

THE NORTH CAROLINA STATE BAR

# JOURNAL

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2021



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THE  
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# Embracing Change

BY BARBARA R. CHRISTY

*Come gather 'round people  
wherever you roam  
And admit that the waters  
around you have grown  
And accept it that soon you'll  
be drenched to the bone  
And if your breath to you is  
worth savin'  
Then you better start swim-  
min' or you'll sink like a stone  
For the times, they are a-  
changin'*

—Bob Dylan

While attending a meeting of the Southern Conference of Bar Presidents, I had the opportunity to visit the State Bar building in another state. In the lobby area of the building there was a replica of a lawyer's office from over a hundred years ago. What struck me as I looked at it was not how different it looked from a lawyer's office today, but how little it had changed. There was a large desk covered with paper, a chair and table for client conferences, and bookshelves full of weighty tomes. Had there been a computer on the desk it would strongly resemble the office of many lawyers today.

The lawyer's office I have described is designed for a lawyer to meet with a client and deliver legal advice face-to-face and one-to-one. Many will tell you this is the very best way to practice law and they cling to it fiercely. However, there is hard data that tells us that perception is not reality, and that most North Carolina citizens are

unable to access or afford traditional legal services.

In 2020 the North Carolina Equal Access to Justice Commission and the Equal Justice Alliance partnered with UNC Greenboro's Center for Housing and Community Studies to undertake a comprehensive assessment of civil legal needs in North Carolina. I commend to you the entire report, which may be found at [nclegalneeds.org](http://nclegalneeds.org), but some of the salient facts include the following:

- 71% of low-income families will experience at least one civil legal problem in a given year.
- 86% of these legal needs go unmet because of limited resources for civil legal aid providers.
- Legal aid providers are forced to turn away many eligible people with meritorious cases due to lack of resources.
- Family law was by far the most often mentioned area of underserved practice. The second most often cited was immigration. Housing issues are also prevalent.
- For both low-income and middle-income families, cost was named as the greatest barrier to access to legal services.
- Underserved populations include veterans, the elderly, and people with disabilities.

These issues are not confined to the civil arena. While it is true that anyone who is charged with a crime is entitled to appointed legal counsel if indigent, a Workload Assessment completed by the North Carolina Office of Indigent Defense Services in 2019 concluded that around 500 additional attorneys, 112 administrative staff members, and 139 investigators would be needed to effectively handle cur-

rent public defender office caseloads. The difficulty in increasing the number of attorneys providing indigent defense services is compounded by the large caseloads such attorneys are required to handle and the limited compensation they receive (an issue currently being studied by the State Bar's Subcommittee on Compensation of Court-Appointed Counsel.)

The challenge then, is how to embrace the changes necessary to increase access to justice without compromising our values. One of my very favorite events of the year is the annual luncheon given by the State Bar to celebrate lawyers who have been licensed for 50 years. These lawyers are invited to share a short biography about themselves and their legal career. Time



and time again, these bios reveal that lawyers are deeply committed to the profession of law and the system of justice. Though the luncheon for 2020 honorees had to be postponed, some biographies were still submitted and contained quotes such as “[a]dvocating for the rights of individuals, whether in the civil or criminal context, fit with my desire to use the law as a tool for social justice,” “problem solving challenging issues has been the most rewarding part of my practice,” and “if I am remembered for anything, I hope it is my work in trying to build a solid, fair structure for the district court,” as well as numerous stories about meaningful professional relationships. These vignettes reveal that collegiality, professionalism, advocacy, public service, and hard work are some of the values that lawyers consider important. There are several ways to retain these values

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while increasing access to justice.

*Pro bono* service and legal aid have been traditional means of making legal services available to those of limited means—and they will always be important in this regard—but there are simply not enough lawyers to address all the unmet need. Even if every licensed attorney in the state met the aspirational goal of 50 hours of *pro bono* service each year, it would not be enough. In addition, many of the unmet needs are those of middle-income families who don't qualify for the services of legal aid, but still find themselves unable to afford the services of a lawyer.

Technological innovations can definitely help both lawyers and *pro se* litigants. Programs such as the Self-Serve Center in Mecklenburg County and the Guide and File System recently implemented by the Administrative Office of the Courts offer persons representing themselves resources and guidance. Once fully implemented, e-Courts will greatly improve efficiency for all those involved in the judicial system. Lawyers, considered slow to change as a

group, showed remarkable resilience as they had to move to a virtual practice with very little notice due to the COVID-19 restrictions. Some changes, such as remote calendar call and certain other remote hearings, may become permanent and will allow lawyers to reduce their time in court and increase their time available to serve clients.

We must also consider whether regulatory changes can improve access to justice. In 2019, a group commissioned by the Utah Supreme Court released a report called *Narrowing the Access-to-Justice Gap by Reimagining Regulation*. We have started reimagining regulation in North Carolina as we have a State Bar committee studying new and innovative programs in other states such as court navigators, licensed paralegal practitioners, online dispute resolution, document preparers, and statewide self-help centers. Some view any innovation in the practice of law as a retreat from our profession's important values, yet we are in a time where many people prepare their own taxes using a software program

and handle routine medical matters with physicians' assistants, nurse practitioners, or through telehealth visits. Rather than fighting these changes, we should study them with open hearts and minds, regulate as necessary to ensure protection of the public, but recognize that we must improve access to justice.

I will leave you with a few final reflections. The first is from Charles Darwin who spent his life studying change and concluded, "It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change." Socrates also offers this timeless bit of advice: "[t]he secret of change is to focus all of your energy, not on fighting the old, but on building the new." Lawyers are smart, hard-working, and dedicated. I know we can do this. ■

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

# CLE and Me...and You...

BY ALICE NEECE MINE

I was licensed in North Carolina in 1985, which means that I was a member of the first generation of lawyers who were required to take continuing legal education courses from the beginning of their legal careers. Technically, the Supreme Court order approving the rules that created the CLE program was not entered until October 7, 1987, a couple of years after I was licensed, but the rules were being drafted and the campaign to get North Carolina lawyers to embrace mandatory CLE (MCLE as it is known in most other states) was well underway when I took my first job at a law firm. I never considered the requirements that I take 12 hours of CLE every year and the three-hour “ethics block” every three years (required at that time) to be unusual or onerous. However, when I was hired at the State Bar a few years later to serve as director of CLE—in addition to some other roles—I learned that MCLE was quite controversial when originally introduced to the more seasoned members of the Bar. From my new-lawyer perspective, it was just part of what you did to stay on top of the law, to remain competent as the Rules of Professional Conduct and our malpractice carriers tell us we need to be. (Truth be told, for new lawyers—or at least for me—it was a part of becoming competent.) I bought the admonishment in the “Purpose” section of the CLE rules:

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications, and amendments) and are increasing in complexity. One cannot render competent legal services without con-

tinuous education and training. 27 N.C. Admin. Code 1D, Rule .1501(b). For perspective on whether the rapidity of change has declined since 1987, consider that the “purpose” section was written before email, websites, social media, the cloud. Need I say more?



Whether you agree with the admonishment or not, there are three important matters relevant to MCLE in this edition of the *Journal* on which an engaged lawyer should educate herself. First, there is an article by Court of Appeals Judge Richard Dietz in which he suggests that MCLE “needs a rework” because it costs too much, isn’t available on an equal basis, and doesn’t deliver on the promise to make lawyers more competent. At the end of the article, he asks the legal community “to confront these realities and find solutions.” I do not agree with many of the criticisms in the article, and I still believe that MCLE has an important role to play in maintaining competency, but I do agree with Judge Dietz that there is always room for improvement in any program, especially one that has been around for over 30 years. The State Bar’s Board of Continuing Legal Education has, in fact, recognized the need to streamline and simplify our program and procedures. It is currently undertaking a complete review of the process for accrediting courses, for accounting for the CLE credits for every active lawyer on an annual basis, and for collecting the funds necessary to operate the program. For example, serious consideration will be given to going to a two-year or three-year reporting period. To echo Judge Dietz, input from the members of the Bar on ways to improve MCLE in North Carolina is welcomed.

The second item of MCLE interest is found in the section of the “Rule Amendments” article that reports on amendments headed to the Supreme Court for approval (*see* page 46). At its April meeting, the State Bar Council approved amendments to the CLE rules that add a definition for CLE training on diversity, inclusion, and elimination of bias and will require all active members of the State Bar to take an hour of such training in 2022 as a part of their annual 12-hour MCLE. The rule amendments do not currently require additional “D & I” training after 2022, but, once the overhaul of the State Bar’s CLE program is complete, there is a possibility that the CLE Board will propose that such training be required on a periodic basis like the mental health/substance abuse requirement. Note that the requirement for 2022 will only take effect if the rule amendments are approved by the Supreme Court. They will be submitted to the Court for its consideration after the July Quarterly Meeting of the State Bar Council (July 13-16, 2021). Many lawyers and organizations commented on the proposed new requirement. Feelings ran strongly both in favor of adoption and against. Those in opposition largely objected to a new requirement because they did not see such training as being relevant to the competency of a lawyer as a lawyer. The CLE Board was provided with all comments; however, after undergoing the training itself, the board concluded that education on diversity, inclusion, and elimination of bias is essential to lawyer competency in our complex, ever-changing society. Like the requirement to take the three-hour ethics block that was mandated back in the 1980s when many lawyers were essentially ignorant of the content of the Rules of Professional Conduct, diversity, inclusion, and elimination of bias training may be the education that

CONTINUED ON PAGE 12

# Time for Digital Justice Access Commission, a Digital Agenda for the NC Courts Commission

BY THE HONORABLE CHASE SAUNDERS AND KATHLEEN K. LUCCHESI

**C** OVID-19 changed everything in 2020. Public and attorney access to justice and its processes was denied, impeded, postponed, and delayed in a manner never before seen

in North Carolina's judicial history. Digital solutions are keeping the economy afloat and have worked to mitigate some of the effects of COVID-19. These solutions are only marginally available or useful to the judicial system because it is primarily an analog system—a system rooted in the last major reforms instituted by the NC Courts Commission in the late

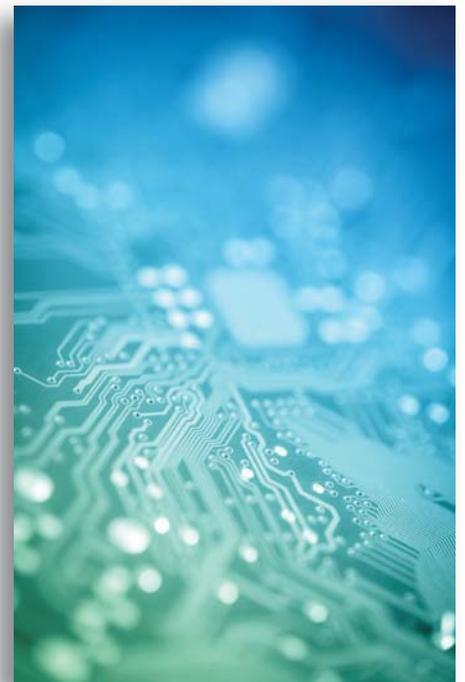
1960s. As we move into 2021, we must acknowledge and plan to solve the technology challenges associated with reopening.

In an effort to identify the impact of the pandemic on the practicing attorney, we were asked by Mecklenburg County Bar President Heath Gilbert to co-chair and assemble a team of practitioners to examine the problems and priorities resulting from the global crisis for a project entitled the "Justice Access Initiative." The Mecklenburg County Bar sent out a survey to its 6,000

members seeking input. Our coalition of nearly 100 people included members of the bar, judicial executives, business executives, and academicians divided into nine teams covering nine sectors or ecosystems. Over the course of 90 days, these teams met remotely to identify the issues facing practitioners in these ecosystems and, most importantly to our mission, suggest work-

able solutions with a priority given to those solutions which were immediately doable, those intermediately doable, and those needing a longer term effort.

At the end of 90 days, our teams culled this information into nine Team Sector reports. These reports identified those things which could be done locally and those which would require state action. They



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acknowledged the problems judicial services executives are facing and their immediate need for assistance. The reports were not “pie in the sky” in their assessments or proposed solutions—they were pragmatic and existential, and realistically address the challenges posed by inherent inequities in social mobility and digital access in every community. These reports are the meat of an unprecedented nearly 700-page, sector-by-sector report and appendix entitled “The Case for Change.”

Through our work chairing this examination process, the information that we were obtaining suggested to the two of us that while technology has changed over the last 50 years, it was COVID-19 that really exposed the need to advance the judicial system into the 21st Century through technology. This state has a history of new advancements. The Courts Commission of the 1960s into the 1970s instituted new and much needed reforms. Notable among them was the creation of the uniform court system operating under a uniform and standardized set of district, superior, and appellate courts that followed the newly enacted uniform rules of civil procedure. A uniform codification of criminal laws followed.

Through our efforts in examining the consequences of COVID-19, the two of us have come to the realization that there is now a critical need for a uniform and statewide approach to solve the problems associated with the pandemic. Most of our states’ courts were either closed or operating in a limited capacity since mid-March 2020 upon multiple orders from multiple judicial officials. Each county moved forward in an attempt for remote access despite never having done it before and within their traditional budgets. Creating remote procedures and protocol isn’t a task that happens overnight. It’s a hugely difficult and time-consuming task. Adapting the available digital technology to the new protocol, educating the public and the bar on its use, and ensuring digital access to the vast numbers of our communities on the other side of the digital divide pose immense and, for some counties, insurmountable challenges best addressed in a collective and collaborative fashion.

Through our research, we have discovered that the collaborative approach that we employed in chairing the research initiative is inherent in the digital ecosystem in which our successful enterprises reside as lawyers.

The approach recognizes that each sector of legal activity is an ecosystem with its own unique procedures and operational needs and rules. Digitization is simply the marriage of current technology to the vast, separate, and multiple databases to create an accessible, equitable, transparent, data-driven, uniform, and accountable system which is responsive to the needs of the people and to the members of the Bar.

Many of us see the fruits of this marriage in our daily lives in our ability to immediately access goods, services, and entertainment. From online shopping to food delivery, the result can be a higher quality of life with greater efficiency and better outcomes. Watching streaming media, remote working, remote education, reduced commuting, free messaging, democratized investing, democratized publication and reporting of information via online social media platforms, and democratized access to knowledge can all be good things. Even healthcare is finding its way onto virtual platforms with telemedicine and remote patient access. Every service and change has been re-envisioned and restructured to be user and consumer friendly and, more importantly, readily accessible online.

