which I speak is less a measure of mental health than an indicator of how much we have bought into the illusion of our false self, our ego's power and its mistaken chase for something outside of ourselves that we think will finally make us happy, satisfied, and whole.

At my CLE presentations, you have heard me talk about the ego and the false self. I spend a considerable amount of time discussing the ways in which the legal profession reveres and reinforces the ego and false self, and why it is so detrimental to our mental health and overall quality of life. I also highlight specific ways we can begin to disidentify with the ego and false self and begin to create a trustworthy and objective inner observer.

In his book about meditation and contemplative practice, *Into the Silent Land*, Martin Laird provides a remarkably good metaphor for the human condition. Rather than botch his beautiful writing by way of paraphrase, let me quote him directly as he richly discusses the "riveting of our attention, the constant chatter of the cocktail party going on in our heads." It is a long quote, but I include it because it can free us from so many of the false ideas that can rob of us our happiness, and in extreme cases, even our lives.

> The…wholeness that flowers in silence, dispels the [previously described painful] illusion of separation [from ourselves, others, life, and the present moment].[1] For when the mind is brought to stillness, and all of our strategies of acquisition [and distraction to avoid feeling anything] have dropped, the deeper truth presents itself.… [We are already whole and are not separated and alone like we mistakenly feel and think we are]. The marvelous world of thoughts, sensation, emotions, and inspiration, the spectacular world of creation around us, are all patterns of stunning weather on...a mountain. But we are not the weather. We are the mountain. Weather is happening—delightful sunshine, dull sky, or destructive storm—this is undeniable. But if we think we are the weather happening on [the mountain] (and most of us do precisely this with our attention riveted to the video), then the fundamental truth of our [wholeness and] union…remains obscured and our sense of painful alienation heightened. When the mind is brought to stillness we see that we are the mountain and not the changing patterns of weather appearing on the mountain. We are the awareness in which thoughts and feelings (what we take to be ourselves) appear like so much weather on the mountain.
>
> For a lifetime we have taken this weather—our thoughts and feelings—to be ourselves, taking ourselves to be this video to which the attention is riveted. Stillness reveals that we are the silent, vast awareness in which the video is playing. To glimpse this fundamental truth is to be liberated, to be set free….

Wait! Wait! Don't put this article down! I suspect that I just lost or am about to lose

about 99.9% of readers whose knee jerk reaction is, "Well I tried meditating, but I'm no good at it because I'm a thinker, not a meditator. I simply can't 'shut down' my mind."

Relax. None of us can. Not even Martin Laird. He admits as much in his book. "Getting rid of thoughts" is neither the purpose nor, more importantly, the method of contemplative practice. In fact, for all of us (meaning all people on the planet, including the Dalai Lama), that will never be the outcome. Ridding ourselves of thoughts is impossible because the very nature of the mind is to think. If I tell you, "Do not think of a pink rhinoceros," what do you immediately think of? See? Laird observes that the more one tries to fight the thoughts the stronger they become, which is why most people give up immediately and conclude that they are hopeless at meditation.

While we cannot silence the mind, we can begin to observe the thinking that never shuts off. This is the true nature of contemplation, whether practiced by a monk or an attorney. These thoughts, feelings, ideas, fears, and afflictive emotions are the weather patterns of our lives. But they are not us. Once we begin to observe these weather patterns (by refocusing our attention on our breath, for example), we will start identifying with them less. And as we start to put some distance between ourselves and our thoughts, we will find that the more we disidentify from whatever happens to be going on in our heads in any given moment, the less we will suffer.

Yes, each of us suffers. As William Shafer observes in *Roaming Free Inside the Cage*, when our ego structure was formed in early childhood, it got cut off from our original source of peace, joy, and energy that is the very nature of the mountain, as we increasingly became identified with the weather patterns. Our ego searches for that missing peace, joy and energy, mistakenly believing that they lie somewhere out there, outside of us. "So [we keep] trying to find alternative sources of peace, joy and energy but [we] cannot, and this is why, no matter how much we learn, how successful we are, or how many friends we have, we continue to suffer. The ego may have helped us survive the pain and traumas of childhood and get on with life's journey, but it can never carry us home."

Ironically, the more we strive,[2] often the greater we suffer. We create running commentaries in our heads about all kinds of things: our underlying suffering, our reactions to it, judgment of ourselves, our inability to fix it [whatever "it" is], our perceptions that other people are really causing the weather patterns… "if only they behaved properly, we would not be fixated on this weather…." You get my point. But while we may be acutely aware of our suffering, we are largely unconscious of this relentless firestorm raging in our heads that is literally feeding and fueling our suffering. It is like computer bots running their scans and algorithms. It happens automatically, unconsciously.

The good news is that we do not have to rewire our inner circuitry, which would be a daunting task. Instead the goal is to become more and more identified with the mountain and less and less identified with the weather patterns appearing upon it. Laird does a remarkable job in just a few pages of normalizing this universal experience of life and explaining the gateways through which we pass with a contemplative practice. As we become more skilled at quietly observing the commentary and returning our focus and attention to breath and a repeated word, we slowly shift from victim to witness. And therein lies our freedom.

So, why does all this matter? Why does it matter for lawyers and our profession in particular? Forget productivity. Forget managing risk. Just for a moment, I beg you, please put these familiar, laudable goals aside. Yes, getting some distance from our frantic, busy, crazy minds will dramatically help us to be more productive, more effective, and less "at-risk" as attorneys, but that is not why I am writing this article. From my vantage point, I see a pattern with much bigger implications.

At the recent national conference of the ABA Commission on Lawyer Assistance Programs, I heard a very young widow tell the story of meeting her husband in law school. She showed us a honeymoon photo from their African photo safari trip. They graduated law school and passed the bar, each of them securing great jobs. He got a job at a law firm where he had been employed in a non-legal administrative position before going to law school. It was his first choice and his dream to work at this firm. Two months into his employment, he mentioned in passing at dinner one night that he was not sure he liked practicing law, that it was not what he expected or thought it would be. Two weeks later he killed himself.[3]

One has to ask, what *exactly* is going on here? This is not the typical situation we hear about lawyers who've been in practice for years, who have become so run down that they have moved beyond compassion fatigue into burnout and severe depression and one night they get blind drunk and kill themselves in a fit of drunken (i.e., uninhibited) despair. This young man did not have a drinking problem. He had no personal or family history of depression. While I never met him, I will go out on a limb and postulate that he was not depressed; rather, he was disillusioned. His "strategy of acquisition" (marriage, becoming a lawyer, dream job at his first-choice firm) which he thought would make him "feel happy" (the "alternative sources of energy, peace and joy" that Shafer noted) did not work.

So, then, what's the point of all of this? Of being lawyers? Of simply being? Can you follow the thinking? In my view, this is not what we think of as a true mental health problem; it is more an existential crisis.

Several years ago I attended one of our lawyer support group meetings. One of the lawyers in the group was getting ready to travel abroad and had misplaced his passport. He had searched high and low and had not yet found it. From what I recall the trip was quickly approaching and there was not time to get another passport. As he reported his predicament, he finished by saying, "I'm freaking out." He paused, and with some emphasis then said, "Or rather, I am noticing that I'm freaking out." Everybody laughed, as did he. The difference between his first sentence and his second sentence may seem minuscule. It is actually huge. In fact, the difference is so monumental, it accounts for why this lawyer was able to laugh at the situation. He was, precisely as Laird describes it, moving from victim to witness. (He found the passport, by the way.)

A lawyer approached me after a CLE talk one day and asked, "Will I still get irritated if I meditate?" I was able to honestly answer, "Absolutely." You will still get irritated. But what will happen is that you will notice you are getting irritated. The initial irritation is what it is. It's our immediate reaction to the stimulus. But then the running commentary kicks in and we become agitated and more irritated that the person has irritated us. Maybe we feel they have wasted our time or are not performing in some way we expected. The part of us that's ramping up the story and whipping things up emotionally is the

ego/false self. The part of us that can notice the initial irritation is not that; it is something deeper. By definition, the one observing the irritation cannot be identified with the irritation. Just that little gap of space gives us greater agency of choice about how to respond to a situation.

The reason that people who have some form of contemplative practice seem calmer and less reactive to life is not because they are somehow less affected by life. They still have the same ups and downs, twists and turns, joys and disappointments that we all do because that is the nature of life. And they still have feelings and reactions to these life events. What is different is that they can see them and meet them without going down the rabbit hole of obsessive, over-personalized thinking. They are not ruled by their feelings and reactions because they are not totally identified with them. Through a regular practice of observing the thoughts that never shut off, they are better able to meet these thoughts, feelings, and reactions as the mountain instead of as the cloud that is being swept up by a cyclone system. The word for this state of mind is equanimity.

There are many forms and methods of contemplative practice. Some are religious-based, others are not. The modern-day Christian contemplative prayer method differs from the transcendental meditation movement of the 1960s and 70s only in what word or phrase is repeated with the breath. Many people have found tools like the Enneagram[4] extremely helpful in identifying the subtle (or not-so-subtle) tricks of the ego and then developing a greater awareness and ability to "catch ourselves in the act"—to more quickly see when we are caught in the special fixated thought pattern (i.e., weather pattern) associated with each personality type. This latter example is a form of active contemplation. Mindfulness is another powerful form of contemplative practice that helps us not only to identify when we have moved into unconscious, reactive mode, but also to practice techniques that better equip us to stay in a more conscious, responsive mode. As Laird notes, even the therapeutic techniques used in cognitive behavioral therapy, whereby we work to notice and modify repeated negative thoughts and behavioral patterns, is its own form of beginning contemplative practice—just the noticing. Although cognitive behavioral therapy is more about changing the weather pattern on the mountain, from say a stormy day to a bright and sunny one, it certainly has its place and can serve as a good starting point for many of us.

Circling back to why this is so important, I believe the profession itself is currently in an existential crisis. The statistics of the toll this is taking on us cannot be denied, nor should it continue to be ignored. When you examine so many of the examples of lawyer suicide in North Carolina, much of the running theme involves lawyers who were too wrapped up in their ego, too wrapped up in their image, too wrapped up in chasing after external things that they thought would make them happy and didn't, too proud or image-oriented or self-sufficient to ask for help, accept help when it was offered, change jobs, change practice areas, take a sabbatical, the list goes on. At the Lawyer Assistance Program, we work with people on the individual level to help first calm the weather patterns. It might be that the next step is to change the weather pattern from stormy to dull clouds to sunny. Eventually, however, for anyone in any form of long-term recovery for any issue, we have to learn to identify more with the mountain if we want sustainable peace of mind, freedom, and joy.

In the fall of 2018, I was scheduled to give a CLE presentation with a colleague who is also a friend. The State Bar car I was driving broke down on the side of the highway. Forty minutes of calls later I had secured a ride and would be arriving within two or three minutes of the scheduled start time. On the phone with my co-presenter, after I rather frantically relayed what had happened, I said, "I'm freaking out…. Or rather, I am noticing that I'm freaking out." We laughed and he said, "I'm not sure it works that way." Without hesitation came my reply. "Actually, that's exactly how it works."

Mediation and contemplative practice don't make us emotionally detached automatons, unaffected by life, nor do they dull our experience of life. Rather these practices provide the trust, curiosity, and vulnerability to contact and experience life more fully and to feel more connected to the present moment. Many report experiencing this as contact with something more real. In so doing, it opens us up to much greater freedom precisely because we are less identified with the weather patterns. In time it begins to dissolve the illusion of separation that we have from our authentic selves, life, and from each other. And then our lives can truly become our own.

It is not easy to find happiness in ourselves, and it not possible to find it elsewhere.
—Agnes Repplier, The Treasure Chest ■

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

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may impair a lawyer's ability to practice. For more information, go to nclap.org or call: Cathy Killian (Charlotte/areas west) at 704-910-2310, or Nicole Ellington (Raleigh/down east) at 919-719-9267.

Endnotes

1. Laird calls it strategies of acquisition and distraction to avoid the painful empty feeling of separation. In recovery circles people talk about grabbing for things on the outside to fill up something that feels missing on the inside. We grab money, scholarly degrees, power, prestige, alcohol, drugs, lovers, spouses, houses, food, cars, job promotions, control, approval, security, the list goes on. To clarify, I'm not talking about attorneys here. I'm talking about what nonattorneys share about in 12-step meetings.
2. I call it "doubling down."
3. This is a different lawyer than the one who was the subject of another young widow's article, "Big Law Killed My Husband," which was widely circulated earlier this year.
4. In its most basic application, the Enneagram is a personality typing system. What the Enneagram reveals, however, is our fixated point of attention—our special flavor of tunnel vision that limits a broader perspective (and causes us a lot of internal strife and pain). As one author notes, "The Enneagram does not put us in a box, it shows us the box we are already in—and the way out." (Don Riso and Russ Hudson, *The Wisdom of the Enneagram*, Bantam Books, 1999). There are several schools that use the Enneagram for personal development including the Riso-Hudson School, The Enneagram Institute (enneagraminstitute.com), and the Palmer-Daniels School of the Enneagram (enneagram.com).

Gaining a Professional Edge by Seeking Help

By Laura Mahr

As attorneys, we are often looking for ways to have a competitive edge over our competition or the opposing side. I recently spoke with Danny Dreyer, a nationally renowned running coach and author and the founder of ChiRunning. Danny coaches clients, including numerous lawyers, to perform better in races. He said that lawyers are easy athletes to coach because we are willing to get help, spend money, and make time to improve our game to get an edge over the competition. This coach's comment makes sense to me—as a whole, our profession values excellence and is willing to put the necessary resources into striving toward and achieving our very best. And yet, it also gave me pause. In my experience and research as a resilience coach and well-being trainer for lawyers, judges, and law school students, I have found that our profession is less likely to value and seek help for well-being than most other professions. Danny agreed, saying, "It's odd. I've noticed that lawyers are more willing to spend money on physical help than well-being help." I started wondering, "What's behind the dichotomy—why don't lawyers value and get the kind of help that would give us a competitive mental edge as we would if we wanted to gain a competitive physical edge?"

My first thought in response to this question is that our profession as a whole has not yet connected the dots between stress, cognitive functioning, and performance. In my experience talking with thousands of lawyers and judges nationally about well-being, I have gleaned that it is not yet widely understood that stress impacts our ability to think and communicate clearly, and that actively reducing stress gives us a professional advantage. While this makes sense to me now after spending years researching the neuroscience of stress, the connection never crossed my mind during the 11 years I practiced law.

In a nutshell, here's how it works: stress compromises our cognitive functioning, making it difficult to think, focus, problem solve, perceive, articulate, and remember effectively—all the things we need to do our best work as a lawyer, judge, or law school student. In fact, there is an inverse relationship between stress and cognitive functioning: the higher the stress, the lower or cognitive functioning, and vice versa. In his book, *Hardwiring Happiness: The New Brain Science of Contentment, Calm and Confidence*, neuropsychologist Dr. Rick Hanson explains that our brains have two different operating modes: reactive and responsive. When our brains are in reactive mode, our nervous system is dysregulated and we think less clearly because our cognitive functioning is diminished. Conversely, when our brains are in responsive mode, our nervous system is regulated and we feel "in the flow," resulting in effective cognitive functioning, greater productivity, and increased satisfaction in our lives. Evolution has thus far wired our brains to orient toward the world in reactive mode; we are constantly on the lookout for things that adversely impact our survival, specifically things that negatively impact our safety, satisfaction, and connection. While working in our chronically stressful legal profession exacerbates our reactive state, we have the ability to rewire our brains and experience life "in flow." However, our brains won't rewire themselves without conscious attention, focus, and time—which is where help-seeking for our well-being and optimized cognitive performance comes into play.

©iStockphoto.com/Juergen Sack

If you value your cognitive functioning, you may consider shifting your perspective and values about getting help for your well-being. Below are a few of the basic tenets of help-seeking that may inform your process.

What is "help-seeking?"

The American Psychological Association Dictionary of Psychology defines "help-seeking" as "searching for or requesting help from others via formal or informal mechanisms, such as through mental health services," while in the *Oxford Dictionary*, it is defined as an "attempt to find (seek) assistance to improve a situation or problem (help)."

Who to go to for improved well-being and stress reduction.

There are many kinds of professionals who can help. Therapists specialize in numerous areas that, if successfully addressed, can help reduce chronic stress, including issues related to addiction, depression, anxiety, ADHD, Aspergers Syndrome, and intrapersonal conflict.

Additionally, well-being and resilience coaches can help with areas that improve well-being and performance including problem solving, resilience building, focus, self-care, work-life balance, overwhelm (the feeling of being swamped or buried with no clear path-

way out), procrastination, and business planning. For example, I have developed a mindfulness and neuroscience-based toolkit that I tailor for individual coaching clients to help them to address stress in the moment it arises. Reducing present moment stress helps my clients get their cognitive functioning back online fast and get back to work thinking more clearly, making better decisions, and problem solving more creatively while making better connections with clients.

In our discussion, Danny also commented on the value of mindfulness in getting ahead. "What I teach in my workshops and coaching," he said, "is to pay close attention to what's happening in the moment and respond to that, instead of keeping your eyes on the goal of winning the case or the race. Being able to be truly present in whatever situation you find yourself will always give you the edge over your competition (or adversary) because you'll be much more adaptable to any changes and circumstances along the way."

Finally, spiritual leaders and teachers may help with well-being issues that impact stress levels such as disillusionment, trust, hope, and grief.

NOTE: Seeking medical help to address the physical impacts of stress—such as insomnia, weight loss or gain, high or low blood pressure, exhaustion, and addictions—and to improve well-being should be considered in addition to seeking help from other well-being professionals.

How might professional well-being and stress reduction support be beneficial?

Working individually with a trained professional gives us time to process the emotional stress inherent in most kinds of legal practice and law school studies. Even though we consider ourselves to be a "thinking" profession, the work we do can be very emotionally taxing. Dealing with the issues that bring our clients stress—from divorce to personal injury to problems with the criminal justice system—and interfacing with clients when they are emotional can be challenging, especially when we are dealing with our own stress from the pressures inherent in lawyering. Working with a professional to process our emotions and problem-solve solutions can help to reduce overwhelm. Reducing overwhelm curtails stress and frees our minds to think clearly about solutions, next best steps, and creating an action plan. In addition, a professional's perspective can help us see our blind spots, assist us in approaching our challenges and growing our success in new ways, as well as supporting us in developing healthier coping skills.

What stands in the way of getting help?

In the past four years of providing well-being coaching and CLE training for lawyers, judges, and law school students, I've ascertained key concerns that often prevent individuals in our profession from seeking help. None of the items on this list are true for all of us all of the time, but they may be true for some of us some of the time:

1. Fear of being judged.
2. Concerns about confidentiality and/or disciplinary action.
3. More comfortable providing help to others than seeking help for ourselves.
4. Denial of the severity of our problems.
5. Fear of being misunderstood by those outside of our profession and a lack of support tailored for those in the legal profession.
6. Not knowing where to go for support or what kind of help would be useful.
7. Skeptical about the effectiveness of mental health/well-being services.
8. Out of pocket costs for professional support.
9. No time to get help.
10. Uncomfortable talking about our feelings.

An example of an area where our profession has been shown to avoid help-seeking: problem drinking.