The judicial system is anything but consumer friendly. Among all of the good things now available to the public, improving access to justice had been overlooked. While all private institutions have been adapting to the Internet of Things (including service), our institution of legal justice has been denied the same opportunities to grow and adapt, even at a time when instances of crime are rising and civil courts are being flooded with increasing case filings each year.

The aforementioned report, in our minds, can represent a blueprint for the conversation which must take place at both the community level and statewide because justice and its reforms are matters of public interest and, in the world of digitization, the power and utility of the justice system will come from its connectivity.

What are some extant issues?

- Recognizing that the judicial system in all of its elements is an interconnected ecosystem
- Envisioning a uniform digital, consumer-friendly judicial system with access to all
- Collaborating with the public and business communities seeking input and

resources

- Developing goals by which to measure performance by a digitized judicial system
- Ensuring that there is reliable internet access to mitigate the effects of the digital divide
- Developing remote procedures which are accessible and user friendly for common legal processes
- Implementing and educating the public and profession in how these remote protocols work
- Developing informational systems which provide real time information for public users (i.e., chatbots)
- Connecting all databases in all courthouses and register of deeds office into a statewide network
- Establishing juror and court operation health protocols to ensure sustainable operation
- Re-envisioning the services provided by judicial system officials to provide support and education
- Establishing a Digital Justice Access Commission (DJAC) to establish goals and priorities to be addressed
- Setting deadlines for DJAC work to ensure that time is recognized to be of the essence

As a result of COVID-19, the judicial system is in crisis. Access to justice has been limited by the pandemic, but outside the courthouse, change is happening all around us. Nearly every other major institution serving our community is responding to the pandemic through the use and creation of digital technologies and platforms. Meanwhile, judicial operations are falling further behind every day. The case for change is evident and solutions are recognizable and implementable—the only question is whether we have the will to act. The Justice Access Initiative merely started the conversation. It’s now up to all of us as members of the Bar to continue these conversations.

We hope that the current NC Courts Commission can facilitate these conversations by taking a leading role in setting an agenda for the digitization of the justice system to provide access to justice for all. ■

*Kathleen K. Lucchesi (Jackson Lewis, PC) regularly advises, trains, and defends employers regarding all types of human resources and*

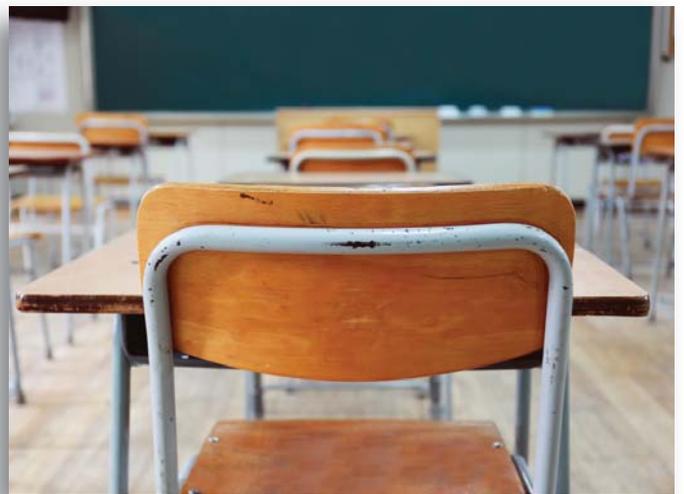
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# Continuing Legal Education Needs a Rework

BY THE HONORABLE RICHARD DIETZ

**A**s an appellate judge, I'm exempt from the State Bar's continuing legal education requirements. So I'll be honest—I haven't been paying much attention to

CLE. But late last year, appellate lawyers started telling me that their usual CLE programs were postponed or cancelled because of the pan-



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demical and they didn't know where to get their hours. With the generous help of my colleagues on the court of appeals, we threw together a six-hour free CLE course and put it on the court website.

It wasn't a flashy program because we didn't have much time. We spent a few late nights cranking out PowerPoint slides and then recorded it on our webcams. I wasn't sure how the program would be received, but it proved popular. More than 1,000 lawyers participated. But when I started getting feedback on the program, I saw a troubling pattern. The participants were largely a collection of lawyers in rural areas, public and non-profit attorneys, and minorities in the profession. And they all told me the same story. It wasn't just the pandemic, they always struggled to find affordable CLE.

My experience exposed an unfortunate

truth about our state's continuing legal education system: it's not working. CLE providers have become predatory; the system itself has become discriminatory; and our failure to address these issues is undermining core values of our profession.

Your initial reaction to this might be skepticism—after all, if this were true, surely someone would have done something about it by now. But there are many interest groups that profit (often literally) from the current system and don't want it to change. We need to acknowledge that there are better, less harmful ways to educate lawyers.

Let me start at the beginning. Why do we

have continuing legal education? Mandatory CLE was born a half-century ago, amidst concern in legal communities nationwide that "the rising number of new attorneys had led to a decrease in the quality of lawyering."<sup>1</sup> A speech by Chief Justice Warren Burger, later published in the *Fordham Law Review*, often is credited as a key catalyst for mandatory CLE initiatives.<sup>2</sup> Chief Justice Burger believed newly practicing attorneys lacked essential legal skills, especially courtroom skills, and that one solution was post-law school training "under the tutelage of experts, not by trial and error at clients' expense."<sup>3</sup>

The early proponents of mandatory CLE

had good intentions. They viewed the continuing education of practicing attorneys as a shared responsibility of law schools, the bar, and the judiciary.<sup>4</sup> They imagined CLE as a collaborative process where the insights of more experienced attorneys freely could be shared for the betterment of the profession.

In North Carolina, that vision is not reality. CLE isn't collaborative, it isn't freely shared, and it certainly isn't free. Many (purportedly) nonprofit CLE providers aggressively push their own paid CLE offerings and refuse to promote other opportunities. Meanwhile, lawyers are flooded with advertisements from for-profit companies scrambling to offer the cheapest, simplest way to pick up those mandatory hours.

To make matters worse, the CLE system puts an arbitrary one-year expiration date on CLE. So, for example, a free video CLE on the art of cross-examination from a legendary trial lawyer—with practice tips that are effectively timeless—needs reapproval every year. That takes time and effort. The system inadvertently rewards sophisticated providers who treat CLE like a business, and hinders those who would offer it solely as a public service.

So what's going on here? The truth is that CLE is no longer about helping the profession or improving the competence of lawyers. Today, CLE is all about making money. Every year the mandatory CLE for our state's lawyers raises somewhere between 10 and 20 million dollars in revenue for various businesses and organizations.<sup>5</sup> On top of that, the State Bar charges a fee for every CLE hour to fund various legal initiatives. That fee is either paid directly by lawyers or passed on to them in CLE pricing, making it, in effect, a second million dollar licensing tax on the profession.

Of course, if CLE actually worked—that is, if it made lawyers more competent—perhaps we could justify the costs, the resources, even the bad incentives. But CLE doesn't work. For years, neutral academics and empiricists (meaning those not working at the behest of CLE proponents) have tried to find evidence that CLE makes lawyers more competent, lowers malpractice premiums, or leads to fewer disciplinary cases. The data simply don't support these claims.<sup>6</sup>

This shouldn't surprise you. Remember those concerns from a half-century ago about a surge of newly practicing attorneys lacking essential skills? Those concerns seem rather antiquated today, when law schools are

falling over themselves to emphasize practical skills, offer for-credit externships or residencies, and create legal clinics for every conceivable practice area. And what about lawyers who, despite graduating from law school, passing a complicated licensing exam, and then gaining experience on the job, still need training in basic competencies? They are unlikely to enroll in the sort of sophisticated, engaging CLE offerings that would fix the problem—the sort of CLE that the original architects of the system envisioned. After all, those CLEs tend to cost hundreds—sometimes thousands—of dollars. Instead, it is reasonable to expect these lawyers (like so many others) to search out the cheapest, most convenient options to hit their required hours and move on.

Worse yet, the transformation of CLE into a money-making enterprise has made the system unfair and discriminatory. CLE favors wealthy, white urban elites. Many large law firms, for example, contract with CLE providers so that their attorneys can get their CLE through presentations at the office without paying anything out of pocket. Indeed, big firms often view CLE as a business tool, hosting free CLE events at hotels or country clubs advertised primarily to in-house counsel of the firm's current and potential clients.

By contrast, solo practitioners, lawyers at smaller firms and organizations, and many public sector lawyers pay for CLE themselves. Particularly for newer attorneys still building their practice, quality CLE is a financial hardship. And because a disproportionate number of lawyers in these practice settings are minorities,<sup>7</sup> these financial burdens hurt minority lawyers more than their white counterparts.

CLE also favors well-connected urban lawyers. There are far more CLE offerings, in far more subject matter areas, in our state's urban regions. For many lawyers, it isn't feasible to spend an entire day traveling to and from Raleigh or Charlotte for a one-hour lunch CLE. The State Bar recently lifted its long-time cap on the number of CLE hours that can be done online, but it's not clear how many providers will move their programs online. After all, these programs often are part of a larger event or conference that require in-person attendees to be profitable.

The State Bar also gives CLE presenters up to six hours of CLE credit for every one hour they teach. Hitting the required CLE hours becomes trivial for influential urban

## CLE Board Conducting Rules Review

The North Carolina Board of Continuing Legal Education recently began a comprehensive review of its rules and regulations with the goal of making the CLE process more user-friendly and efficient for North Carolina lawyers and for the administration of the program. Rules under review include the length of the CLE reporting period, credit-hour fees, the annual report filing requirement, and many others. The board will conduct its review over the next few months and any recommended changes will be proposed through the State Bar's standard rulemaking process. Any proposed rule changes will be communicated to members well in advance of any rules going into effect. Livestreams of CLE Board meetings are available on the State Bar's YouTube channel, [youtube.com/northcarolinastatebar](https://youtube.com/northcarolinastatebar).

lawyers who can teach a CLE session at a conference, stay for the other sessions, and finish their entire yearly CLE in a day. Lawyers without this sort of access are left scrambling to find options as the CLE year draws to a close. Providers prey on these unfortunate lawyers by offering convenient "catch-up" programs in January and February—for a price.

So what can we, as a profession, do to fix these problems? I have some ideas. And the good news is I'm not alone. In preparing this article, I spoke to the State Bar's CLE director and was impressed with the Bar's commitment to improving the CLE system. The bad news is, there will be opposition to change. After all, anything that makes CLE less costly and more accessible will mean millions of dollars in lost profit for providers.

Ultimately, I believe the CLE system needs radical reform. But for now, there are some straightforward changes that can address the biggest issues. Here are a few proposals.

First, we need to upgrade the State Bar's CLE website to improve its search functionality. The current website is clunky and

doesn't let attorneys filter CLE offerings by price. We need to make it easy for lawyers to search for free or low-cost CLE options, especially the online options, directly on the CLE website.

Second, we need to extend the arbitrary expiration dates on CLE. Online CLE like the one I mentioned earlier on the art of cross-examination, with advice that is effectively timeless, should be approved for five or ten years at a time, on the condition that the creator notify the Bar if the law changes and the program needs to be updated or removed. We need to create a lasting library of quality, accessible CLE and stop rewarding the providers who profit off our need to churn out more CLE every year.

Finally, we need to follow the lead of other states and start counting some *pro bono* time as CLE. In private practice, I spent hundreds of hours every year on *pro bono* work. The practical training and experience I gained from every single hour spent on my

*pro bono* cases was worth more than any CLE I've ever taken. I doubt my situation is unique. Many lawyers will get far more training out of *pro bono* work than they ever could sitting through a CLE lecture.

Some states have started to count time spent on *pro bono* as an alternative to traditional CLE. This solves many of the costs, access, and fairness issues with CLE and, at the same time, helps address unmet legal needs. This alternative to traditional CLE is nothing but upside and we should embrace it.

I've offered a few ideas to fix our CLE system, but there are surely many others. We need to come together to talk about them. Our state's continuing legal education system isn't fair, and it isn't working as intended. As a self-governing profession, we owe it to ourselves and to the public to confront these realities and find solutions. ■

*Richard Dietz is a judge on the North Carolina Court of Appeals.*

## Endnotes

1. Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 La. L. Rev. 547, 550 (2018).
2. Cheri A. Harris, *MCLE: The Perils, Pitfalls, and Promise of Regulation*, 40 Val. U. L. Rev. 359, 361 (2006).
3. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 230 (1973).
4. William R. Rakes, *Conclaves on Legal Education: Catalyst for Improvement of the Profession*, 72 Notre Dame L. Rev. 1119, 1120 (1997).
5. See Claudine V. Pease-Wingenter, *Halting the Profession's Female Brain Drain While Increasing the Provision of Legal Services to the Poor: A Proposal to Revamp and Expand Emeritus Attorney Programs*, 37 Okla. City U. L. Rev. 433, 459 (2012) (calculating average mandatory CLE costs as \$30-\$50 per credit hour).
6. Sirota, *supra* note 1, at 554; Donald S. Murphy & Thomas Schwen, *The Future: Transitioning from Training Lawyers to Improving Their Performance*, 40 Val. U. L. Rev. 521 (2006).
7. American Bar Association, *2020 ABA Profile of the Legal Profession*, at 43.

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## State Bar Outlook (cont.)

lawyers do not know that they need. Cheyenne Chambers has shared her perspective on the need for this training in her article, "Actions Speak Louder than Apologies" on page 14 of this edition of the *Journal*.