An important finding from the first national study on attorney substance use and mental health concerns conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs in 2016 (bit.ly/LAPReport2016) relates to help-seeking behaviors of attorneys. In the study, 20.6% of participating lawyers scored on questions related to drinking "at a level consistent with problematic drinking." However, only 6.8% of the participants reported past treatment for alcohol or drug use. In the study, "participants who reported prior treatment for substance use were questioned regarding barriers that impacted their ability to obtain treatment services. Those reporting no prior treatment were questioned regarding hypothetical barriers in the event they were to need future treatment or services. The two most common barriers were the same for both groups: not wanting others to find out they needed help (50.6% and 25.7% for the treatment and nontreatment groups, respectively), and concerns regarding privacy or confidentiality (44.2% and 23.4% for the groups, respectively)."

How to address the barriers to help-seeking.

Take a moment now to consider: What would it feel like to get ahead in my work or personal life? Then make a list of 5-8 kinds of professional help that you imagine would support you to reduce your stress, improve your cognitive functioning, get a competitive edge, and improve your well-being. Next, make a list of all of the professionals you could call, or people who may be able to provide a good referral. Now, make a list of anything that stands in your way (use the above list to generate ideas). Lastly, problem solve: What would it take for me to address any of these concerns, and overcome my barriers, one step at a time?

Make a commitment to taking one step; put it on your to-do list or in your calendar. Tell someone who cares about you about your vision for your improved well-being. Enjoy the process, your progress, and savor the results of experiencing life "in flow" while getting help cultivating your professional edge. ■

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

If you would like to bring Laura to your firm or event to conduct a well-being CLE or learn more about professionals who can help you cultivate your well-being and your professional edge, contact Laura at consciouslegalminds.com. You may also wish to seek assistance from the NC Lawyer Assistance Program at 919-719-9269.

If you'd like to learn more about stress reduction and improved cognitive functioning using mindfulness, check out:

"Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness, Meditation, and Neuroscience" (online, on demand mental health CLE), consciouslegalminds.com/register.

Committee Publishes Proposed Opinion on Responding to Negative Reviews

Council Actions

At its meeting on January 24, 2020, the State Bar Council adopted the ethics opinion summarized below:

2019 Formal Ethics Opinion 7

Attorney Eyes Only Disclosure Restriction

Opinion rules that a lawyer may agree to an "attorney eyes only" disclosure restriction.

Ethics Committee Actions

The Ethics Committee considered a total of five inquiries at its meeting on January 23, 2020, including the opinion listed above that was subsequently adopted by the State Bar Council. Of the remaining four inquiries, two inquiries were returned to subcommittee for further study, including an inquiry addressing the permissibility of certain communications with judges and an inquiry concerning whether the Rules of Professional Conduct permit a lawyer to advance a client's portion of settlement proceeds. The Ethics Committee also approved an ethics advisory on the topic of whether a lawyer is prohibited from representing his solo practice in litigation where the lawyer is likely to be a necessary witness in the dispute. The committee intends to continue studying this issue as a new formal inquiry at its next quarterly meeting. Lastly, the committee approved for publication a proposed opinion on a lawyer's professional responsibility in responding to negative online reviews, which appears below.

Proposed 2020 Formal Ethics Opinion 1
Responding to Negative Online Reviews
January 23, 2020

Proposed opinion rules that a lawyer may post a proportional and restrained response to a negative online review, but may not disclose confidential client information.

Inquiry:

Lawyer's former client posted a negative review of Lawyer's representation on a consumer rating website. Lawyer believes that the former client's comments are false. Lawyer believes that certain information in Lawyer's possession about the representation would rebut the negative allegations. The information in question constitutes confidential information as defined by Rule 1.6(a).

In what manner may Lawyer publicly respond to the former client's negative online review?

Opinion:

In response to the former client's negative online review, Lawyer may post a proportional and restrained response that does not reveal any confidential information. The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. Rule 1.6(a) of the Rules of Professional Conduct provides that a lawyer may not reveal information acquired during the professional relationship with a client unless (1) the client gives informed consent, (2) the disclosure is impliedly authorized, or (3) one of the exceptions set out in Rule 1.6(b) applies. Rule 1.6(a) applies to all information acquired during the representation. Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. Therefore, Lawyer may not reveal confidential information in response to the negative online review unless the former client consents or an exception set out in Rule 1.6(b) applies. *See* 2018 FEO 1 (lawyers are cautioned to avoid disclosing confidential client information when responding to a negative review).

No exception in Rule 1.6(b) allows Lawyer to reveal confidential information in response to a former client's negative review. The only exception potentially applicable to the facts presented is the "self-defense exception" set out in Rule 1.6(b)(6). Rule 1.6(b)(6) permits a lawyer to reveal information to the extent the lawyer reasonably believes necessary:

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 March 30, 2020.

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.

> [T]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment [11] to Rule 1.6 provides guidance as to the application of the self-defense exception. Pursuant to comment [11]:

> Where *a legal claim or disciplinary charge* alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. *Such a charge can arise in a civil, criminal, disciplinary, or other proceeding* and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

Rule 1.6, [cmt] 11 (emphasis added). Thus, the self-defense exception applies to legal claims and disciplinary charges arising in civil, criminal, disciplinary, or other proceedings. A negative online review does not fall within these categories and, therefore, does not trigger the self-defense exception.

This conclusion is consistent with other jurisdictions that have opined on this issue. In Penn. Bar Ass'n Ethics Comm. Op. 2014-200, the Pennsylvania Ethics Committee concluded that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception." The committee stated:

> A disagreement as to the quality of a lawyer's services might qualify as a "controversy." However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, [comment [11]] makes clear that a lawyer's disclosure of confidential information to "establish a claim or defense" only arises in the context of a civil, criminal, disciplinary or other proceeding.

Id. Likewise, the Texas Bar determined that the self-defense exception "cannot reasonably be interpreted to allow public disclosure of a former client's confidences just because a former client has chosen to make negative comments about the lawyer on the internet." Texas Center for Legal Ethics Op. 662 (2016). Similarly, the Nassau County Bar stated that the exception does not apply to "informal complaints such as posting criticisms on the Internet." Bar Ass'n of Nassau County Comm. on Prof'l Ethics Op. 2016-1. Also, the New York State Bar opined that, "the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information.... Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession." New York State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014). The Restatement of the Law Governing Lawyers similarly states that the self-defense exception to the duty of confidentiality is limited to "charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification[.]" Restatement (Third) of the Law Governing Lawyers § 64, cmt. c. (Am. Law Inst. 2000).[1]

An online negative review is not a legal claim or disciplinary charge arising in a civil, criminal, disciplinary, or other proceeding.

We note that comment [11] to Rule 1.6 provides that a lawyer does not have to "await the commencement" of an action or proceeding to rely on the self-defense exception. Nonetheless, there must be an action or proceeding in contemplation for the exception to apply. Penn. Bar Ass'n Ethics Comm. Op. 2014-200. The restatement provides that, in the absence of the filing of a charge, there must be "the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant." The Restatement (Third) of the Law Governing Lawyers § 64. It is the "manifestation of intent" that makes the disclosure of confidential client information "reasonably necessary." As noted in the restatement:

> Use or disclosure of confidential client information...is warranted only if and to the extent that the disclosing lawyer reasonably believes necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy.

Id. The posting of negative comments about a lawyer on the internet does not amount to the requisite "manifestation of intent" to initiate proceedings against the lawyer as contemplated by the restatement or comment [11] to Rule 1.6.

While Lawyer is not permitted to reveal confidential information in a response to the negative review, Lawyer is not barred from responding. Any response should be "proportional and restrained." Penn. Bar Ass'n Ethics Comm. Op. 2014-200. The Pennsylvania State Bar Ethics Committee proposes the following generic response to a negative online review:

> A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.

Id. Similarly, the San Francisco Bar opined that if the client's matter has ended, a simple

CONTINUED ON PAGE 41

Amendments Pending Supreme Court Approval

At its meetings on October 25, 2019, and January 24, 2020, 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 Fall 2019 and Winter 2019 editions of the *Journal* or visit the State Bar website.)

Proposed Amendment to the Rules Governing the Administrative Committee

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

The proposed amendment will allow service of a notice to show cause via publication in the State Bar *Journal* when the State Bar is unable to serve a member using other authorized methods.

Proposed Amendment to The Plan of Legal Specialization

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

The proposed amendment clarifies the prohibition on waiving the minimum years of practice requirement for specialty certification.

Proposed Amendment to Immigration Law Specialty Standards

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

The proposed amendment permits the Board of Legal Specialization to offer the immigration law specialty exam either annually or every other year based upon the recommendation of the Immigration Law Specialty Committee.

Highlights

• Extensive proposed amendments to the rules on prepaid legal services plans are published for comment.

Proposed Amendments to The Plan for Certification of Paralegals

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

The proposed amendments eliminate the educational prerequisite for paralegal certification for applicants who satisfy work experience requirements. To be certified, applicants who satisfy the work experience requirements must pass the certification examination.

Proposed Amendments

At its meeting on October 25, 2019, the council voted to publish proposed amendments to Rule .2605 of the immigration law specialty standards, 27 N.C.A.C. 1D, Section .2600, Certification Standards for the Immigration Law Specialty. The proposed amendments update and clarify the requirements for substantial involvement for certification as a specialist in immigration law. During the publication period following the October meeting, comment was received. At the January 2020 Quarterly Meeting of the State Bar Council, upon the request of the Board of Legal Specialization, action on the proposed amendments was deferred until the April Quarterly Meeting of the State Bar Council.

At its meeting on January 24, 2020, the council voted to publish for comment the following proposed rule amendments:

Proposed Amendments to the Rules on Administrative Reinstatement

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

The proposed amendments replace the current $125 fee for reinstatement from inactive status and administrative suspension with a fee in an amount to be determined by the Council.

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement.
...
(c) Requirements for Reinstatement
(1) Completion of Petition...
(6) Payment of Fees, Assessments and Costs.
The member must pay all of the following:
(A) a ~~$125.00~~ reinstatement fee **in an amount determined by the council**;
(B) …
(d) Service of Reinstatement Petition ...

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order…
(d) Requirements for Reinstatement
(1) Completion of Petition ...
(6) Payment of Fees, Assessments and Costs
The member must pay all of the following:
(A) a ~~$125.00~~ reinstatement fee **in an amount determined by the council** or $250.00 reinstatement fee if suspended for failure to comply with CLE requirements;
(B) ...

(7) Pro Hac Vice Registration Statements ...

(e) Procedure for Review of Reinstatement Petition ...

Proposed Amendments to Regulations for Organizations Practicing Law

27 N.C.A.C. 1E, Section .0100, Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law; Section .0200, Registration of Interstate and International Law Firms

The proposed amendments replace specified filing and registration fees with fees in amounts to be determined by the council.

.0104 Management and Financial Matters

(a) Management

...

(g) Transfer of Stock of Professional Corporation - When stock of a professional corporation is transferred to a licensee, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC-5; see Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be ~~two dollars~~ **in an amount determined by the council and shall be charged** for each transferee listed on the stock transfer certificate.

.0105, General and Administrative Provisions

(a) Administration of Regulations ...

...

(d) Filing Fee - Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee **in an amount determined by the council**.

(e) Accounting for Filing Fees - ...

.0203, Registration Fee

There shall be submitted with each registration statement and supporting documentation a registration fee ~~of $500.00~~ as **an** administrative cost **which shall be in an amount determined by the council**.

Proposed Amendments to the Rules for Prepaid Legal Services Plans

27 N.C.A.C. 1E, Section .0300, Rules Concerning Prepaid Legal Services Plans

After studying the rules for registration of prepaid legal services plans, the Authorized Practice Committee of the State Bar Council determined that the rules and forms on which prepaid legal service plans register with the State Bar should be updated. The committee recommended comprehensive amendments to the rules including: incorporating the registration, renewal, and amendment forms in the rules; eliminating the requirement that the State Bar review plan documents to determine whether representations made in the registration, renewal, and amendment forms are true; and specifying that registration and renewal fees shall be in amounts to be determined by the State Bar Council. Note that new rules are identified as new rules, but the text is not underlined or in bold.

~~.0301 State Bar May Not Approve or Disapprove Plans~~ [INCORPORATED INTO NEW RULE .0309]

~~The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under these rules shall not be construed to indicate approval or disapproval of the plan.~~

~~.0303~~ .0301 Definition~~s~~ ~~of Prepaid Plan~~

The following words and phrases when used in this subchapter shall have the meanings given to them in this rule:

1) Counsel – the counsel of the North Carolina State Bar appointed by the Council of the North Carolina State Bar.

2) Plan Owner – the person or entity not authorized to engage in the practice of law that operates or is seeking to operate a plan in accordance with these Rules.

3) ~~A prepaid legal services plan or a group legal services plan ("a plan") is~~ **Prepaid Legal Services Plan or Plan –** any arrangement by which a person~~, firm or corporation~~ **or entity**, not ~~otherwise~~ authorized to engage in the practice of law, in exchange for any valuable consideration, offers to ~~provide or~~ arrange~~s~~ the provision of specified legal services that are paid for in advance of any immediate need for the specified legal services ("covered services"). In addition to covered services, a plan may ~~provide~~ **arrange the provision of** specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services ~~offered~~ **arranged** by a plan must be provided by a North Carolina licensed ~~lawyer~~ **attorney** who is not an employee, director, or owner of the plan. A ~~prepaid legal services~~ plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee. ~~[This definition is also found in Rule 7.3(d) of the Revised Rules of Professional Conduct.]~~

~~.0311~~ .0302 State Bar Jurisdiction

The North Carolina State Bar retains jurisdiction ~~of~~ **over** North Carolina licensed attorneys who participate in ~~prepaid legal services~~ plans ~~and North Carolina licensed attorneys are~~**, whose conduct is** subject to the rules and regulations of the ~~North Carolina~~ State Bar.

.0303 Role of Authorized Practice Committee [NEW RULE]

The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall oversee the registration of plans in accordance with these rules. The committee shall also establish reasonable deadlines, rules and procedures regarding the initial and annual registrations, amendments to registrations, and the revocation of registrations of plans.

~~.0309~~ .0304 Index of Registered Plans

The North Carolina State Bar shall maintain an index of the ~~prepaid legal services~~ plans registered pursuant to these rules. All documents filed ~~in compliance with this~~ **pursuant to these** rule**s** ~~are considered public documents and~~ shall be available for public inspection during ~~normal~~ **regular** business hours.

~~.0302~~ .0305 Registration Requirement

A ~~prepaid legal services~~ plan ~~("plan") must~~ **shall** be registered with the North Carolina State Bar before ~~its implementation or operation~~ **operating** in North Carolina. **Registration shall be evidenced by a certificate of registration issued by the State Bar.** ~~No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has com-~~

~~plied with the rules set forth below. No prepaid legal services plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services offered under the plan at all times during the operation of the plan.~~ No ~~prepaid legal services~~ plan may operate in any manner that ~~constitutes~~ **violates the North Carolina statutes regarding** the unauthorized practice of law. ~~No plan may operate until its registration has been accepted by the North Carolina State Bar in accordance with these rules.~~ **No plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services arranged by the plan at all times during the operation of the plan. No licensed North Carolina attorney shall participate in a plan in this state unless the plan has registered with the State Bar and has complied with the rules set forth below.**

~~.0308~~ .0306 Registration Fees

The initial and annual registration fees ~~for each prepaid legal services plan~~ shall be ~~$100~~ **in an amount determined by the council and shall be non-refundable**. ~~The fee is non-refundable.~~

~~.0304~~ .0307 Registration Procedures

~~To register with the North Carolina State Bar, a prepaid legal services plan must comply with all of the following procedures for initial registration:~~

~~(a) A prepaid legal services plan seeking to operate in North Carolina must file an~~ **To register a plan, the plan owner shall complete the** initial registration statement form **contained in Rule .0310 and file it** with the secretary of the North Carolina State Bar~~, using a form promulgated by the State Bar, requesting registration~~.

~~(b) The owner or sponsor of the prepaid legal services plan must fully disclose in its initial registration statement form filed with the secretary at least the following information: the name of the plan, the name of the owner or sponsor of the plan, a principal address for the plan in North Carolina, a designated plan representative to whom communications with the State Bar will be directed, all persons or entities with ownership interest in the plan and the extent of their interests, all terms and conditions of the plan, all services provided under the plan and a schedule of benefits and fees or charges for the plan, a copy of all plan documents, a copy of all plan marketing and advertising materials, a copy of all plan contracts with its customers, a copy of all plan contracts with plan attorneys, and a list of all North Carolina attorneys who have agreed to participate in the plan. Additionally, the owner or sponsor will provide a detailed statement explaining how the plan meets the definition of a prepaid legal services plan in North Carolina. The owner or sponsor of the prepaid legal services plan will certify or acknowledge the veracity of the information contained in the registration statement, an understanding of the rules applicable to prepaid legal services plans, and an understanding of the law on unauthorized practice.~~

~~(c) The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall oversee the registration of prepaid legal services plans in accordance with these rules. The committee shall also establish any deadlines by when registrations may be submitted for review and any additional, necessary rules and procedures regarding the initial and annual registrations, and the revocation of registrations, of prepaid legal services plans.~~

~~.0305~~ .0308 Initial Registration Determination

Counsel ~~will~~ **shall** review the plan's initial registration statement ~~to determine whether the registration statement is complete and the plan, as described in the registration statement, meets the definition of a prepaid legal services plan and otherwise satisfies the requirements for registration provided by Rule .0304~~. If~~, in the opinion of counsel,~~ the plan ~~clearly meets the definition and the registration statement otherwise~~ satisfies the requirements for registration, the secretary ~~will~~ **shall** issue a certificate of registration to the plan~~'s sponsor~~ **owner**. If~~, in the opinion of counsel,~~ the plan does not ~~meet the definition or otherwise fails to~~ satisfy the requirements for registration, counsel ~~will~~ **shall** inform the plan~~'s sponsor~~ **owner** that the ~~registration is not accepted~~ **plan will not be registered** and **shall** explain ~~any~~ **the** deficiencies. Upon notice that the plan~~'s registration has not been accepted~~ **will not be registered**, the plan ~~sponsor~~ **owner** may resubmit ~~an~~ **one** amended ~~plan~~ **initial** registration ~~form~~ **statement** or request a hearing before the committee pursuant to Rule ~~.0313~~ .0317 below. Counsel ~~will~~ **shall** provide a report to the committee each quarter identifying the plans **that** submitted **initial registration statements** and ~~the registration decisions made by counsel~~ **whether each plan was registered**.

.0309 Registration Does Not Constitute Approval [NEW RULE]

The registration of any plan under these rules shall not be construed to indicate approval, disapproval, or an endorsement of the plan by the North Carolina State Bar. Any plan that advertises or otherwise represents that it is registered with the State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the State Bar does not constitute approval or an endorsement of the plan by the State Bar.

~~.0310 Advertising of State Bar Approval Prohibited~~ [INCORPORATED INTO NEW RULE .0309]

~~Any plan that advertises or otherwise represents that it is registered with the North Carolina State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar.~~

.0310 Initial Registration Statement Form [NEW RULE]

Initial Registration Statement Form for Prepaid Legal Services Plan

Any person or entity seeking to operate a prepaid legal services plan shall register the plan with the North Carolina State Bar on the initial registration statement form provided by the State Bar. Each plan must be registered prior to its operation in North Carolina.