The third item of MCLE interest is the publication for comment, in the "Rule Amendments" section of a proposed new comment to Rule of Professional Conduct 1.1 on the duty of competency. The comment observes that competency "includes a lawyer's awareness of implicit bias and cultural differences...that might affect the lawyer's

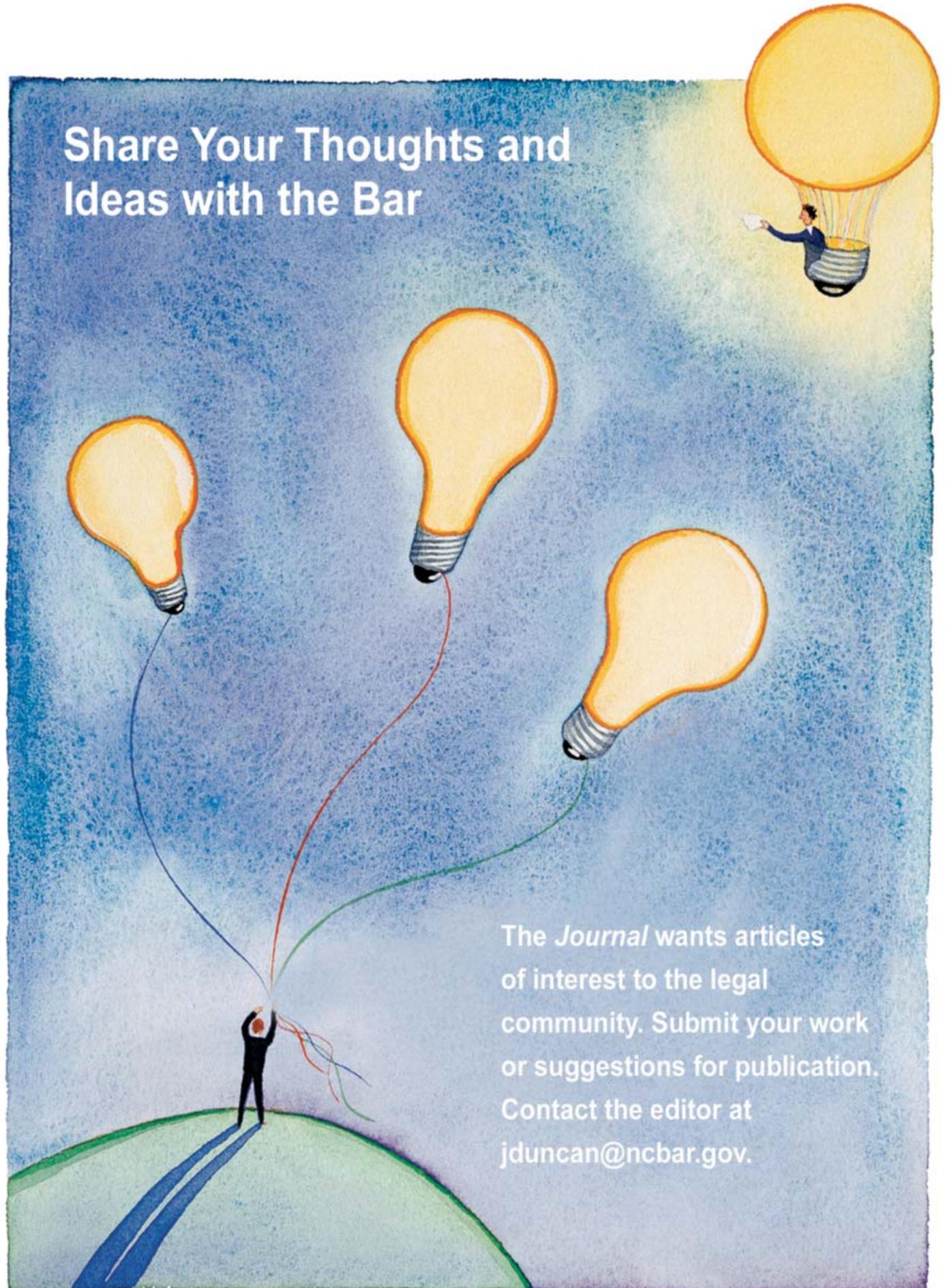
representation of the client." Although an echo of the new MCLE requirement that awaits approval by the Supreme Court, the proposal to add this comment to Rule 1.1 derived separately, if simultaneously, from the deliberations of the Ethics Committee. The confluence of these two initiatives is indicative of their importance for our profession at this moment in time.

Here are three opportunities for the members of the Bar to voice their opinions and to offer creative solutions. By doing so, you will participate not only in shaping the educational requirements to practice law in North Carolina, you will also participate in shaping the message to the public those requirements convey about our values as a profession. So, send your comments and recommendations to me or Peter Bolac, State Bar assistant director and director of CLE (amine@ncbar.gov; pbolac@ncbar.gov); comments on Rule 1.1 may also be sent to ethicscomments@ncbar.gov. Any comments we receive on the proposed new MCLE requirement will be shared with the members of the Supreme Court. ■

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



# Share Your Thoughts and Ideas with the Bar



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# Actions Speak Louder than Apologies—Why Attorneys Need Diversity and Inclusion Training

BY CHEYENNE N. CHAMBERS

**A**s Americans flooded the streets last summer, text messages, emails, and social media notifications flooded my inboxes. Law schools, bar associations, and law firms from across the country released statements.



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They quoted Dr. Martin Luther King Jr. They pledged to donate money. They called for solidarity. Even attorneys, some I had not heard from in years, wrote to me:

*I cannot believe that someone would treat another human being that way! I love what you shared on LinkedIn—very well said, Cheyenne. I am really sorry that this happened. Is there anything that I can do?*

I observed their dismay. I noticed their kind words. And I read their apologies. But I did not feel any better. Quite frankly, I still do not feel any better. Because minutes after I heard the words, “guilty, guilty, guilty,” I

received a news alert about 16-year-old Ma’Khia Bryant, who was killed by a police officer in Columbus, Ohio.

We have only scratched the surface of something that has been going on for centuries. Even the most genuine apology cannot heal my generational pain. Systemic change is what I need.

So, when two prominent members of the Bar asked me to write an article for the *Journal* explaining why diversity and inclu-

sion training should become a required part of our continuing legal education, I accepted the invitation without hesitation. As a young attorney, I am honored to share my thoughts on such an important proposal that affects thousands of people. A proposal that, if implemented and *utilized*, will advance my beloved profession in tangible ways. But as a Black woman, who has already addressed similar issues in other areas of the law, I am deeply concerned about the real possibility

that some of my peers, even after everything that happened last summer (and is still happening today), will question the need for such reformative courses.

Aware of the potential for pushback, I explored a variety of methods to articulate my support for mandatory diversity and inclusion training. I could have examined numerous shortcomings of our country's previous presidential administration. But some would say that this approach is too "political." I could have presented statistical evidence to confirm that people of color die while in police custody at disproportionately higher rates, and for those who make it to the arraignment, their constitutional rights are infringed upon at every stage of the criminal justice system. But some would assert that this angle is too "divisive." Or I could have started this article by just listing the names of Monika Diamond, Chanel Scurlock, and Elisha Walker. But unfortunately, some of you would have no idea who I am talking about, even though you might have spent a the last several months using the hashtag #BlackLivesMatter. Therefore, after a series of handwritten drafts that were too "unfamiliar," too "divisive," and too "political," I settled for a more neutral approach, one that I believe with which we can surely all agree.

The North Carolina Rules of Professional Conduct, our code of ethics which seeks to unify all who practice in this state, contains the most straightforward reason for why diversity and inclusion courses should be mandatory for attorneys:

#### Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Simply put, every client has a story. That story has been shaped not only by their race, color, ethnicity, sex, gender identity, sexual orientation, national origin, religion, age, disability, and economic status, it has also been impacted by how others perceive, oppose, or engage with these characteristics. A client's story, complete with all of its complexities, contradictions, and concerns, is *always* relevant to the client's situation. The legal profession, at its core, requires attorneys to assess the ways in which humans interact with one

another, and then consider whether those interactions are permissible. If an attorney lacks the competence necessary to comprehend how their client's story connects to their legal matter, then that attorney—win, lose, or settle—has fallen short of their ethical duty as an advisor. Period.

Let me be clear—I do not mean to suggest that attorneys are supposed to be perfect. Regardless of how many awards one receives, verdicts one obtains, or black robes one wears, no attorney will be perfect. But our inability to achieve perfection should not be used as an excuse to do nothing. We can always do better. And after what happened last summer, we must do better. Not just for our clients, but for each other, and for the thousands of attorneys and clients who will follow us.

As this diversity and inclusion initiative proceeds through the proper administrative channels, I want to remind my fellow members of the Bar that there is plenty that can be done right now. In fact, here are three steps that you can complete this week (and every week) to become a more supportive ally, and by consequence, a more effective advisor to your clients:

**Do Your Research:** We spend days on Westlaw or LexisNexis searching for the right set of cases to cite in a brief. We spend hours reviewing deposition transcripts and exhibits to ensure that the most important facts are presented to the court. We even spend several moments throughout the day consumed with our social media feeds to see if our colleagues responded to a post that we shared earlier in the day. So, we are more than capable of reserving time each week to educate ourselves on different factors that contribute to our profession's lack of diversity. Remember, if you can spend 15 minutes scrolling the internet for the lyrics to your favorite rap song, or 15 minutes watching the highlights from last night's game, then you can spend another 15 minutes reading an article about why attorneys of color have higher attrition rates at law firms. (Like any other continuing legal education course that explains recent developments in the law, diversity and inclusion courses can assist attorneys with recognizing the most persistent issues affecting our profession and the communities that we represent.)

**Question Everything:** After you finish reading that article about high attrition rates, visit your law firm's website or your employer's directory and review the attorney profiles. Are there any attorneys of color on the page?

If so, how many? Does each practice group have an attorney of color? How many partners are women? How diverse was your previous class of summer associates? What type of *pro bono* projects did your firm support last year? Has your employer engaged in any meaningful attempts to mentor law students, or network with respective affinity groups at law schools? Consider the diversity statement that almost every large employer has posted on its website: are you and your colleagues actually living up to your commitment? Again, I get it; no one firm or employer can do everything. But there is always room for improvement. Remember, a commitment without reflection and refinement is nothing more than an empty promise. (Diversity and inclusion courses can help attorneys identify which areas within their firms need improvement, develop effective strategies on how to advance the diversity pipeline to the legal profession, and pinpoint which overlooked communities need *pro bono* services.)

**See Something, Say Something:** A male colleague once invited me to attend a meeting with a male client I had never met before. Seconds after I walked into the room, the client, who thought I was my colleague's administrative assistant, asked me to get him a glass of water. The male colleague quickly interjected and told the client that I was joining as co-counsel on his case. The colleague then left the room to get a glass of water for the client. Underrepresented attorneys experience microaggressions like this in the office and in the courtroom almost every day. And too many times, another attorney will witness these microaggressions happen without saying a word. When you see something, say something. Otherwise, your silence is complicity. (Our prospective diversity and inclusion courses can provide safe spaces for guest speakers and panelists to share their own experiences with microaggressions, and offer advice to attorneys on how to address these uncomfortable situations with their clients, colleagues, and judges.)

*I am really sorry that this happened, Cheyenne. Is there anything that I can do? Yes. Do the work. ■*

*Cheyenne N. Chambers is a civil rights attorney with Tin, Fulton, Walker & Owen, PLLC, in Charlotte. Before private practice, Chambers served as a law clerk to the Honorable Paul J. Watford of the US Court of Appeals for the Ninth Circuit.*

# Opioid Overdoses Have Not Gone Away

BY JUSTIN GARRITY

*The yellowed walls trapped the lingering smoke in the dingy room at the local Motel 6. Empty liquor bottles and tall blue discarded Bud Light cans littered the counters and floor. A pile of women's clothing sprawled across the bed: a balled-up black and white halter top came to a rest atop a cut-off blue jean skirt. A gaggle of hangers tore through the black trash bag that held the rest of this woman's stuff. This ripped trash bag and a cracking, plastic, dollar-store linen basket held her entire life, containers that seemed destined to break—much like we were. The cigarette butts filling three black ash-trays made the room reek of poison and discarded hope.*

*She sat on the floor wearing a yellow spaghetti strap shirt, naked from the waist down. She had strawberry blonde hair with light white streaks through it and a three-leaf clover tattooed on her neck. Blood ran down the inside of her arm and slowly dripped from her pinky finger onto the matted carpet. Her eyes were fluttering open and closed. She was talking incessantly, but I could not make out anything she said.*

*Hotels, parked cars, bathrooms—they were all home to me. Although I was intimately familiar with this setting, I felt oddly out of place as I looked around the room. This was not who I was supposed to be. When my eyes focused on the mirror, I could not recognize the person staring back at me. My ribs protruded through a thin veil of pale blue skin. Those haunted, demonic eyes, glowing a burnt red, scared me, and I saw my fear reflected right back at me. Here I was in this hell I had often tried to escape but, through my inability to break free on my own, found myself ensnared in once again. Staring at the macabre figure in the mirror, completely ashamed of what I had once again devolved into, I heard three loud*

*bangs at the door followed by an authoritative, "Cary Police—open up, or we're coming in!"*

*It didn't take long for them to find the drugs, so I went to jail.*

*I have been in recovery ever since that night in April 2014. I am lucky, grateful, and blessed.*

## Too Many People

On Friday, October 30, Brandon, whose leg was mangled from an infection that led to sepsis, passed away; Rome passed on Monday, November 16, after using cocaine that contained fentanyl—Rome didn't know the deadly drug was mixed in the bag; a blood clot in the brain caused by bacterial endocarditis snatched Adam away on Wednesday, November 25; Skylar, a beautiful young man who continually battled addiction, took his own life on Friday, December 11; and Nate, who was doing so well, died from an overdose on Sunday, December 13.

I am 33 years old and work at a nonprofit homeless shelter with a peer led program that helps individuals overcome substance use disorders, and the past few months have been rough. "I'm nearly twice your age and you know more people that die every year than me. I'm the one who is supposed to know more people dying, not you." My mom said this to me a few years ago and it resonates each time another member of my recovery network passes. During COVID, isolation has led to more use, higher potency drugs have led to more overdoses, and more overdoses have led to more emergency department admissions and deaths.

*Connected to a ventilator, short breaths rattle her lungs while she is reaching her now brittle hand for the adult children who are crying*



©iStockphoto.com/Stuart Ritchie

*behind a hospital window unable to see their mother in her most needy time—a pain even Tantalus cannot understand.*

COVID-19 has shaken the lives of every American, some much more than others. This past year's headlines have transitioned from the previous national epidemic of opioid overdose to the tragedies of COVID-19. One epidemic lurks in the shadows, while the other lingers in the air, and both are slaying more people each day. Resounding themes link the pandemic and the crisis.