The plan owner shall complete this form and file it with the secretary of the State Bar. The plan owner must provide complete responses to each of the following items. The plan will not be registered if any item is left incomplete.

1. Name of Plan:

(a) Owner of Plan

i. Name:

ii. Title:

2. Principal North Carolina Address for Plan:

a. Address:

b. City:

c. State:

d. Zip Code:

3. Contact Information for Plan Representative

a. Name:

b. Address:

c. City:

d. State:

e. Zip Code:

f. Telephone Number:

g. Email Address:

4. Is the plan offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]

5. Does the plan, in exchange for any valuable consideration, offer to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]

6. Are the legal services the plan offers to arrange provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]

a. Attach a list of the names, addresses, bar numbers, and telephone numbers of all North Carolina licensed attorneys who have agreed to participate in the plan. This list should be alphabetized by attorney last name.

7. Do the covered services the plan offers to arrange extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]

8. Has the plan owner signing below read and gained an understanding of the administrative rules applicable to prepaid legal services plans as adopted by the State Bar Council? [Yes] [No]

9. Does the plan owner signing below agree to comply with the administrative rules applicable to prepaid legal services plans as adopted by the State Bar Council and accept responsibility for the plan's compliance with those administrative rules? [Yes] [No]

10. Has the plan owner signing below read and gained an understanding of the law governing the unauthorized practice of law as set out in N.C. Gen. Stat. § 84-2.1, 4, and 5? [Yes] [No]

11. Is a check for the initial registration fee made payable to the State Bar enclosed with this statement? [Yes] [No]

12. After reading the foregoing form and examining the requested attachment in its entirety, does the plan owner signing below certify that all statements made in this form and all attachments are true and correct to the best of his or her knowledge? [Yes] [No]

_____

Date

_____

Signature of Plan Owner

_____

Typed Name of Plan Owner

~~.0307~~ .0311 Annual Registration Renewal

After its initial registration, a ~~prepaid legal services~~ plan may continue to operate so long as it ~~is operated as registered and it renews its registration annually on or before January 31 by filing a~~ **timely files the proscribed registration renewal form and its operation is consistent with its registration statement. The plan owner shall file the** registration renewal form **contained in Rule .0312** with the secretary **of the North Carolina State Bar** and pay~~ing~~ the annual registration fee **on or before December 1 of each year**. **If a plan fails to file the registration renewal form and pay the annual registration fee by December 1, counsel may request the committee at its next quarterly meeting to instruct the secretary of the State Bar to serve upon the plan owner a notice to show cause why the plan's registration should not be revoked as provided in Rule .0316.**

.0312 Registration Renewal Form [NEW RULE]

Registration Renewal Form for Prepaid Legal Services Plan

Each prepaid legal services plan registered to operate in North Carolina shall renew its registration each year. If a plan fails to file the registration renewal form and pay the annual registration fee by December 1, counsel may request the Authorized Practice Committee at its next quarterly meeting to instruct the secretary of the State Bar to serve upon the plan's owner a notice to show cause why the plan's registration should not be revoked.

1. Current Registration Information

a. Plan Name:

b. Plan Number:

2. Is the plan still offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]

3. Does the plan, in exchange for any valuable consideration, still offer to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]

4. Are the legal services the plan offers to arrange still provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]

5. Do the covered services the plan offers to arrange still extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]

6. Attach a list of the names, addresses, bar numbers, and telephone numbers of all North Carolina licensed attorneys who provide or offer to provide the legal services arranged by the plan. This list should be alphabetized by attorney last name.

7. If there have been any amendments to the plan since its initial registration statement or since it renewed its registration last year that are not indicated herein, please attach copies of the registration amendment forms filed with the State Bar and the letter from the State Bar reporting that such forms were registered to this report and indicate in the box provided whether any amendments are attached. []

8. Is a check for the non-refundable annual registration fee payable to the State Bar enclosed with this report? [Yes] [No]

9. Are there any changes the owner signing below wishes to make to the plan? [Yes] [No]

a. If "No," please skip to item 15. If "Yes," only complete the items below that the plan owner wishes to change. Please note that any desired changes must be indicated here and that the plan owner must complete and file a separate registration amendment form.

10. New Name of Plan:

11. New Owner of Plan

a. Name:

b. Title:

12. New Principal North Carolina Address for Plan

a. Address:

b. City:

c. State:

d. Zip Code:

13. New Contact Information for Plan Representative

a. Name:

b. Address:

c. City:

d. State:

e. Zip Code:

f. Telephone Number:

g. Email Address:

14. Does the plan owner signing below understand that the amendments to this plan may not be implemented until the registration amendment form is registered with the State Bar in accordance with 27 N.C.A.C. 1E, §§ .0313 through .0315 of the North Carolina State Bar Regulations for Organizations Practicing Law? [Yes] [No]

15. Does the plan owner signing below certify that the information contained herein is true and correct to the best of his or her knowledge? [Yes] [No]

_____

Date

_____

Signature of Plan Owner

_____

Typed Name of Plan Owner

~~.0306~~ .0313 ~~Requirement to File~~ Registration Amendments

a. A plan owner shall file an amendment to its registration statement ("registration amendment") to document any change in the information provided in its initial registration statement or in its last registration renewal form. ~~Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar~~ **A plan owner shall file the registration amendment form contained in Rule .0315 with the secretary of the North Carolina State Bar** ~~no later than 30 days after the adoption of such amendments~~ **prior to any change that requires the plan owner to file an amendment**. ~~Plan amendments must be submitted in the same manner as the initial registration and may~~ **An amendment to a plan shall** not be implemented until the ~~amended plan~~ **registration amendment** is registered in accordance with Rule ~~.0305~~ **.0314**.

b. A plan owner shall not be required to file a registration amendment form each time there is a change in licensed North Carolina attorneys who have agreed to provide the legal services arranged by the plan. A plan owner shall provide a current list of licensed North Carolina attorneys who agree to provide the legal services arranged by the plan with each registration renewal form as set forth in Rule .0312.

.0314 Determination of Registration Amendments [NEW RULE]

Counsel shall review a plan's registration amendment. If counsel determines that the plan will continue to satisfy the requirements for registration, counsel shall inform the plan owner that the plan's registration amendment will be registered. If counsel determines that the plan will not continue to satisfy the requirements for registration, counsel shall inform the plan owner that the registration amendment will not be registered and shall explain the deficiencies. Counsel shall provide a report to the committee each quarter identifying the plans that submitted registration amendments and whether each registration amendment was registered.

.0315 Registration Amendment Form [NEW RULE]

Registration Amendment Form for Prepaid Legal Services Plan

A prepaid legal services plan shall file a registration amendment form with the secretary of the North Carolina State Bar no later than 30 days after a change in the information provided by the plan in its initial registration statement or in its last registration renewal form. Changes to the operation of the plan or to the governing documents of the plan that are inconsistent with the information contained in the plan's initial registration statement or in the plan's last registration renewal form may not be implemented until they are registered with the State Bar.

The plan owner shall provide complete responses to items 2 – 5 if he or she would like to amend the plan's current registration information. There is no need to complete items that have not changed. The plan owner shall provide complete responses to item 1 and items 6 – 11. If more space is needed to respond to an item, additional documents may be attached to this form.

1. Current Registration Information
   a. Plan Name:
   b. Plan Number:
2. New Name of Plan:
3. New Owner of Plan
   a. Name:
   b. Title:
4. New Principal North Carolina Address for Plan
   a. Address:
   b. City:
   c. State:
   d. Zip Code:
5. New Contact Information for Plan Representative
   a. Name:
   b. Address:
   c. City:
   d. State:
   e. Zip Code:
   f. Telephone Number:
   g. Email Address:
6. Is the plan still offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]
7. Does the plan, in exchange for any valuable consideration, still offer to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]
8. Are the legal services the plan offers to arrange still provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]
9. Do the covered services the plan offers to arrange still extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]
10. After reading the foregoing form and examining any attachments in their entirety, does the plan owner signing below certify that all statements made in this form and all attachments are true and correct to the best of his or her knowledge? [Yes] [No]
11. Does the plan owner signing below understand that the amendments to this plan may not be implemented until the registration amendment form is registered with the North Carolina State Bar in accordance with 27 N.C.A.C. 1E, §§ .0313 through .0315 of the North Carolina State Bar Regulations for Organizations Practicing Law? [Yes] [No]

_____

Date

_____

Signature of Plan Owner

_____

Typed Name of Plan Owner

~~.0312~~ .0316 Revocation of Registration

Whenever it appears that a plan**: (1)** no longer meets the definition of a prepaid legal services plan; **(2)** is marketed or operates in a manner that is not consistent with the representations made in the initial ~~or amended registration statement and accompanying documents upon which the State Bar relied in registering the plan~~ **registration statement, the registration amendment form, or with the most recent registration renewal**

form filed with the North Carolina State Bar; (3) is marketed or operates in a manner that ~~would~~ constitutes the unauthorized practice of law; (4) is marketed or operates in a manner that violates state or federal laws or regulations, including the rules and regulations of the ~~North Carolina~~ State Bar; or (5) has failed to pay the annual registration fee, the committee may instruct the secretary **of the State Bar** to serve upon the plan~~'s sponsor~~ **owner** a notice to show cause why the plan's registration should not be revoked. The notice shall specify the plan's apparent deficiency and allow the plan~~'s sponsor~~ **owner** to file **with the secretary** a written response within 30 days of service ~~by sending the same to the secretary~~. If the ~~sponsor~~ **plan owner** fails to file a timely written response, the secretary shall issue an order revoking the plan's registration and shall serve the order upon the plan~~'s sponsor~~ **owner**. If a timely written response is filed, the secretary shall schedule a hearing, in accordance with Rule ~~.0313~~ **.0317** below, before the ~~Authorized Practice Committee at its next regularly scheduled meeting~~ **committee** and shall so notify the plan ~~sponsor~~ **owner**. **The secretary may waive such hearing based upon a stipulation by the plan owner and counsel that the plan's apparent deficiency has been cured.** All notices to show cause and orders required to be served herein ~~may~~ **shall** be served**:** (1) by certified mail ~~to~~ **at** the ~~last~~ address **last** provided ~~for~~ **to the State Bar by** the plan ~~sponsor on its most current registration statement or owner;~~ (2) in accordance with **any other provisions of** Rule 4 of the North Carolina Rules of Civil Procedure**;** ~~and~~ **or** (3) ~~may be served~~ by a State Bar investigator or **by** any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. The State Bar ~~will~~ **shall** not ~~renew the annual registration~~ **register the registration renewal form** of any plan ~~that has received~~ **for which the secretary has issued** a notice to show cause under this section, but the plan may continue to operate under the prior registration **statement** until resolution of the show cause notice by the council.

~~.0313~~ .0317 Hearing before the Authorized Practice Committee

~~At any hearing concerning the registration of a prepaid legal services plan, the committee chair~~ **The chair of the Authorized Practice Committee** ~~will~~ **shall** preside ~~to ensure that the hearing is conducted in accordance with these rules~~ **at any hearing concerning the registration of a prepaid legal services plan**. The ~~committee~~ chair shall cause a record of the proceedings to be made. Strict compliance with the **North Carolina** Rules of Evidence is not required, but **the North Carolina Rules of Evidence** may be used to guide the committee in the conduct of an orderly hearing. ~~The plan sponsor may appear and be heard, be represented by counsel, offer witnesses and documents in support of its position and cross-examine any adverse witnesses.~~ The counsel ~~may appear on behalf of the State Bar and be heard,~~ **shall represent the State Bar** and may offer witnesses and ~~documents~~ **documentary evidence, may cross-examine adverse witnesses, and may argue the State Bar's position**. **The plan owner may appear and may be represented by counsel, may offer witnesses and documentary evidence, may cross-examine adverse witnesses, and may argue the plan owner's position.** The burden of proof shall be upon the ~~sponsor~~ **plan owner** to establish **that** the plan meets the definition of a prepaid legal services plan, that all registration fees have been paid, and that the plan has operated **and does operate** in a manner consistent with all ~~material~~ **applicable law, with these rules, and with all** representations made in its then current registration statement~~, the law, and these rules~~. If the ~~sponsor~~ **plan owner** ~~carries~~ **meets** its burden of proof, the ~~plan's registration shall be accepted or continued~~ **initial registration statement, the registration amendment form, or the registration renewal form in question shall be registered**. If the ~~sponsor~~ **plan owner** fails to ~~carry~~ **meet** its burden of proof, the committee shall recommend to the council that the plan's **initial** registration **statement, registration amendment form, or registration renewal form** be denied or revoked.

~~.0314~~ .0318 Action by the Council

Upon the recommendation of the **Authorized Practice** ~~c~~**C**ommittee, the council may enter an order denying or revoking the registration of ~~the~~ **a** plan. The order shall be effective when entered by the council. A copy of the order shall be served upon the plan~~'s sponsor~~ **owner** as prescribed in Rule ~~.0312~~ **.0316** above. ■

Proposed Opinions (cont.)

response that denies the veracity or merit of the former client's assertions would not violate the duty of loyalty that lawyers owe to former clients. San Francisco Bar Ass'n Op. 2014-1. *See also* Los Angeles County Ethics Op. 525 (2012) (lawyer may make a "proportionate and restrained" response to his former client's negative review, but may not reveal confidential information or damage the former client in relation to the representation); Texas State Bar Opinion 662 (2016) (lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the rules of ethics).

Accordingly, Lawyer may post an online response to the former client's negative online review provided the response is proportional and restrained and does not contain any confidential client information. ■

Endnote

1. While the California Rules of Professional Conduct do not contain a "self-defense" exception to the duty of confidentiality, the California Evidence Code contains a self-defense exception to the attorney-client privilege. Cal. Code Evid. § 958 (no privilege as to a communication relevant to an issue of breach by lawyer of duty arising out of lawyer-client relationship). Two ethics opinions from local California bar associations interpreting the exception conclude that a lawyer may not rely on the exception to disclose confidential information in response to a negative online review. San Francisco Bar Ass'n Legal Ethics Comm. Op. 2014-1; Los Angeles County Op. 525 (2012).

Go East: Views from NC and Germany (cont.)

22. German Code of Civil Procedure § 160.
23. German Code of Civil Procedure § 160.
24. German Code of Civil Procedure § 164.
25. *See* German Civil Code § 242 (good faith and fair dealing); German Civil Code § 826 (intentional tortious conduct contrary to public policy).
26. Basic Law for the Federal Republic of Germany § 97.
27. German Federal Constitutional Act § 31.
28. German Code of Civil Procedure § 91.
29. German Federal Attorney Regulation § 49b.
30. German Attorney Remuneration Act § 13 and annex thereto.
31. German Judicature Act §§ 169-172.
32. German Judicature Act § 169; German Code of Civil Procedure § 299.

Client Security Fund Reimburses Victims

At its January 23, 2020, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $98,677.68 to 15 applicants who suffered financial losses due to the misconduct of North Carolina lawyers. In addition, the board's counsel reimbursed five claims totaling $1,522.76 for title premiums paid by clients of John Lafferty pursuant to the guidelines established by the board at its meeting in October 2019.

The payments authorized were:

1. An award of $4,500 to a former client of Robert A. Bell of Fayetteville. The board determined that Bell was retained to handle several criminal charges for a client. Bell failed to provide any meaningful legal services for the fee paid prior to being placed on disability inactive status on April 10, 2015. The board previously reimbursed seven other Bell clients a total of $12,975.

2. An award of $780 to a former client of Wallace W. Bradsher of Roxboro. The board determined that Bradsher was retained to represent a client on speeding and DWI charges. Bradsher failed to provide evidence of any meaningful legal services performed for the fee paid prior to his disbarment. Bradsher was disbarred on June 26, 2018.

3. An award of $500 to a former client of Jerry Braswell of Goldsboro. The board determined that Braswell was retained to handle an appeal of an order terminating a client's parental rights. Braswell's law license was suspended before he could provide any legal services to the client, and he failed to inform the client of his upcoming suspension. Braswell's license was suspended on September 18, 2017.

4. An award of $3,545 to a former client of Sarah Brinson of Clinton. The board determined that Brinson was retained to handle an immigration matter. Brinson failed to provide any meaningful legal services to the client for the fee paid. Brinson was disbarred on August 7, 2019. The board previously reimbursed two other Brinson clients a total of $7,030.

5. An award of $1,735 to a former client of Sarah Brinson. The board determined that Brinson was retained to handle an immigration matter for a client and her child. Brinson failed to provide any meaningful legal services to the client for the fee paid.

6. An award of $2,000 to a former client of Alan T. Briones Jr. of Raleigh. The board determined that Briones was retained to handle a criminal matter for a client. Briones failed to provide any meaningful legal services to the client for the fee paid before being placed on disability inactive status.

7. An award of $5,000 to a former client of Paige C. Cabe of Sanford. The board determined that Cabe was retained to represent a client in an equitable distribution action and to file an alienation of affection claim. Cabe failed to file any claims or provide any meaningful legal services for the fee paid. Cabe was disbarred on November 25, 2018. The board previously reimbursed six other Cabe clients a total of $44,591.48.

8. An award of $1,500 to a former client of Paige C. Cabe. The board determined that Cabe was retained to represent a client in a domestic action. Cabe failed to provide any meaningful legal services to the client for the fee paid.

9. An award of $1,565 to a former client of Van H. Johnson of Hertford. The board determined that Johnson was retained to file for bankruptcy for a client. Johnson failed to provide any meaningful legal services to the client for the fee paid. The board previously reimbursed three other Johnson clients a total of $6,500.

10. An award of $2,722.64 to a former client of John O. Lafferty Jr. of Lincoln. The board determined that Lafferty was retained to handle a real estate closing for a client. Lafferty embezzled funds that were overpayments from the closing proceeds he received and failed to obtain the client's title insurance from the closing proceeds. Due to misappropriation, Lafferty's trust account balance is insufficient to pay all of his client obligations. Lafferty was disbarred on May 5, 2019. The board previously reimbursed six other Lafferty clients a total of $124,375.73.

11. An award of $1,807.81 to an applicant who suffered a loss because of John O. Lafferty Jr. The board determined that Lafferty represented an estate and filed a final Affidavit of Collection in the estate showing that payments had been made to four creditors. However, after Lafferty's disbarment, the trustee appointed to wind down his practice found the checks written to the creditors still in the file. Due to misappropriation, Lafferty's trust account balance is insufficient to pay all of his client obligations.

12. An award of $2,910 to a former client of Katherine H. Pekman of Hickory. The board determined that Pekman was retained to obtain a separation and custody agreement for a client. After communication with Pekman failed, the client requested a refund of her remaining funds. Pekman produced a trust account ledger showing the remaining funds after deductions for a consultation, an email, and a short meeting with the client. Pekman failed to make a refund and failed to provide meaningful legal services for the balance of the fee paid. Pekman was suspended on April 15, 2019.

13. An award of $912 to a former client of Katherine H. Pekman. The board determined that Pekman was retained to obtain a client's divorce. The client paid the quoted fee and costs, and then communication with Pekman failed. Pekman failed to provide any meaningful legal services to the client for the fee paid prior to being suspended.

14. An award of $19,200.23 to a former client of James M. Shelton of Greensboro. The board determined that Shelton was retained to file bankruptcy for a client to avoid foreclosure and to sell the client's business. Shelton voluntarily dismissed the client's Chapter 13 bankruptcy so that the client could sell the business outside of the bankruptcy. Shelton made payments to himself from the business sale proceeds in excess of fees he had earned and without the client's knowledge or consent until after the fact.