- "Science." White, suburban children were dying at record numbers from over-

dose, and the public began listening to how addiction progresses. Shifting the long-held belief that addiction was a moral failing to viewing the affliction as a chronic, relapsing disease led to new programs. Field experts' data-driven, evidence-based solutions provided insight and action on decreasing overdose. Understanding the virus' dangers, scientists of all ranks provided best practices for overcoming COVID. Expert opinion and analysis still prove the best way to overcome public health crisis. Please wear a mask.

- “Treatment.” Reducing overdoses, community initiatives began upstream—aimed at preventing initiation of drug use—and continued downstream to aid those caught in the grips. Prompt action and hard work expedited a vaccine that hopefully extinguishes the virus over the next year and returns life to normalcy. Both took payer buy in, data-driven procedures, and creativity to ensure efficacy.

- “Population.” Though addiction can happen to anyone, those with family history of substance use, past traumas, poor childhood environments, lack of employment opportunities, lower educational achievements, and being a person of color drastically contribute to one developing a substance use disorder. Unfortunately, COVID death rates also trend higher in these demographics. Until social determinants of health and racial equity are addressed through researched, community desired, consistently funded programs, individuals who fall into these categories will continually have higher rates of disease fatality. Having treatment is wonderful, but providing access to treatment is essential to ending both epidemics.

### Addiction Lives in Isolation. Recovery Lives in Connections

In Johann Hari's book *Chasing the Scream*, the author discusses how captive rats, given the choice between water or water laced with cocaine, chose the cocaine water 90% of the time.<sup>1</sup> Professor Bruce Alexander, a professor of psychology at Simon Fraser University, understood that a bleary caged isolation does not mimic real world experience, so he set up “rat park.” The park housed plenty of toys, mates, and food for the once-caged rats to explore. It also had a bottle of water and a bottle of cocaine water. When exposed to the new life of connection, the cocaine consumption drastically decreased, which correlated to

meaningful connections having profound impacts on substance consumption.

Aside from routine disruption, sickness, and death, COVID-19 has given us the substantial hurdle of isolation. A popular meme says, “While in a Zoom meeting, blow on your mug so people will think you have coffee in it instead of wine.” Not only have overdose emergency room admissions increased over the past year, but alcohol consumption has also skyrocketed. A March 2020 study, conducted by the USA Nielsen Company, found 240% increases in internet alcohol sales, including strong liquors (spirits) by 75%, wines by 66%, and beers by 42%.<sup>2</sup> Saturday nights which used to be filled with music and laughter alongside friends, have transitioned to sweatpants and Netflix while attempting to recreate the fun with two bottles of wine instead of one. For those with an opioid use disorder, the increased anxiety caused by political turmoil and less job security, coupled with decreased social connectivity, has led to more isolated use, preventing friends from intervening with Naloxone during an overdose. This lack of intervention often leads to death. Seclusion's black veil is troublesome for some, but deadly for others. And the ones hit hardest lack—or struggle to obtain—necessities of health that continue to dwindle during the virus outbreak.

### Progression

According to Sam Quinones's book *Dreamland: The True Tale of America's Opiate Epidemic*,<sup>3</sup> in mid-2000s California people hooked on Oxycontin began shifting their preference to the cheaper and more abundant black tar heroin brought to the US by former sugar cane farmers from Nayarit, Mexico. Instead of standing on a street corner slinging dope, these dealers delivered it.

As these new distribution networks grew, heroin overtook pills as the primary opioid used nationwide, and in the early 2010s opioid overdose fatalities and emergency department admissions rose. Then came fentanyl, a synthetic opioid 50 times more potent than heroin.<sup>4</sup> Many times, a user is unaware that fentanyl is lacing their heroin, making what is typically a safe shot a fatal one. Having built a tolerance to heroin, many users opt for straight fentanyl, and because the synthetic does not last as long, more of the drug is required to sustain a high, creating even

more opportunities for overdose.

### Challenges

North Carolina has seen a 24% (5,608 to 6,934) increase in emergency department admissions for opioid overdose from 2019 to 2020. Every month of 2020 has seen increased opioid emergency admissions rates across the state.<sup>5</sup> The pandemic is shifting distribution networks, causing users to purchase unfamiliar products. One's history of use dictates their injecting/use amount, but because of supply chain disruption, the bag purchased last week which was safe is different and deadly this week. Additionally, fentanyl is making its way into other drugs not affiliated with opioids such as benzodiazepines and cocaine.

Recently, the Rapid Responder Program—a team that works with overdose survivors in Wake County—has seen more individuals overdosing because of fentanyl-laced cocaine. So when non-opioid users who are part-time partiers decide to get a bag of coke for the weekend, before they know it EMS is waking them with Naloxone (a drug that reverses opioid overdose). Whereas those using heroin routinely understand the risk of fentanyl lacing their bags and may take a test shot to gauge potency, low frequency users are completely unaware they could be ingesting the deadly synthetic.

The pandemic has not only created a change in use patterns and narcotic potency, but has also limited resources for addiction help. In Wake County, finding recovery resources has become challenging as agencies restrict program admissions to ensure their current clients' safety. In-patient bed reductions are typical amongst all local treatment agencies, preventing those seeking recovery access to sustained help. The insuranceless are severely disadvantaged when trying to access care. Most Wake County overdose survivors do not have insurance, which further reduces needed treatment options and strains the few resources that do not require insurance. Many local homeless shelters have stopped taking individuals, placing higher volumes of individuals into sober living houses. If use occurs in one of these houses, a detox period is typically required to continue to stay in the house, but if a detox is unavailable, and homeless shelters are closed, living on the street becomes the only possible next step. Additionally, funding is ending for a hotel that once housed individuals experi-

encing homelessness, which will further strain an already stressed system and may further increase the number of those living on the streets.

### What is Being Done

I work at Healing Transitions in Raleigh and oversee the Rapid Responder Program. Healing Transitions is a non-profit organization providing non-medical detoxification, overnight emergency “wet” shelter, and a long-term, peer-led recovery program that includes access to healthcare as well as child and family resources for individuals experiencing homelessness coupled with substance use disorders. The organization’s mission is to offer innovative peer-based, recovery-oriented services to homeless, uninsured, and underserved individuals with alcoholism and other substance addictions.

Since opening in 2001, the men’s campus has grown to 180 beds and the women’s campus to 120 beds. At a cost to Healing Transitions of \$35 per person per day, the facility offers local EMS and law enforcement a cost saving and recovery enhancing alternative to emergency departments or jail. Seeking to create access and lower barriers to care, Healing Transitions requires no insurance or payment for services, and is available on demand 24/7.

In 2015 through Wake County’s Drug Overdose Prevention Coalition, Healing Transitions and Wake County EMS began formally developing a Post-Overdose Response Team (PORT) loosely based on Colerain, Ohio’s Quick Response Team model. Wake’s Rapid Response Program (RRP) sends certified peer-support specialists (CPSS)—named rapid responders (RR)—with advanced practice paramedics to follow-up with opioid overdose survivors within 24 to 72 hours of the overdose episode. Instead of waiting for individuals to show up for treatment or trying to navigate the cluttered systems of health care and social aid by themselves, Post Overdose Response Teams go to the person to build rapport and link clients to needed resources, recovery treatment, or harm reduction options.

Each morning the RRP receives an encrypted report from Wake County EMS (Narcen Report) that provides demographic and narrative information about individuals surviving an opioid overdose within Wake County over the past 24-72 hours. The Narcen Report’s information is entered into

the program’s FiveCRM database system (a client-relationship management application configured to document client demographics, assessments, and barriers—both physical and social—to health) prior to the RR/EMS in-person follow-up attempt. In addition to documentation, FiveCRM is used to create schedules for client follow-up, track client progress over time, and generate reports. The database allows the RRP to make data-driven policies and procedures that best serve the client.

Following Narcen Report data input, an advanced practice paramedic (AAP) picks up a rapid responder and they drive to the overdose survivor’s recorded place of residence. On the initial visit, rapid responders provide the client with a community-based resource packet, a toiletry bag, and Naloxone to render aid regardless of future interactions. After initial contact, the RRs employ a combination of face-to-face, telephonic, and/or texting modalities to connect with the recently overdosed individuals (and potentially their family members) to build rapport and link them to recovery supports, harm reduction services, and other community resources. Clients have the option to opt-out of the support service at any time.

To retain peer connectivity, the RRs gather information and support clients through person-centered planning in accordance with the client’s goals/needs through casual conversations as opposed to more formal tools or instruments. The program hopes to illustrate the benefits of living substance-free (properly taking medication for one’s addiction is considered substance-free) while also—understanding harm reduction is crucial for this population—offering varying resources and strategies/supplies to reduce risk of infection and death. Recognizing that substance use disorders frequently require multiple trials of recovery initiation before attaining sustained recovery, the rapid responders support clients regardless of their self-identified recovery status or continued substance use. After each contact or outreach attempt, the RR records the encounter or lack thereof (e.g., no phone contact) into FiveCRM. This data then becomes the client’s record of support and response to treatment and reveals outreach modality trends.

Due to the untrusting nature of the RRP’s client population, rapport building is critical. Without trust, built through shared experiences of addiction and continued fol-

low-up, explaining the benefits of safe drug use or substance use treatment typically proves fruitless. However, with trust, clients feel safe asking an RR for care and are more likely to persist with treatment or resource follow through.

Frequency of consumer contact varies depending on care linkage, treatment adherence, life circumstances, etc. For example, after a person overdoses, the frequency of outreach is high because of the life altering event and greater need for support. As rapport builds and the client ascertains more recovery capital (support, housing, employment, etc.), the rate of contact eases until another change in circumstances occurs, at which point contact frequency increases again. FiveCRM helps the RR set follow-up dates and provides an onscreen list of who is to be called next, ensuring those with the highest need are receiving greatest support.

Beginning as a referral pathway from EMS to peer supports, the RRP now receives in-bound client referrals from many different local agencies and hospitals. Growing the understanding of community-based peer support, the program recognizes itself as a vessel between providers with in-depth knowledge of all interagency services provided to its clients. Placed in the center of an ever-growing Venn Diagram of overlapping resources, the program de-silos agencies and helps clients navigate the various, complex systems of care without falling between the cracks. Freely moving throughout the community, the RRP’s supportive safety net is not hampered by insurance or discharge times, giving individuals access to help without strings attached.

Other municipalities have started PORTs across the state, each staffed and ran slightly differently, with Wilmington and Greensboro having two of the oldest.

### Good News

Although Wake sober living houses are seeing an increase in admissions, they are remaining open to assist individuals recently released from treatment housing to sustain their recovery. Luckily, during the initial eight months of COVID, funding through the Managed Care Organization Alliance was provided to individuals experiencing crisis to pay for the first few months of rent at various sober living houses. Food pantries have remained open and the rapid response team has been able to provide clothing from

various organizations to clients in need. The shelters and treatment centers that are admitting clients even at a reduced capacity are playing a vital role in saving lives. Continuing to serve this population is critical for the health of the individuals, their families, and the community: every dollar invested in drug treatment saves taxpayers \$7.46 in societal costs.<sup>6</sup>

Additionally, in Wake County, Opioid Treatment Providers (OTP) are still providing Medication Assisted Treatment (MAT) (methadone, buprenorphine, and Naltrexone) that meets the gold standard for sustaining recovery from an opioid use disorder and preventing overdose. One of the most researched drugs, Methadone has been proven time and again to be the most effective medicine for opioid use disorder recovery.<sup>7</sup> Though skepticisms exist regarding MAT, through the RRP's work with opioid overdose survivors over the past two-and-a-half-years (a database holding over 1,200 individuals), we have found that when people get on MAT, they stop dying. When linking our clients to NC Harm Reduction Services, they stop getting HIV, Hep C, sepsis, and bacterial endocarditis, which would put them hospital beds—now needed for COVID patients—or lead to death. These evidence-based practices are as essential to combating the opioid epidemic as wearing masks are to fighting COVID.

Like most agencies, Healing Transitions has faced challenges throughout the pandemic on admission criteria, recovery connections, and family reunification. Necessity requires that we remain open; however, our organization sees more death due to overdose or substance use than from COVID. Following state and local safety guidelines, we have worked at keeping participants safe while also granting them access to recovery outside the building's walls. Our clients attend ten mutual aid meetings per week where they grow their recovery network, learn about the disease of addiction, and follow steps to sustain sobriety. During COVID we have been connecting them to outside groups via Zoom, which is helpful but decreases the opportunity to create a robust recovery network.

When someone begins recovering, the family gets to reconnect with the person they temporarily lost to drugs. Denying family visitation can be detrimental to sustaining recovery, so we have allowed mem-

bers to visit in shifts outside, on campus, socially distanced and masked. The same opportunities have been provided to program alumni and 12-step mutual aid sponsors to create those recovery network connections. By providing safe visitation we run a low risk of virus contraction, but without this visitation we run the higher risk of clients leaving, using, and dying. Through this ever-changing time, we have needed to be restrictive but malleable to adjust based on safety and sobriety.

We wish we could provide access to all who walk up, but to remain safe we have reduced bed numbers and created a waiting list. With a services-on-demand culture it has been hard for staff to tell people they must wait for an available bed. Addiction does not stop, and the window of one wanting recovery is small and closes quickly. Denying prompt service increases the likelihood of use and fatality. The adjustments have been difficult, but we find hope knowing enlightened citizens are listening to science and adhering to precautions so we can get people off the street and into care sooner rather than later.

It is important to broaden the scope of substance use beyond one specific narcotic and understand that the lack of social determinants to health play primary roles in addiction development. Regardless of the pandemic, trauma, poor social environment, early drug initiation, incarceration, and lack of education often leads to substance use disorders and creates monumental hurdles to achieving a healthy life. We must meet people who have a substance use disorder with compassion and view the affliction as a mental illness with physiological traits. Addiction is not going away, but our approach to care can and must change to encompass the community and a person's other needs aside from addiction treatment. Most people know someone with a substance use disorder. Please look at the person and not the disease.