Shelton also embezzled a portion of business sale proceeds he had deposited in his operating account. After filing the second Chapter 13 bankruptcy, the client terminated Shelton and challenged his fee application. Shelton made misrepresentations to the bankruptcy trustee that resulted in Shelton being overpaid in the second bankruptcy. Shelton was disbarred on May 17, 2018.

15. An award of $50,000 to former clients of W. Darrell Whitley of Lexington. The board determined that Whitley was retained to handle a couple's personal injury claims. Whitley settled one claim without the wife's knowledge or consent, and failed to handle the other claim. Whitley failed to pay any of the settlement to his client or to any medical providers. This claim was originally awarded in April 2013, subject to any medical liens, but rescinded in April 2018 due to an inability to locate the clients again for lien information. In August 2019, the trustee appointed to wind down Whitley's practice located the client's daughter. The trustee communicated with the lien holders, but did not get a response. Counsel was directed to retain half of the client's award until after counsel attempts to get a response from the lien holders. Whitley died on December 6, 2011. ■

In Memoriam

Jesse B. Ashe III
Charlotte, NC

Louis Adams Bledsoe Jr.
Charlotte, NC

Robert Vincent Bode
Raleigh, NC

Richard J. Boles
Murrells Inlet, SC

Anthony Mason Brannon
Durham, NC

Franklin Roosevelt Brown
Tarboro, NC

Everette C. Carnes Jr.
Marion, NC

Nelson Monroe Casstevens Jr.
Charlotte, NC

Robert William Detwiler
Jacksonville, NC

John Francis Eichorn
Burnsville, NC

Michael A. Ellis
Goldsboro, NC

Corrie Vonshea Foster
Raleigh, NC

Lucas Matthew Horner
Asheboro, NC

J. Charles Jones
Charlotte, NC

Ola M. Lewis
Bolivia, NC

William Hicks Miller
Tryon, NC

Wendell Harrell Ott
Oak Ridge, NC

Talmage Newton Penland
Candler, NC

Jack Poisson
Asheville, NC

John Richard Rittelmeyer
Raleigh, NC

Bertram John Schaeffer
Egg Harbor Township, NJ

Lewis Alston Thompson III
Warrenton, NC

Jack Allen Thompson
Fayetteville, NC

Lucius Stacy Weaver Jr.
Fayetteville, NC

Jerry Claid Woodell
Wilmington, NC

IOLTA Update (cont.)

was vetoed by the governor and no budget was enacted.

Heather Taraska, assistant district attorney in Charlotte, is a former NC LEAF participant and a continuing champion for the program. Taraska has worked as a prosecutor at the Mecklenburg County District Attorney's Office for almost 20 years. She shares her story with other lawyers to emphasize the value of loan repayment assistance for the administration of justice.

"It sounds cliché, but I went to law school because I wanted to help people," Taraska says. Beginning in law school, her summer internships were all "centered in public interest" and she has maintained that commitment to the present, having worked in the public sector since she was licensed.

"Throughout my career, I represented the state in plea negotiations and bench and jury trials against both adult and juvenile offenders for various felony and misdemeanor offenses. I supervised the narcotics prosecution team for a number of years, and I currently supervise the juvenile prosecution team." For the residents of Mecklenburg County and the State of North Carolina, Taraska's experience as a career prosecutor protects communities and promotes the administration of justice. "I get the greatest fulfillment from mentoring younger attorneys in my office and helping victims and their families navigate the criminal justice system."

Taraska attended an NC LEAF information session as a law student. She knew she wanted to pursue a lifelong career in public service. She applied for NC LEAF "at the earliest possible opportunity" and was accepted as a participant to receive loan repayment assistance as a young assistant district attorney. Taraska says she "would simply not have been able to afford housing, utilities, insurance, transportation, and groceries without the assistance of NC LEAF" early in her career.

NC LEAF also allowed Taraska to continue to progress on her chosen career path. "Throughout my time as a supervisor, dozens of attorneys have tendered their resignations, citing the need to make more money as the reason for their leaving a job that they loved," says Taraska. With the assistance of NC LEAF, Taraska ultimately paid off her student loans. "NC LEAF is the reason that I am debt free and continue to serve my community."

For more information about the work of the NC Legal Education Assistance Foundation, visit their website at ncleaf.org. ■

Law School Briefs

Campbell University School of Law

Campbell Law School's Innovate Capital Business Law Clinic—in partnership with incubator HQ Raleigh—works with clients across the area's entrepreneurial ecosystem to help them solve real-world business and legal problems. Launched in January 2020, the startup counsel program helps bridge classroom learning and the hands-on practicing of law with Campbell Law students weighing in on client legal issues such as business entity formation, employee/contractor documentation, equity compensation plans and awards, commercial agreements such as NDAs and capital raising, as well as other operational topics. Legal services are provided at no cost by upper-level students, under the supervision of veteran licensed business attorneys and co-clinic directors Jim Verdonik and Benji Jones. The clinic is named in honor of Innovate Capital Law, a leading Triangle area law firm, which was instrumental in the clinic's founding. Founders Verdonik and Jones have more than five decades of collective sector experience, and focus on advising entrepreneurs and investors in capital raising transactions. Learn more at law.campbell.edu/advocate/clinical-programs/innovate-capital-business-law-clinic.

Campbell Law advocates continued their winning streak by earning two new national titles in November 2019. Campbell Law teams earned national titles at the Hofstra Medical Legal Mock Trial Competition and the National Civil Trial Competition (NCTC). Third-year students Chamberlain Collier, Justin Hill, and Jake Terrell, second-year students Kelsey Myers and Joshua Steedly, and their coach Casey Peaden '17 made history by winning the championship in Campbell Law's first appearance at the Hofstra competition. Campbell Law trial advocates—third-year students Kevin Littlejohn and Lydia Stoney, second-year students Courtney Haywood and Luke Coates, and their coach Jacob Morse '17—also prevailed at the Greene Broillet & Wheeler National Civil Trial Competition at Loyola Law School in Los Angeles. Stoney was named the championship round best advocate and Littlejohn won the prestigious Best Opening Statement award among all the competitors.

Duke Law School

Elvin R. Latty Professor of Law Arti Rai, faculty co-director of the Duke Center for Innovation Policy, is the lead investigator on a one-year grant from the Laura and John Arnold Foundation to examine how the Patent Trial and Appeals Board (PTAB) affects the biopharmaceutical industry. She is leading a team of researchers to investigate how challenges to small-molecule drug and biologics patents before district courts and the PTAB may affect decision making by biopharmaceutical innovators. Rai, an internationally recognized expert in intellectual property law, innovation policy, administrative law, and health law, led policy analysis of the legislation that would become the America Invents Act of 2011 while serving as administrator of policy and external affairs at the US Patent and Trademark Office in 2009 and 2010.

In his new book, *Measuring Social Welfare: An Introduction* (Oxford University Press, 2019), Professor Matthew Adler sets forth a systemic new framework for assessing government policies as an alternative to—and significant improvement on—cost-benefit analysis, the norm since the 1980s. His framework, known as the social welfare function, factors individual well-being into policy evaluation and addressing questions of societal inequity. Adler, whose interdisciplinary research focuses on improving frameworks for policy analysis, is the Richard A. Horvitz Professor of Law and professor of economics, philosophy and public policy, and a founding director of the Duke Center for Law, Economics, and Public Policy.

Duke's 10th annual Wintersession, held January 4-8, drew a record 500 law students who attended short courses focused on practical and professional skills over the last days of their winter break. Many enrolled in two of the 29 half-credit classes offered, all taught by leading scholars and practitioners in subjects ranging from accounting, insurance law, and antitrust litigation to prosecutorial ethics, design thinking, and professional communication.

Elon University School of Law

Study: Lower debt, stronger diversity & improved outcomes at Elon Law—Elon Law's 2.5-year curriculum is a key feature for prospective students, and the law school looks to have uniquely positioned itself with an approach to legal education characterized by lower debt, improved bar results, and increased diversity and inclusivity, according to a new research study by RTI International. Commissioned by Elon Law through a $259,000 grant from AccessLex Institute, the report's top findings this fall included:

- Most Elon Law students were aware of the law school's accelerated curriculum and focus on experiential learning prior to applying.
- Compared with peers at other schools, Elon Law students agree the school encourages contact among diverse students, and the percentage of degrees earned at Elon Law by students of color has almost tripled since 2015.
- A combination of lower tuition rates and an investment in scholarship availability has led to a decline of nearly 33% in average student loan debt at graduation.
- Investments in the Office of Academic Success, plus a move to the Uniform Bar Exam by the North Carolina Board of Law Examiners, has led to higher bar passage rates.

NC's top jurist to Elon Law grads: "Transform our legal system"—Chief Justice Cheri L. Beasley of the Supreme Court of North Carolina tasked Elon Law's

Class of 2019 with using knowledge to expand access to justice for all people. Beasley delivered the commencement address to 107 graduates in Elon Law's December ceremony. "It is you who has the power and, really, the obligation to transform our legal system into one that truly serves every person as our society continues to change," she said. Anna Kathryn Barnes L'19 received the law school's 2019 David Gergen Award for Leadership & Professionalism, the school's highest honor, at the ceremony.

North Carolina Central University School of Law

Federal Courthouse named for alumnus John Hervey Wheeler 47'—In October 2019, several representatives of the law school attended the renaming celebration for the US District Court for the Middle District of North Carolina building in Durham. The building now honors civil rights lawyer, political activist, bank president, and philanthropist John Hervey Wheeler 47', an important leader in school desegregation in North Carolina. Another NCCU Law alumnus, Congressman G.K Butterfield 74', introduced H.R. 3460, the bill to rename the US Courthouse the John Hervey Wheeler United States Courthouse.