*Thank you, hospital workers and front-line medical staff for your incredible work.*

*Thank you, scientists who have ceaselessly worked to produce a vaccine.*

*Thank you, logistics companies who are taking on the massive job of distributing the vaccine.*

*Please be kind to those experiencing homelessness.*

*Please do not look down on those with*

*addiction.*

*Please support initiatives that provide social determinants of health for those in need.*

*Please wear a mask. ■*

*Justin Garrity is in sustained recovery, having achieved over seven years of continuous sobriety which he attributes to supportive community resources and active networking with other individuals following similar recovery pathways. He currently serves as the director of recovery services at Healing Transitions' Men's Campus. Prior to taking this new role he served as the rapid response administrator at Healing Transitions, overseeing a Post Overdose Response Team that sends peer support specialists with Wake EMS to follow up on opioid overdose survivors within 24-72 hours of the overdose episode.*

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## Digital Access Justice Commission (cont.)

*employment issues both in and out of the workplace.*

*Chase B. Saunders (SaundersLaw, PLLC) is a retired superior court judge, district court judge, and assistant solicitor. He is currently on the Commercial Arbitration Panel with the American Arbitration Association. His interest is in the study of the digitization of justice solutions and dispute resolution.*

*This article represents the opinions of the authors individually. This article does not represent the opinions of the Mecklenburg County Bar and is not written by or on behalf of the Mecklenburg County Bar.*

# A Legal Incubator: The Durham Opportunity and Justice Incubator (DOJI)

BY MARK ATKINSON

**F**red Rooney graduated from law school in 1986 with a passion to serve the poor. In that

first year after law school, he addressed the legal needs of the poor, but his family (wife and two kids) could not live on his

income as a young attorney. To survive, they were on food stamps, fuel assistance, and subsidized day care.

Rooney eventually grew his private practice, but he never forgot the difficulty of those early years. Years later, in conjunction with City University of New York School of Law (CUNY), Rooney developed “a program to train lawyers serving poor and moderate-income clients to become not just good advocates, but smart businesspeople too.”<sup>1</sup> From that CUNY program, Rooney launched the first legal incubator in 2007.<sup>2</sup> The California Commission on Access to Justice defines a legal incubator as:

A postgraduate program to support and assist law school graduates [and other

lawyers] in starting their own solo practices. Incubator participants receive the infrastructure and basic training needed to get their practices up and running and serve the local community’s legal needs at an affordable cost. A [legal] incubator provides a work environment where incubator attorneys can gain experience in the practice of law and knowledge about how to manage a law practice. In an incubator, newer attorneys provide legal services while being mentored, supervised, and taught by experienced attorneys. Most incubators require *pro*

*bono* service and emphasize creating a practice around service to low and moderate-income people.<sup>3</sup>

More than 60 incubators have been launched since that first one at CUNY.<sup>4</sup>

Following Rooney’s example and building on lessons learned from existing legal incubators, I launched the Durham Opportunity and Justice Incubator (DOJI, “Doe-Gee”) in October 2020. DOJI exists to provide a viable alternative career option for attorneys who, like Fred Rooney, are justice-minded and need support in creating a financially sustainable legal practice. For most young



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attorneys, building a career means choosing between two options: working at an established law firm or public interest (e.g., legal aid, public defender, or government). For some young attorneys, however, they either want to create their own legal practice out of an entrepreneurial instinct or they have to create their own legal practice out of necessity. DOJI is for these attorneys.

Established law firms tend to target high income, high wealth clients, while public interest legal services address the needs of low income, low wealth clients. Potential clients in the middle—modest means clients, those not targeted by most law firms or legal aid—are often left without adequate legal representation.

The mission of DOJI is to equip entrepreneurial attorneys with practical business and legal skills so that they can create sustainable and innovative legal practices that directly address the access to justice gap—the modest means clients caught in the middle, overlooked or underserved by legal aid and most law firms. For the newly licensed attorney just out of law school, DOJI acts as a supportive bridge from law school to serving clients. On that bridge, a new attorney learns the business and legal skills to crawl, walk, and then run with his new practice. For the experienced attorney who is ready to transition from working for someone else to starting her own solo practice or small firm, DOJI is a runway to help launch her new practice. To be clear, DOJI is not a law firm. DOJI is an incubator—a supportive environment—for participating attorneys to build their own justice-minded, independent legal practices.

DOJI's twin mission is to create new opportunities for attorneys and improve access to justice for the community. To accomplish DOJI's mission, participating attorneys must be justice-minded, financially savvy, and innovative.

### Justice-Minded

Justice-minded or socially conscious attorneys are those who understand the need to improve access to justice and, accordingly, create practices that serve modest means clients who often go without adequate legal representation. These individuals or families make too much money to qualify for legal aid, but not enough to afford a law firm's large retainer. At DOJI, modest means clients are defined as those whose household

income is between 125% and 400% of the federal poverty limit. In practical terms, this is a family of four with a household income of roughly \$32,000 to \$105,000. DOJI attorneys are not prevented from serving higher-income clients. However, if a DOJI-associated attorney focuses *exclusively* on high-income clients, then she no longer conforms to DOJI's mission. Conversely, DOJI attorneys are encouraged to fill gaps in service to clients when Legal Aid is understaffed or otherwise unable to fill. Under Rule 6.1 of the Rules of Professional Conduct, "every lawyer has a professional responsibility to provide legal services to those unable to pay...[a] lawyer should aspire to render at least 50 hours of *pro bono* public legal services per year."<sup>5</sup> At DOJI, this understanding is reinforced by an agreement signed by every participating attorney. DOJI attorneys are strongly encouraged to go beyond the 50 hour annual standard for *pro bono* services to accomplish DOJI's mission of improving access to justice.

### Financially Savvy

In addition to being justice-minded, DOJI attorneys must be financially savvy so that they create financially sustainable legal practices. A DOJI attorney serving modest means clients must be able to make a living. Though *pro bono* service is strongly encouraged as a professional responsibility and as an opportunity for professional development, DOJI recognizes the need to generate a livable income. DOJI provides participating attorneys with the tools and training to run a business that generates an income for the attorney, serves the underserved client, and, ideally, endures for decades.

In law school, a student is taught *the law*, but is rarely taught how to run a financially viable legal practice: a business with income, expenses, and profit. The 12-month DOJI program includes training sessions on topics such as business formation, growing a client base through marketing and legal referral services, website design, efficient client intake, budgeting, taxes, and pricing of services. One of the most productive sessions is a panel discussion and Q&A with established solo practitioners on how they launched and grew their practice. In this session, the panel gives specific and practical answers to questions such as: What is your most and least effective marketing tool? What practice management software do you use? Is there an app

you find particularly helpful? Is there any equipment or device that you find necessary other than a phone and a laptop? What bank do you use and why? How do you do client intake? Who does your taxes? How did you develop your billing rates? The training program also includes access to free legal training through Practising Law Institute (PLI). Because DOJI is a 501(c)3, PLI makes most of its training courses free to DOJI attorneys. This provides a cost-effective way of obtaining continuing legal education (CLE) credits and also exploring new potential practice areas. While DOJI cannot guarantee financial success for every DOJI-participating attorney, the DOJI program is constructed to provide access to tools and training that make it more likely.

### Innovative

The final characteristic of DOJI attorneys is that they must be innovative, embracing new ways to deliver legal services. Over the past ten years, legal tech companies have created tools that greatly benefit solo practitioners and small firms. These tools include document automation (Lawyaw and Documate), scheduling (Calendly), digital legal references and resources (Fastcase, Lexis, Bloomberg, and Westlaw), online payments services (LawPay, PayPal), and numerous practice management packages (Clio, Cosmolex, Mycase, PracticePanther, Smokeball, and more). With the proper tech tools, an attorney can better manage her time and multiply how many clients she can serve and, thereby, increase her sources of revenue. Many of the legal tech vendors provide deep discounts or free access to DOJI participating attorneys. Clio, for example, will provide its Clio Manage practice management software with LawPay for free for 12 months to DOJI attorneys. This offer will save an attorney over \$1,000 in her first year of practice.

In addition to embracing new technologies, a DOJI attorney is encouraged to deliver legal services in creative and innovative ways. Creative delivery of legal services includes avoiding hourly billing where possible, implementing fixed fee pricing, exploring subscription legal services, and providing unbundled services. Historically, these approaches were rare because full representation with hourly billing was the accepted practice for most attorneys. However, a justice-minded attorney who is creating a finan-

cially sustainable practice must be willing to employ innovative approaches for delivering legal services. The client reasonably asks, “How much will it cost?” In the hourly billing paradigm, the attorney answers, “I can’t say. It depends on how long it takes me to solve the problem.” For some clients, this is not a workable answer. Fixed pricing, however, tells the client exactly how much they are going to pay. Additionally, unbundling services and limited representation can empower the client, involving them in the decision of what services are provided by the attorney and how that are delivered. It makes legal representation more affordable by dividing those services properly performed by an attorney from those that a client may do themselves. Similarly, subscription services can create a way for clients to access repre-

sentation or legal advice for a fixed monthly fee. The monthly costs are known and are generally modest for the client in a subscription service. For the attorney, the subscription service model creates a known monthly revenue stream.

### Long-Term Vision for DOJ

DOJI’s long-term vision is to be a thriving, sustainable community that accomplishes its twin mission of creating new opportunities for attorneys and improving access to justice for the community in Durham. DOJ is a 12-month program with legal and business training, access to free and discounted legal tech tools, office space, networking, and a supportive peer group. The business opportunity exists and the need to improve access to justice in Durham is real.

The community needs entrepreneurial attorneys who are justice-minded, innovative, and financially savvy. ■

*Mark Atkinson is an attorney and a 2020 graduate of North Carolina Central University School of Law. Prior to law school, he was a principal at Kimley-Horn and Associates, Inc.*

*For additional information about the DOJ program or how to apply, contact mark@doji.lawyer or visit doji.lawyer.*

### Endnotes

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## A DOJ Profile

RS Legal Group is a new law firm started in late 2020 by Michelle Schalliol and Cameron Redd, both NCCU School of Law 2020 graduates. The following profile (edited and condensed from an interview) tells the story of their practice and how DOJ supported it.

### How did you two meet and get to know each other?

Michelle: We were paired together in Trial Team in our 2L year. That’s where we first met—we spent a lot of time together, practicing and strategizing.

Cameron: We have similar thought processes, but we have different personalities. Michelle is a bulldog. She’s a tough advocate.

Michelle: Cameron sees the big picture. He has a vision of what can be. I focus on today and Cameron looks out into the future. We complement each other well.”

### When did you first become interested in becoming a lawyer?

Cameron: For me, it started in elementary school with my cousin, Claudia Jordan. She was the first black female judge in Denver, Colorado. She’s older than me—she’s more like my aunt. She inspired me.

Michelle: It started in elementary school for me, too. I remember wanting to stand up and defend others who were being mistreat-

ed. I wanted to help, but I felt helpless. Being in the army, stationed in Saudi Arabia, was also an important factor for me wanting to be an attorney. I saw how women were mistreated and I wanted to fight that injustice.

### Tell us about RS Legal Group. Why did you start this partnership and what do you guys do?

Cameron: I always had a job—my own job—growing up. I had a lawn mower and I cut grass. I like the idea of creating something and then running it.

Michelle: I loved the idea of being able to pursue whatever I wanted to. We can build our firm focusing on what we want to do, even if it doesn’t fit into a traditional law firm model. Also, I wanted to be in charge of my schedule. I’m a mom of four kids with a husband. Having my own firm—a partnership with Cameron—gave me what I wanted and needed—freedom and flexibility. In terms of what kind of work we’re doing, we’re doing just about everything. We talk to each other all the time about what we do or don’t do...or which client we should or shouldn’t take. I have some juvenile clients and we’re beginning to get a variety of clients from the Bar Association referral program. Every new case is a challenge because it is new and we’re still learning.

Cameron: We are both getting into real estate. I want to focus more on real estate and eventually do some international work. Having a partner is great because, as Michelle mentioned, you have a person to bounce ideas off of and to check yourself.

### What’s the long-term vision for RS Legal Group?

Michelle: I’ll let Cameron answer that! That’s his strength.

Cameron: I don’t put limits on things. I want to eventually practice internationally. That’s part of the long-term vision. Also, we plan to have our own office, a physical building, at some point. We have a vision to start a non-profit. It is clear to us that we, as attorneys, often get involved in problems way downstream. There are issues that need to be addressed early on—before they become legal issues. Education inequity is a perfect example. The non-profit would help kids get back on track or, better yet, stay on track so that they don’t get caught up in the legal system.

### What did law school prepare you for? What did it not prepare you for?

Michelle: Law school taught us to have a heart. It taught me that it’s about the client.

CONTINUED ON PAGE 24

# Zone of Action

WRITTEN BY KIRK WARNER, BOOK REVIEW BY G. GRAY WILSON

Anyone who has ever been in the military knows that it is a world alien to the civilian population. But in *Zone of Action*, Raleigh attorney Kirk Warner bridges that divide with a journal of his experiences as a JAG officer during Operation Iraqi Freedom and the COBRA II military campaign in 2003. A tribute in the opening pages describes Warner's writing persona by suggesting that he could be the putative love child of Robin Williams and Alan Dershowitz. With equal parts humor, legal insight, and humanity, Warner offers a vivid portrait of a Middle Eastern land consumed by violence, privation, and chaos. His job as a lawyer is simple—bring the nation back to a semblance of civilization and order by imposing basic standards of human decency embodied in the law.

Warner admits that there is an admission price for the book: the first 25 pages or so set the stage with his call-up and protracted transport to Camp Doha in Kuwait, courtesy of the hurry-up-and-wait military bureaucracy. But then the SCUD missiles start flying and the theater of operations heats up as the Coalition forces roll north to Bagdad and beyond, and Saddam Hussein mysteriously disappears from the scene (Warner wonders if he could be the love child of Stalin, and the resemblance is admittedly striking). The author's writing style may not be exactly on a par with Xenophon's *Anabasis* (The March Up Country), but only because of the relentless comedic overlay that lightens almost every page, with levity worthy of an Aristophanes play.

Here is his take on a SCUD missile attack:

Fortunately, the missile fell short into the water but caused a ruckus in the city and a blast back here at Camp Doha across the bay that seemed to lift the roof off the office, shake the cement floor, and cause CPT Wittman to adjourn his quest for midnight chow and opt for the laundry to tackle his newly soiled drawers.

Or try this one on:

The mosques around here continually trumpet a yodel-like chant that sounds like a man with his you-know-whats in a vise.

From the scatological to the political, Colonel

Warner never lets up on the gallows humor, in sharp contrast to the work that lies ahead in a land that has drifted from corruption and brutality into fanaticism and anarchy, where ethnic and religious division is endemic. No matter how dismal the scene, the wisecracks just keep coming.

Acronyms abound in these pages, the coded language of the military. And the soldiers and their spouses moon-talk at night, while families wait with anticipation for the letters, packages, and rare transglobal calls that share a small piece of home. For what awaits Warner and the other JAG officers in his unit are the horrors of combat and occupation—friendly fire incidents, handling of POWs (including visits to the notorious Abu Ghraib prison, the “Dark Hole” of Iraq), a host of forensic investigations, oil-smuggling operations, weapons policies, mortuary issues, banking policies, security forces, and countless war

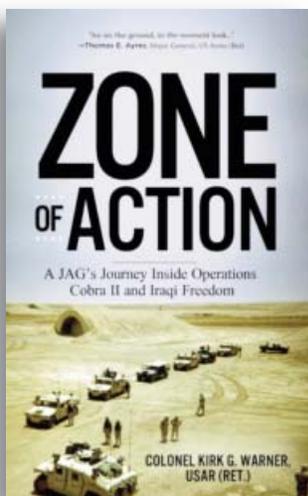
crimes by an enemy that observed no rules of civilized behavior, with torture, death squads, and sacrificial civilian shields that included children. Perhaps most newsworthy was Warner's participation in the repatriation of American POWs liberated by a daring special ops raid. Among those liberated was a young soldier, Jessica Lynch, who would soon become a household name back in the states.

When Warner arrives in Bagdad, he is tapped to restore a judicial system that has historically been a den of corruption, and he sums up the challenge as follows:

With a few sporting prohibitions against gender, race, and religious discrimination, a pinch of due process here and equal protections there, and deleting the interesting provisions making a wife a slave, we would have a good starting point for the Lady of Justice to hang her balances.

Hanging out in one of the lesser palaces, without water, power, or hot food, Warner commutes to the inner city each day, meeting with everyone from private lawyers to judges to Donald Rumsfeld as he works to bring the court system back online. He regularly briefs Ambassador Jerry Bremer and even gets quoted in *Newsday*, the popular New York city area circular. Before long, his “Bagdad Chronicles” have garnered a huge fan club across the US, with the Navy Seals, and elsewhere in the Middle East.

This is not a friendly environment, with an unruly populace laced with scam artists and hustlers, an active black market, 130-degree heat, and sandstorms. The barren landscape is punctuated by the occasional gunfire directed at his Humvee. He blames the unrest on a population deprived of beer, all the while knowing that the problems are way more serious than the ban on alcohol. There are thousands of criminal files to be



reviewed, judges to vet, courtrooms to open, military panels to decide exactly who does and does not belong in prison, all driven by those pesky protocols known as the Hague and Geneva Conventions, which unfortunately only the occupying forces observed.

Trials are conducted by a panel of three Iraqi judges, who examine all the witnesses and review sworn statements from those not present for the proceedings. The prosecutor and defense lawyer basically hang out while all this is going on. Then the judges retire to deliberate, and soon return to pronounce their verdict and sentence. Each case only takes several hours, and Warner evaluates the process as “fairly efficient, openly fair, and the results seemed just.”

There are also the brighter moments, as when Warner hauls a load of toys shipped from stateside to a Bagdad orphanage, “making one smile-filled day in a frown-filled country.” He gets in on the bust of a Russian tanker attempting to smuggle oil out of the country, at which he encounters a voluptuous young Ukrainian named Olga. He attends a riotous poolside Fourth of July celebration at a palace, at which the only dress code essential is that everyone present pack a firearm.

After more than six months in harm’s way, Warner returns home to his law practice in Wake County. He has only praise for those dumped into the cauldron of war, and his commentary about the political objectives in Iraq ring true to this day.

For us, our mission is complete. It was a remarkable victory for a bunch of citizen-soldiers rudely thrust into this arena. We hunkered down; dodged a few missiles, bullets, and ambushes; and pulled our weight and then some. We were fortunate to have been on the playing field and in the game, not on the sidelines....

Warner was one of those citizen-soldiers who “dropped his plow-lines” and answered the call. Cincinnatus would have been proud. ■

*Mr. Wilson is a partner with Nelson Mullins Riley & Scarborough in Winston-Salem, and a past-president of the North Carolina State Bar and the North Carolina Bar Association.*

## DOJI Profile (cont.)

It also taught me the very practical skill of how to figure things out. If you don’t know something, you have to learn it. One incredible resource is the alumni network. Law

school alums want to help you. Just recently, I called five different alums one day asking for help. They were all great and so helpful.

Cameron: Law school prepared me for the bar exam. It also taught me simple but important and practical skills like how to write “lawyerly” emails. My legal writing skills got better in law school. Communicating with clients—by email, text, in person, by video—is so important, and law school helped with that.

Michelle: That’s true, but I would have liked more on client counseling. I participated in the client counseling competition, but it is so important to our work that it should be emphasized more. Last thing: While I did learn a lot of practical skills in law school, I would love it if someone would create a handbook titled *Lawyering 101* that gives step-by-step instructions on what to do and who to see and what to say for the Durham courts. That would be really helpful!

**How has DOJI helped you?**

Michelle: DOJI has been a good community for us. Even with a partnership, we need others to challenge us. The training is a huge benefit, learning from others. And the space has been great. We meet our clients here and we have a space in which to work.

Cameron: DOJI gives us the support we need. There’s accountability and motivation. I want RS Legal Group to succeed and I want DOJI to succeed.

**What advice would you give others—law students or attorneys—looking for a change?**

Michelle: To the law student, I’d say that you don’t know what you don’t know, but people will help along the way. It does not have to be overwhelming. There is help out there, from DOJI or from the law school alumni network. To the practicing attorney who is thinking about starting their own practice, don’t be afraid to take that step. You definitely have to count the costs—be smart, manage your expenses, build your business. But it can be done. It’s exciting. I love what I’m doing. Yes, it can be stressful, but this is why I went to law school—to help others. I love it.

Cameron: Don’t limit yourself. You have more options than getting a job working for someone else. You can create your own thing. Of course, you have to be realistic. We’re not paying ourselves a salary yet, but we are paying our expenses. Step over the fear. It really is exciting. I love it, too! ■



# Celebrating the 2020 Class of 50-Year Lawyer Honorees

*During our Annual Meeting each October, the State Bar traditionally hosts a luncheon to honor those who have been licensed members of the Bar for 50 years. In 2020, due to the COVID-19 pandemic, we were unable to hold the event, and have postponed it until November 2021. Every year, each honoree is asked to submit a bio about their career in the law. These bios are published in the luncheon program. We appreciate the patience of the 2020 50-year lawyer class. In recognition of their achievements, we are sharing a few of the submitted messages below.*



## **Stafford G. Bullock**

I was born and reared in an agrarian community in Granville County, NC, where I received my elementary and secondary education. Upon graduation I attended Shaw University in Raleigh, and graduated in 1963 with a BA degree in English and a minor in French. After leaving Shaw, I taught English and French for the Person County public school system for three years.

I enrolled at Howard University Law School in Washington, DC, in 1966 and graduated in 1969 with a juris doctorate degree. The following year, I was employed at North Carolina Department of Public Instruction in the school desegregation division from 1969 to 1970. There I assisted three team members in the application of the law as it pertained to public school desegregation.

In 1970 I joined the Samuel S. Mitchell law firm where I engaged in the private practice of law.

I was recruited by W. G. Randsdell to join his staff as an assistant district attorney. While serving as an assistant district attorney from 1971 to 1974, I prosecuted cases in both district and superior court.

Subsequently, I was appointed district court judge in 1974 by NC Governor James

Holshouser. I was a district court judge for 20 years, and served as chief district court judge from 1991 to 1993. In 1994 I was elected superior court judge for the 10th judicial district. After ten years of serving on the superior court, I retired in 2004.

During my tenure as a lawyer, there are two occasions that I will always remember. First, when I received notice that I had passed the North Carolina bar exam. I remember very clearly where I was and what I was doing when I got the information. I remember that Andrew Vanore, an attorney on the attorney general's staff, was the first person to call and offer his congratulations. Second, when I received the call from the Office of the Governor to inform me that I had been appointed to serve as judge on the district court. That appointment made me the first African-American to serve as a district court judge in Wake County.

Perhaps there will always be disputes, disagreements, and confusion among us, but we have a system whereby we can seek a resolution to our grievances. It is my hope that this system will continue to involve persons who are unbiased, impartial, and capable of tem-

pering justice with mercy.

## **Frank Goldsmith**

I grew up in Marion, where the local lawyers included my uncle. But I never gave any thought to becoming a lawyer until the second semester of my senior year at Davidson College, when an aptitude test revealed that I seemed suited to the law. So I applied to UNC-Chapel Hill and was accepted. In truth, my decision was partially motivated by the fact that it was 1967, the height of the Vietnam War, and that upon graduation, I would receive a commission as an infantry lieutenant. Staying in school seemed preferable.

I actually enjoyed law school—I realize that is not the universal reaction—and thought I might become a law professor. I made good grades and was offered a clerkship by US District Judge James B. McMillan. The army had other plans for me, however, and so the first years of my practice were spent as a JAGC officer. Trying courts-martial gave me quick experience as a trial lawyer; I received a caseload of 99 cases the first day on the job.

After discharge I practiced for a year in

Durham, then decided to return to the mountains. Growing up in a small town had been pleasant, and I wanted the same for my children. So I returned to Marion, practiced for a few years with my uncle, and then formed a firm with my brother Jim, later joined by our partner, Julie Dews. I enjoyed the variety of small-town law practice and the relative freedom of working for oneself. I especially focused on civil rights and constitutional law. Advocating for the rights of individuals, whether in the civil or criminal context, fit with my desire to use the law as a tool for social justice. It was not a lucrative practice, but it was intellectually stimulating and morally satisfying. I litigated cases of free speech, freedom of assembly, religious freedom, freedom from unlawful searches, due

process, and more. I represented law enforcement officers when their rights were violated, citizens victimized by police misconduct, and numerous workers wrongly treated in the workplace. At the age of 31, I experienced the thrill of arguing (and winning) a court-appointed case before the US Supreme Court on behalf of a prisoner. For several years I represented detainees held in Guantánamo Bay, Cuba, in challenges to their confinement. I served as an ACLU cooperating attorney for decades and spent about 30 years on court-appointed counsel lists for criminal cases. And I got to teach law after all, as an adjunct professor of trial advocacy and in CLE programs.

Along the way, I served on various boards and received my share of professional honors. But most meaningful to me were the cases where I was able to win exoneration for the wrongfully convicted, especially a man who spent nearly 15 years on death row, whose conviction and death sentence were the result of an appalling combination of police dishonesty and lawyer ineptitude.

Now I have retired from the courtroom and from representing clients, but I still work as a mediator and occasional arbitrator. I find satisfaction in helping litigants make peace. One of the great Talmudic sages, Rabbi Tarfon, taught that, “it is not your responsibility to complete the work [of repairing the world], but neither are you free to desist from it.” I have completed little of the work, but I have tried not to desist.

#### Oliver Noble

Fifty years is such a short time. Thinking about some of the things that happened makes it seem a bit longer, but still...

Serving as a district judge beginning in 1977 put me in North Carolina’s busy court at a time when the legislature was loading it up with all the jurisdiction no one else wanted. As more responsibility was piled on, it became clear that a much higher level of organization and professionalism was needed. Fortunately, the Constitution was amended to require that judicial candidates at least be licensed lawyers. When equitable distribution was given to us, we had to figure out some practical ways to handle the added load. The revised Juvenile Code required three to five lawyers for each of the frequent reviews of each foster care case. Increased enforcement of child support cases and the right to counsel for them were put in the pile. The Safe Roads Act required more time. And while the work

grew, the number of judges stayed the same for years. If I am remembered for anything, I hope it is my work in trying to build a solid, fair structure for the district court. Judge Jim Lanning told me that we were lucky because we had an opportunity few lawyers ever have—the opportunity to create a court system, nearly from scratch.

I was a district court judge for nearly 22 years, and a superior court judge over three years. I always had to fight to stay on the bench. I won a gubernatorial appointment from Governor Hunt; won a lawsuit that was filed against me the day I was sworn in; and won two primaries, one run-off primary, and six general elections, all but one of which were hotly contested. Amid all that turmoil, I learned a lot about elections for judges. I believe non-partisan elections are the best way to put judges in the courtrooms, and non-partisan elections are the best way to assure unquestionable fairness. Many of us worked hard to make judicial elections non-partisan.

The other half of my career has been spent practicing law. I started in the 1970s, and then I started over in 2002. Law practice changed during my time away. I could not have achieved much on my own; I have always worked with good and ethical lawyers. I have had the opportunity to work and practice with great mentors and friends including Judge Earl Vaughn, Marshall Yount, Charlie Dixon, Bob Mullinax, and my classmates Steve Thomas and Franklin Freeman. Each of them helped me understand what in the world I was supposed to do with my legal education.

My law practice has been, well, general. I remember searching titles while waiting to try a felony before a jury. I argued rates for small water systems before the Utilities Commission the day after I researched a tax issue. I wrote a profit sharing plan, and corporate charters, and a lot of limited driving privileges. The adventure keeps me in the office after 50 years.

I like being a working lawyer, even if I am an old one. I enjoy seeing the bright young lawyers all around me. I wish the economics of practicing law allowed working lawyers to hire average law school graduates and teach them to use the fabric of their education to make good-fitting, durable, affordable garments for their clients. My mentors did that for me, twice, by word and by example, with generous tolerances for a country boy from Deep Run. ■

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# Grievance Committee and DHC Actions

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

## Suspensions & Stayed Suspensions

**Beverly Berniece Cook** of Murphy pled guilty in 2019 to failing to file her North Carolina income tax returns for 2014, 2015, and 2016. She also failed to timely file and pay her federal income tax obligations for the same time period. The DHC suspended her license for three years. The suspension is stayed for three years upon compliance with enumerated conditions.