Virtual Justice Program marks 10th anniversary—In December the school celebrated the 10th anniversary of its unique Virtual Justice Program. Initially funded in 2010 with a Broadband Technology Opportunity Program Grant, NCCU School of Law pioneered using telepresence and high definition videoconferencing to address the under-representation and lack of access to justice for low income and marginalized communities. The program also offers virtual pre-law courses to prepare students, wherever they are, for the rigor of law school. A "Know Your Rights" series offers legal information that empowers participants to understand the law and promotes self-advocacy.

Career Services Office partners with NAMWOLF—NCCU School of Law's Office of Career Services and Professional Development began a partnership in Fall 2019 with National Association of Minority and Women Owned Law Firms (NAMWOLF) to broaden the diversity pipeline with companies, corporations, and firms actively addressing diversity and inclusion challenges in law offices. We will host a full day to include panel sessions, job fairs, a keynote address, and networking dinner to showcase our practice-ready students to potential employers.

Pro bono *highlights*—In addition to the ongoing Elder Law Project, which assists Durham County citizens in preparing wills and advance directives, over three dozen NCCU Law students provided those services to retired military personnel and spouses at Fort Bragg's Retiree Appreciation Day in October. Over 300 clients were served at this event.

University of North Carolina School of Law

UNC celebrates 175th anniversary—UNC School of Law, North Carolina's oldest professional school, celebrates its 175th anniversary during the 2019-2020 academic year. Since opening its doors in 1845, Carolina Law has played an integral role in shaping the history and progress of the state.

Earn CLE credit—Attend The ABCs of Banking Law, March 25, Charlotte; The Banking Institute, March 26-27, Charlotte; and The J. Nelson Young Tax Institute, April 23-24, Chapel Hill.

Professor Michael Gerhardt testifies at impeachment hearings—Gerhardt was one of four constitutional scholars offering testimony to the Judiciary Committee of the US House of Representatives in connection with the presidential impeachment proceedings.

Hunger in High Point—High Point is not what comes to mind when thinking about the hungriest metropolitan area in the US, but a new report authored by Heather Hunt '02 and Professor Gene Nichol shows many seniors and children struggle with food insecurity and hunger.

Professor Richard Myers '98 sworn in as judge of the United States District Court for the Eastern District of North Carolina—Myers, who joined the UNC law faculty in 2004, was nominated by President Trump to fill the longest standing vacancy in the federal courts.

Professor Maxine Eichner publishes book—Many Americans face challenges in juggling work and parenting. Eichner's book *The Free-Market Family: How the Market Crushed the American Dream (and How It Can Be Restored)* focuses on how policy makers can restore the American dream by supporting families.

Wake Forest School of Law

Wake Forest Law well-represented as reporters and members of the American Law Institute—Professor of Law Chris Coughlin has become the sixth Wake Forest faculty member elected to the American Law Institute (ALI). Coughlin and two co-authors have just published *Law Jobs: The Complete Guide*, offering an in-depth exploration of legal careers, including how technology is changing the practice of law. With interdisciplinary scholarship focused on the legal, ethical, and policy issues in human subjects research and emerging biotechnologies, Coughlin's work has been cited in legal, scientific, medical, and educational journals.

Wake Forest Law currently has four ALI reporters among its faculty—The reporters are Michael Green, Tanya Marsh, Jonathan Cardi, and Mark Hall. Dean Jane Aiken also holds an ALI membership.

Second consecutive Dukeminier Award given to Professor Marie-Amélie George—The Williams Institute of UCLA School of Law awarded Marie-Amélie George a Dukeminier Award for her Yale Law & Policy Review (2019) article, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*. The Dukeminier Awards recognize the best sexual orientation and gender identity law review articles each year.

Wake Forest Law students team up with corporate clients for experiential learning—The Action Learning Project course invites second- and third-year law students to join graduate business student teams in consultation with corporate clients. Wake Forest Law students will use their intellectual property, copyright research, and health care regulation legal knowledge to benefit organizations creating new products or solving business problems.

Professor Ron Wright defends "social justice" movement among local, state, and federal prosecutors—Professor Ron Wright, a leading expert in criminal law and procedure, authored a USA Today op-ed that discusses Attorney General William Barr and current trends in prosecutorial reform. His op-ed, *Attorney General Barr wrong about role of prosecutors. Tough-on-crime stance stunts progress*, argues that district attorneys at the focus of Barr's criticism are listening to the voters who put them in office. ■

John B. McMillan Distinguished Service Award

Mark A. Scruggs

Attorney Mark A. Scruggs received the John B. McMillan Distinguished Service Award on December 3rd at the Tenth Judicial District Bar and Wake County Bar Association Annual Meeting. North Carolina State Bar President C. Colon Willoughby Jr. presented the award.

Mr. Scruggs received his law degree *cum laude* from the Campbell University School of Law in 1986. He was an editor of the *Campbell Law Review*, and a member of the Omicron Delta Kappa National Leadership Honor Society and the Phi Kappa Phi Honor Society. He continues to serves as a volunteer for the law school's mentor program.

Mr. Scruggs spent the first 14 years of his legal career as a well respected trial attorney in Durham at the firm of Spears, Barnes, Baker, Waino & Scruggs. In 2001 Mr. Scruggs joined Lawyers Mutual. In his position as claims counsel, he has had a great impact on North Carolina jurisprudence. Mr. Scruggs serves as a mentor to his fellow claims attorneys at Lawyers Mutual, a counselor for aggrieved lawyers in difficult times, and a kind and patient resource for *pro se* claimants. In addition to his work at Lawyers Mutual, Mr. Scruggs is a frequent and popular CLE speaker. Through teaching the Professionalism for New Admittees Program several times a year, Mr. Scruggs has taught almost a decade's worth of new lawyers about the ethics of forming and maintaining a good attorney-client relationship. He also teaches numerous other CLEs sponsored by the North Carolina Bar Association, NC Advocates for Justice, local bars, and law schools in his ongoing efforts to help lawyers have ethical and rewarding legal careers.

Mr. Scruggs is active in the North Carolina Bar Association and the North Carolina State Bar. He has served as chair of the Law Practice Management Section of the NCBA and as an advisory member of the State Bar's Ethics and Authorized Practice Committees. He served as co-chair of the NC Bar Association's Transitioning Lawyers Commission, working to address the critical issues facing aging lawyers approaching the ends of their careers. Mr. Scruggs recruited attorneys from around North Carolina to help in situations where there was concern that a particular attorney might be experiencing dementia or otherwise slipping in their competence to practice law. He is also one of the principal authors of the publication *Turning Out The Lights,* which serves as a guide for attorneys who are winding down their practices or transitioning into retirement. Mr. Scruggs' work with new admittees as well as retiring lawyers shows his true dedication to the well-being of lawyers from "cradle to grave."

Mr. Scruggs has dedicated his career to improving the quality of services rendered by legal professionals, and encouraging and counseling his peers by providing advice and mentoring.

John R. Wester

John R. "Buddy" Wester received the John B. McMillan Distinguished Service Award at the Mecklenburg County Law & Society Luncheon in Charlotte on October 31, 2019. The award was presented by North Carolina State Bar Past-President G. Gray Wilson.

Mr. Wester attended the University of North Carolina where he was a Morehead scholar. After graduating, he served active duty as a naval intelligence officer and served several more years in the reserves. During that time, he entered Duke University Law School, edited the law review, earned membership in the Order of the Coif, and graduated in 1972 with high honors. He then joined the law firm of Robinson, Bradshaw & Hinson, where he has spent his entire legal career. As a litigator, Mr. Wester has been involved in numerous high-profile cases including *Hyatt v. Shalala*, a class action brought to ensure that disabled citizens of North Carolina received assistance that they were due from the federal government.

Mr. Wester has been a member of the Chief Justice's Commission on Professionalism. He has served as president of the North Carolina Bar Association, served on the Appellate Rules Committee, and has been a long-time advocate for and supporter of Legal Aid of NC and the Charlotte Center for Legal Advocacy. He has served as national vice-chair of the Task Force on Judicial Independence of the American College of Trial Lawyers, and has recently been appointed to serve as the inaugural chair of the college's newly-created Judicial Independence Committee.

In 2016, Mr. Wester won the Distinguished Pro Bono Service Award, presented by the Council for Children's Rights, Legal Services of Southern Piedmont, and Legal Aid of North Carolina. In 2017 he received the Charles S. Ryan Award for professional achievement from the Duke Law Alumni Association. In 2018, Mr. Wester was selected as an inaugural member of the North Carolina Lawyers Hall of Fame.

In addition to honorably serving his country, Mr. Wester has been a passionate advocate for his clients, he has worked tirelessly promoting judicial independence, and he has devoted an extraordinary amount of time to bar leadership, *pro bono* work, and community service.

Nominations Sought

Members of the State Bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. Information and the nomination form are available online at ncbar.gov/bar-programs/distinguished-service-award. Please direct questions to Suzanne Lever at the State Bar office in Raleigh, (919) 828-4620. ■

LAWYERS MUTUAL
CONSULTING + SERVICES

How to succeed in the rapidly changing legal marketplace?

By listening to our insureds and responding to their needs.

Introducing Lawyers Mutual Consulting and Services, here to help lawyers and our peers evolve and thrive. Business development, marketing, succession planning, coaching, firm retreats. Your success is our priority.

Here today, here tomorrow. That's one thing that will never change.

FOR QUESTIONS, CONTACT CAMILLE@LAWYERSMUTUALCONSULTING.COM

800.662.8843 **WWW.LAWYERSMUTUALCONSULTING.COM**

The North Carolina State Bar
PO Box 25908
Raleigh, NC 27611

Spring 2020