**Robin Dale Fussell** of Charlotte engaged in misconduct and a conflict of interest in connection with real estate closings. His license was suspended for one year. The suspension is stayed for one year upon compliance with enumerated conditions.

**William Morgan** of Elizabeth City did not conduct quarterly trust account reviews and reconciliations, did not maintain records sufficient to identify the owners of funds in his trust account, did not adequately supervise assistants to whom he delegated trust account duties, did not ensure entrusted funds were deposited into his trust account, did not promptly correct the resulting deficiencies in his trust account, and did not promptly disburse entrusted funds. The DHC suspended his license for four years. The suspension is stayed for four years upon compliance with enumerated conditions.

**Daniel Ruffy** of Charlotte aided in the criminal practice of debt adjusting, did not supervise his nonlawyer assistants, and made false statements to his clients. He was suspended by the DHC for five years. After serving six months of the suspension, Ruffy will be eligible to petition for a stay of the balance upon demonstrating compliance with enumerated conditions.

**Scott Shelton** of Hendersonville neglected and did not communicate with numerous clients; did not respond to the

Grievance Committee; released escrow funds without authority to do so; did not return a client file; did not deposit entrusted funds into a trust account; did not provide required accountings of entrusted funds; engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; disbursed funds from his trust account on behalf of a client for whom no funds were in the account; and handled entrusted funds when he was enjoined by the Wake County Superior Court from doing so. He was suspended for five years. The suspension begins to run upon expiration of the three-year suspension imposed upon him in 17 DHC 1. At the end of the five-year suspension, Shelton must satisfy numerous conditions before he will be eligible for reinstatement.

## Petitions for Reinstatement

In August 2019, **Susan Lynch** of Raeford was suspended for five years by the DHC for failing to communicate with clients, failing to disclose a conflict of interest, making false statements, and engaging in conduct prejudicial to the administration of justice. After serving 18 months of active suspension, Lynch petitioned for a stay of the balance of her suspension. Her petition was granted. The State Bar did not contest the petition because Lynch satisfied all conditions for a stay.

## Censures

**Richard L. Cox** of Asheboro was censured by the Grievance Committee. He did not communicate to the borrowers and the lender when he discovered a deed of trust not contained in the loan application or documentation, did not take action necessary to clear title of an encumbrance in a refinance, engaged in representation with a concurrent conflict of interest when he continued to represent the borrowers and lender in the refinance without full disclosure to them and without obtaining informed consent, and engaged in an impermissible business transaction with the borrowers.

**Tamara Lee** of Hendersonville submitted orders in two child support cases to a judge ex parte, falsely representing to the court that opposing counsel had consented to entry of the orders. Lee was censured by the Grievance Committee for failing to inform the court in an ex parte proceeding of all material facts that would enable the tribunal to make an informed decision, failing to comply with known local customs of courtesy or practice of the bar, knowingly making a material false statement of fact to the tribunal, and engaging in conduct involving dishonesty that was prejudicial to the administration of justice.

**Rebecca Moriello** of Raleigh was convicted of two federal misdemeanors for failing to comply with a posted regulation and the directives of a court official regarding use of her cell phone during an immigration court proceeding. Moriello was censured by the Grievance Committee for engaging in criminal conduct reflecting adversely on her fitness as a lawyer and for behavior that was disruptive to the court and thereby prejudiced the administration of justice.

## Reprimands

**David Ahmadi** of Raleigh demanded that a realtor provide him a rebate on a home sale although he was not a party to the sale and he did not have a legitimate claim for a rebate. In his communications regarding the demanded rebate, Ahmadi used expletives and made threats regarding the realtor's professional future. Ahmadi filed a motion for a restraining order against the realtor and made a material misrepresentation to the court when he included two other parties as plaintiffs without their knowledge and consent. He was reprimanded by the Grievance Committee.

The Grievance Committee reprimanded **Clarence V. Mattocks** of High Point. Mattocks was appointed successor guardian of an estate in 2012. He sent one letter to the former guardian attempting to obtain possession of the property of the estate. The former

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# No One is Coming

BY ANONYMOUS

At the start, it was a starburst of luminous warmth. It was fun, it was freeing, it was sophisticated. It was summer beers, sunset champagne toasts, French martinis, and obscure Italian wines. I started drinking because it made me relaxed and connected and in love. I felt closer to people around me, to myself, to the buzzing hum of energy I called God. Drinking helped me inch from chrysalis shells of shyness and insecurity. It took me to temporary planes of higher consciousness. Drinking was my friend.

At the end, I was stranded and alone in a darkened house, a husk. What once connected me had led me to self-imposed isolation and crippling loneliness. What once elevated consciousness actively clawed at my very sanity. At the end, it was impossible to sleep through the night without waking up and taking several drinks to calm my nerves. My hands shook so bad each morning, it would take minutes to coax my contacts onto my eyes. I hid liquor bottles around the house and snuck hurried gulps of cheap white wine straight from the bottle on Sunday mornings. When that ran out, it was on to the mouthwash, just to keep the shakes at bay. I was 35.

I wasn't always an alcoholic. My descent into alcoholism was gradual and lined with many enchanted nights. There was a time when I could take it or leave it. But, I never saw a reason to leave it. Drinking was too much fun. It was like having a magician as an ever-present friend: tip the bottle, spin around three times, and an ordinary night got lifted. I was really good at drinking. I learned how to cozily float in the liminal spaces, the candlelit magic suspended between cold florescent reality and blackout oblivion. That was my happy place. I visited every day, often with friends but, if not, then alone. It worked like magic until, suddenly and without warning, it didn't. When it

stopped working, I couldn't find the buzz and the laughter and the warmth and fell headlong into the razor teeth of chemical dependency and blackouts. By that phase in the disease progression, I didn't drink to feel good; I drank to feel less bad.

Long before I was physically dependent, alcohol had wormed itself to DNA depth. From the first drink in my early teens, I developed an emotional and psychological dependency. At 16 I would daydream about bottles of liquor, pining for the day I was of age. From age 21 to 35, I drank—literally—every evening other than five or six nights, two of which were during the bar exam. But while daily I inched imperceptibly closer to the invisible Rubicon crossing that many alcoholics point to, I was succeeding at life. I got places pretty young. At age 19, I graduated from college at the top of the heap; at 22 I had fallen in love and said “I do”; at 23 I had graduated law school and jetted off to work at one of the best law firms in the world. I charged hard, I was serious and earnest and diligent, and I needed—hell, I deserved—to let my hair down and take the edge off. I told myself there's no way I could study, or love, or laugh, or practice law without booze.

As I built a life and a career, my drinking kept pace. It was high-functioning and practical. I drank after work to relax, and then to get to sleep. I drank to socialize with my law firm colleagues and to meet new friends. I drank to dull the tension of high-stakes corporate deals. I drank every day, but I had rules: I never drank during the day, and I never missed work. I drank expensive single malt scotch and bought good wine from a local wine monger I knew by name. I compared my drinking to my colleagues that stumbled and threw up and cheated and told myself I had it under control. I wasn't like Them.

Over time, my drinking crept in like the tide. Sometimes it ebbed in its volume, but it



never left. I started to fray. Weekend binges started making appearances. The blackouts weren't far behind. When I had quiet days at work, I'd steal off in the afternoon to “grab drinks.” I usually found similarly inclined colleagues. I worked in Big Law—they weren't hard to find. The progression continued for years.

One morning, about two years before I got sober, I decided I needed to control my drinking. “Decided” implies I sat in an armchair, soft rays of morning sun casting shadows in my study as I made a list of pros and cons about My Drinking. That would give a civilized gloss to my pitiful state. In reality, I woke up on a Monday after a weekend blackout to find that my wife had moved all of her possessions out of our shared bedroom into the upstairs guest room. I didn't remember anything. Clearly, something was amiss.

I vaguely knew about AA. I knew that I could show up and listen and drink some bad coffee, take some heat off my back. I somehow dragged myself to the office that morning and found a lunchtime AA meeting nearby. When I got there, I had no idea what was happening. People took turns reading from something they called the “big book.” They recited the story of a doctor who was caught up with booze and pills and shooting

up morphine in his garage before he ran past his wife and kids to collapse in bed when the drugs hit his bloodstream. What have I gotten myself into, I thought. Drugs weren't part of my story; I was too much the rule follower. Then people started sharing—about divorces and interventions and car crashes. Some even laughed about it all. I listened, and I judged them. Then I snuck out and didn't come back. I smoothed things over with my wife. I told myself it was all an overreaction. Too much stress at work, I said. After all, I was a successful law partner. I drove a nice car and parked it at the nice house I owned. I paid my taxes on time. I didn't drink and drive. I wasn't like Them. I started drinking again the next day, convinced I could drink like a gentleman.

Over the next two years, I tried to get My Drinking under control. I made rules about how much and when and where I could drink. I broke them all. I got into yoga. I meditated, before it was mainstream. I got a therapist. I went hardcore vegan, and I ran long distances. I began seriously digging into my spirituality for the first time in my life. I devoured books and podcasts on God and faith and mankind. I became environmentally conscious. I switched political parties. I went on silent retreats. All these things made me a better human. But they didn't help temper My Drinking. Not one bit. I was missing the gnawing emptiness of deflation at depth. That was around the corner.

I parted ways with My Drinking when the pain of staying the same outweighed the fear of change. For me, the apogee of pain arrived on back-to-back days: on the first day, I inexplicably blacked out and missed my wife's graduation from a Duke post-graduate program she had been working towards for several years; the next day I blacked out again and missed an international flight with her to hike part of an ancient pilgrimage in northern Spain. I couldn't understand my behavior. I was baffled. In the past, I had blamed my binges on stress at work, on family-of-origin dysfunction. This was different. I was missing the good stuff in life.

I reached out for help. I spoke with my new therapist, who I had recently met through the BarCares referral program. He suggested I call Nicki Ellington at the North Carolina Lawyer Assistance Program. That same day, I called Nicki and scheduled a meeting a few days later. Before the meeting arrived, though, I was hopelessly drunk. My

wife, fresh back from her solo Spain journey, looked at me with eyes equal parts sad, perplexed, and straight up done. I too was done; I was done in the middle. I asked my wife to drive me to a local detox facility. I am forever grateful to her for that act of kindness.

So that's where my best thinking took me: a mental institution. I entered voluntarily, but then realized the gravity of my situation when they asked for consent to hold me for three days, and to put me in a solo padded cell if things went left. The pen shook in my trembling hands as I signed my consent to enter the Unknown. They gave me Librium to help my body come off the booze without having a seizure.

Ms. Ellington came to visit me in the detox facility. She was kind but serious. She told me that I was sick and I needed to get some intense treatment. I needed the real talk. I didn't know the first thing about alcoholism or rehab. LAP helped me make arrangements to get a direct transfer to a wonderful treatment center in Tennessee, where I spent the next month and a half. It was the best thing that happened to me. It saved my life. I needed a drastic reset, the chance to let my body and spirit have a fighting chance to rewire old habits of thought and behavior. I remember arriving at the treatment center and, for the first time in years, being able to breathe. The game was up; I could stop pretending I was okay while I slowly died.

Rehab was a gift. I took it seriously and did the work. I learned how to attend 12 step meetings, how to listen and find the similarities in people's stories, not the differences. I learned how to empathize. I learned to smile, and then to laugh. One day, some ray of light burst upon me: no one is coming to save me. I realized that if I want sobriety, I have to do the work myself. No one else is coming. There are lots of people who will help, but I have to choose recovery for myself. At the same time, I can't do it alone. I need the community of other breathing humans to mirror the positive character habits that point true north.

When I got home from rehab, I threw myself into the local AA community and supplemented it with the local LAP support group that meets weekly. I went to meetings. Lots of meetings. Over time, I started enjoying them. I listened and tried not to judge. I took phone numbers when people offered them to me (yes, that's a thing). I called the people who gave their numbers. I

took their suggestions. I got to know one of them a bit and asked him to help me work through the 12 steps of AA. It hasn't always been easy, but it has been good. I've learned how to be comfortable in my own skin. I've learned how to look life straight in the eye.

To my surprise, I've learned that practicing law is so much easier, even fun, doing it sober. To my surprise, I didn't lose my edge. I can more effectively stand up for myself and my clients in boardrooms and tense negotiations. I used to view law as a means for accumulating personal wealth and status. I now see my role as a lawyer as one of service, of being a social engineer instead of a parasite on society, to quote the late Charles Hamilton Houston.

Just as important, in recovery I've finally found a spiritual path. I used to think that to find God I must pray on the mountaintop, wander in the desert, walk the pilgrim's path. In sobriety, I learned that the path towards the Real is the journey within, the slow deflation of my ego that insists on separation and superiority. In the days of My Drinking, I was someone who wanted to want God. In sobriety, I have become someone who actually wants God, with all the messy, nitty-gritty grist for the mill that comes with it. I used to pray to a God that required tribute, penance, and sacrifice. In sobriety, I found a God that wants me to be happy, joyous, and free. In the days of My Drinking, I used to pray for success and for happiness. These days, I pray that I may be of service, that I may be free of illusion, and that, just for today, I might begin to comprehend the meaning of serenity. As it turns out, that's a life second to none.

If you are reading this and find yourself in a dark wood and have lost the way out, please ask for help. LAP is a great place to start. There you will find the company of men and women who have found a spark of hope at midnight and see no higher service than to help you find yours. ■

*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](http://nclap.org) or call: Cathy Killian (Charlotte/areas west) at 704-910-2310, or Nicole Ellington (Raleigh/down east) at 919-719-9267.*

# The Mental Health Factor: Accounting for the Emotional Toll of the Pandemic

BY LAURA MAHR

*Keys to a successful return to the office plan include flexible choices, robust resourcing, and resilience training with an eye on mental health.*

If your firm is contemplating how to gracefully and seamlessly bring your workforce back to the office, it's in good company. Law offices and other businesses around the country are navigating copious issues—from practical to legal—while planning the reintegration of an in-person workforce. Bringing your team members back to the office as the pandemic winds down will be as novel of a process as sending them home. As surreal as working from home might have felt a year ago, many people have become accustomed to it. Oddly enough, returning to in-office operations may now feel both unfamiliar and uncomfortable. Each phase of the pandemic has presented unprecedented uncertainties and this phase is no different; once again, there are new issues to navigate and no play book to follow.

## The Role of Mental Health

While no one has a map that can circumnavigate all return-to-office planning errors, we do have insight into one key area that would be remiss to overlook in your firm's plan: mental health. In addition to exacerbating pre-existing mental health issues, the pandemic caused increased chronic stress, anxiety, depression, and trauma, research shows. Therefore, in addition to planning the logistics of a safe return to the office, also think about the impact of the past year on your workforce's mental health. Considering the emotional toll and possible post-traumatic stress of the pandemic on your workforce will enable your firm to make available new resources. Targeted resources will support all team members in their performance efficacy; they will also provide additional help for



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those who may be struggling to integrate yet another change.

It should be noted that trauma—feeling physically and/or emotionally overwhelmed without enough resources to feel safe—takes time and often professional help to process. When we have experienced trauma, including the direct or vicarious trauma associated with the pandemic, it doesn't just “go away” when the traumatizing event is over. Some on your team may need specialized help to recover. Time will tell how the collective trauma of going through a pandemic impacts our families, workspaces, and communities, so the kinds of help needed will undoubtedly change over time.

## Lawyers Too?

If you are reading this and thinking, “Lawyers can think their way out of difficult situations, didn't the pandemic impact them less than most people?” or “Lawyers jobs are full of stress, shouldn't they be prepared to

deal with the additional stress of returning to the office?” No, is the likely answer to both questions. The way lawyers think and our ability to separate ourselves from our emotions may make it more difficult for us to make a rapid recovery from the setbacks associated with the pandemic. We may find it challenging to process difficult emotions, think optimistically about change, and work toward a rapid recovery plan. As attorneys, we are taught to spot issues and plan for the worst to mitigate loss for our clients.

The skill of staying vigilant for real or imaginable dangers may impact both team members' resilience and their optimism about a successful return-to-the-office plan. Your attorneys, including those on your management team, will easily discern the risks associated with returning to the office. While on one hand, this “glass half-empty” thinking may be useful to prevent loss and avoid unnecessary mistakes, it may also lead to “paralysis by analysis,” putting up unne-

essary roadblocks to reuniting in person, and preventing a smooth transition.

Most of us went through the pandemic with a great deal of emotional disorientation, not understanding what was happening to us or to the people around us. In my experience, most attorneys act as if we have it all together, thinking that something is wrong with us if we feel overwhelmed or confused. We believe we are alone in our experience. An important part of recovering our resilience and coming back to the office stronger is understanding what happened to us, knowing that how we feel is normal, and realizing that others are experiencing the same.

### Surge Capacity

The first key to success is to recognize that returning to the office will be different for different people. In the same way that some people have adapted and fared well through the pandemic while others have struggled, some members of your workforce will transition with ease back to the office, while others will require effort. When talking with team members about returning, it's helpful to talk with them about and gauge their "surge capacity."

In this context, the concept of surge capacity relates to an individual's capacity to adapt in order to survive a short term intensely stressful situation. For example, when the pandemic began, your surge capacity likely helped you to shift the way you socialize, work, connect with others, shop, and exercise. You may have felt capable of making changes because you felt energized for a short-term shift. However, as the year went on and the pandemic persisted, your surge capacity likely diminished. You may have felt fatigued by all the changes and lacked enthusiasm or patience for keeping them up for the long haul. At some points you may have pushed yourself emotionally and psychologically to keep up with the modifications. For most of us, our surge capacity was depleted by months of intense stress. After such a long haul with no respite to the stress, many of us may still be depleted and ill-prepared for the strain of returning to the office.

I discussed the concept of diminished surge capacity in remote resilience and burnout prevention trainings last fall. Many attorneys and firm management resonate and identify with the concept. As lawyers, we

"get" surge capacity: we use it to mobilize and push through when preparing for big trials or other urgent matters under pressure. After the matter is resolved, there is generally a moment to reset. Pandemic-related stress, however, has been relentless, and numerous attorneys share that they are struggling to understand why they are so exhausted now when they were going strong a few months back. Many are searching for tools to rebuild their stamina so they can return to the office clearheaded and motivated. Some training participants shared their experience of diminished surge capacity due to the isolation they felt working at home. At first, they found the isolation novel, and turned their solitude into productivity—cleaning the basement, doing online exercise classes, connecting with loved ones and the office over Zoom. Over time, however, these makeshift ways of engaging in life and connecting with others became less interesting and even exhausting.

Other participants—often those who were already experiencing chronic stress, teetering on the edge of burnout or going through a personal crisis prior to the pandemic—shared that they went into emotional collapse at the beginning of the pandemic. Their surge capacity was already low, and the shock and stress of the pandemic pushed them into overload right away. Some of the attorneys who collapsed early on are still struggling; they shared that they are exhausted from trying to stay physically well, emotionally afloat, and financially stable this past year. Their surge capacity may be at an all-time low, and they may feel put upon to have to return to work and draw on nonexistent inner resources.

Some who collapsed at the outset may actually experience their surge capacity stronger now than it was a year ago. The pandemic may have been an opportunity for them to focus their attention on their mental health and get the support they needed. Attorneys who had a positive mental health shift during the pandemic share that they are concerned about losing their new edge by returning to old unhealthy habits when they go back to the office. They feel leery about an in-person setup, as they have adjusted well to a work-at-home routine.

It is likely that your team members whose surge capacity for isolation waned will likely feel enthused to return to the office. Attorneys and staff who thrive on in-person

connection shared that they are eager to re-engage in person, socialize with colleagues in the hallways, and see clients face to face. Other team members whose surge capacity for working at home diminished due to the challenges of making their home environment appear professional may also be relieved. These team members might have been overwhelmed by their dining room tables becoming desks or having to stay vigilant to the mute button to block out crying children or barking dogs. They may look forward to a clearer boundary between work and home, and not have the reminder of work in their living space. In addition, some working parents may be relieved to return to the office where they can focus and be free from splitting their attention between legal matters and parenting.

### Everything is Not "Back to Normal"

As your workforce returns to the office, on the outside it may appear that little has changed. In-office operations may even look and run "normally" on the surface. But don't let outward appearances deceive you; a lot may be going on under the surface. No one went through the pandemic—and accompanying social and political strains—without experiencing additional stress. Many people's nervous system and mindset will not yet be recovered from months of uncertainty, loss, and change.

When implementing a return-to-the-workspace plan, firm management should not only account for the fact that people may still be experiencing varying degrees of post-traumatic stress, but they may also have undergone a life perspective shift that impacts their motivation to work the way they used to. Many lawyers' and employees' outlook on life, including their values, goals, and aspirations, have shifted over the past year. For example, many attorney-parents shared that, after spending extended daytime hours at home with their families, they realized that they spent too many hours away from home pre-COVID. They felt sad about missing out on important moments in their children's lives. Other attorneys noted that they liked working alongside their significant others and felt happier overall doing things together. These attorneys may now lament the loss of close connection with their families. These feelings may impact their motivation to work long hours. Other attorneys and business staff shared

that they experience decision-making fatigue and are exhausted from navigating hundreds of micro-choices each day about staying safe from an invisible virus. These individuals may be overwhelmed by the thought of returning to work—including having to make another round of decisions regarding vaccines, work travel, and childcare. This increased anxiety may impact their ability to focus on work and meet deadlines as they return to the office.

Additionally, firm management should consider that most team members have conditioned themselves to stay physically distant from acquaintances and colleagues this past year. By forming this new habit, their nervous systems likely developed an aversion to being physically close to those outside their “pods.” Even the sight of friends hugging on television made one of my client’s body tense up and unconsciously feel like the characters were doing something “wrong.” The proximity of co-workers in office work spaces may feel unnaturally close and even threatening to your workforce’s nervous systems, even with additional space between workstations. This aversion to physical closeness may trigger neurobiological defenses and cause team members to consciously or unconsciously withdraw both physically and socially at work. This impulse to withdraw may impact in-person collaboration, fostering of workplace morale, and looking relaxed during in-person meetings.

### **A Clear, Flexible Plan**

A clear plan, flexible choices, robust resourcing, and resilience training are additional keys to a successful return to the office. Whether team members are excited or reticent about returning to the workspace, most people will have some amount of uncertainty about going back to the office. Many will wonder if it is truly safe and what will be required of them. Feeling anxious about transitions is normal, especially when a person doesn’t have enough information about the transition plan to feel safe. If your firm hasn’t yet thought through the return-to-office policies—including your firm’s expectations regarding vaccinations—do so before communicating with your workforce about returning to the workspace.

That said, don’t wait too long to create and discuss a plan with your team members. One tactic that quells anxiety about transi-

tions is to communicate as much information about the plan as soon as possible. Provide written material about the firm’s plan. Lay out what will be the same, and what will be different. List the things for which you don’t yet have answers and acknowledge the challenges being faced; identifying what isn’t yet decided but is in the works can also calm anxiety. Another approach that can quiet an anxious nervous system is reassurance and appreciation. When possible, when communicating about the back-to-office transition, reassure your workforce about job stability during the transition, and share verbal and written appreciation for your workforce’s flexibility with adapting to so many changes. Firm management should also relax by remembering that it’s all right for management to not know the answers to everything—remember, there is no playbook written for returning to the office after a pandemic.

Giving your team members options can help calm agitated nervous systems. The pandemic left many people feeling like they are out of control, and as a result they may still be experiencing increased anxiety or depression, which, unmitigated, can impact work performance and client satisfaction. Offering team members choices is a practical way to help them recover and regain a sense of control over their lives. Depending on your firm’s specific circumstances, when possible, offer options such as a staggered return to the office, or a hybrid setup such as half days or a partial week in-office for the first few months to help people slowly acclimate. Management may also want to consider offering the option for employees to continue to work at home; some people actually performed *better* at home. Team leaders may have noticed who was particularly productive during the pandemic.

If you notice that certain team members are resisting returning to the office, speak to them directly about their concerns. Discuss firm resources, offer options, and ask them if they need additional help. Take into consideration that some people, especially those experiencing post-traumatic stress, may need to move more slowly back to the office than others.

Offering firm-wide resources targeted toward mental and physical well-being is imperative to replenishing team members’ drained surge capacity and helping them orient to a post-pandemic workplace. These

include any program or materials that support your workforce to recover from stress and trauma, build resilience, and foster healthy coping skills to deal with general or post-pandemic specific stress. Offering programs targeted toward well-being creates new ways for people to connect upon returning to the office.

For example, many firms are planning to launch well-being task forces to provide programming for stress reduction, or are conducting a firm-wide needs assessment to determine the kinds of resources needed. (If your firm conducted a needs assessment pre-COVID, know that your workforce’s needs may have shifted during the pandemic and it’s now timely to conduct a new one). Other firms are expanding and customizing their employee assistance programs to provide one-on-one health and finance coaching or are contracting with private resilience coaches. Resilience coaching allows participants to learn the core concepts of resilience building in a group training, and then tailor the tools for their personal situation in one-on-one sessions.

Firms may be able to build on at-home well-being momentum that emerged during the pandemic. For example, numerous people started exercising more, eating lunch, and getting outside. These simple activities support both mental health and lawyering skills such as creative problem solving and cognitive functioning. Think about ways to encourage mental and physical health breaks during the work day at your office, such as a lunchtime walking club, or yoga classes, or meditation breaks. Encourage people through your office culture to eat lunch away from their desks by having a “lunch club” that meets outside, or continue to do Zoom lunches to virtually connect colleagues in multiple locations.

### **Creating a Surge Capacity Toolkit**

Focus firm-wide training and CLEs on resilience education and on creating a surge capacity toolkit. Well-being resources and programming can be small things that don’t have to cost a lot. The key to building resilience and rebuilding surge capacity is what I refer to as “mini-moments of well-being”—infusing small but consistent spurts of wellness throughout the work day.

It dawned on many law firms during the pandemic that their lawyers were lacking the proper education about how to stay

resilient and replenish their surge capacity in general, and especially during a prolonged crisis. Resilience training using a neuroscience lens is most effective, as it provides both the theory regarding our neurobiological response to stress along with simple, scientifically researched resilience tools that can be practiced in one-minute increments during the workday. Short, simple practices help people refuel their surge capacity, build their resilience, and improve their cognitive functioning. In short, people feel better and lawyer better. Participants share that blending scientific theory and short, targeted stress-reduction tools work well for lawyer brains. Armed

with theory and a simple resilience toolkit, lawyers who are looking for support are quick to implement the skills and reap the rewards. If your firm offers resilience training that is tailored to lawyers and support staff as you ramp back to the office or upon returning, it will address two things: helping your workforce recover from the trauma of the pandemic and building life-long skills that prevent burnout and increase productivity.

### Moving Through the Next Phase

As we move through this next phase of life after the pandemic, know that we are still navigating a lot of unknowns, and there are

still many choices to be made. If you are wondering what to do to support your workforce's mental health, assume that others are wondering too. None of us have all the answers and no firm is totally prepared or completely confident about its path forward. Reach out for advice from outside experts or other firms on how to best move forward. The pandemic may shift our legal culture from feeling uncomfortable talking about mental health to normalizing it as a necessary part of lawyering well. Imagine what it would be like to provide training for team leaders on talking to team members about post-traumatic stress.

Incorporating offerings that support mental health and grow both resilience and surge capacity is a cutting-edge way of doing business. It is also a more productive and effective way to run your firm. Be clear with your policies, as flexible as you can with return-to-office options, and as generous as you can with resourcing. Through this process, your team can orient to what's happening now, make a solid plan, and move forward with greater confidence. A firm that is mental health informed and unites to implement mini-moments of well-being throughout the workday is best prepared to traverse the uncertainties of the now and those to come. ■

*NOTE: This article was originally published in the American Bar Association Law Practice Management Magazine, May 2021*

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*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 approved by the NC State Bar): [consciouslegalminds.com/register](https://consciouslegalminds.com/register).*

## Upcoming Appointments to Commissions and Boards

The following appointments must be made at the July 2021 State Bar Council meeting.

**Board of Legal Specialization** (three-year term)—There are three appointments to be made. Patti Head (public member) is eligible for reappointment.

The specialization program assists in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field. It also seeks to improve the competency of members of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and to meet other requirements of specialization.

**Board of Paralegal Certification** (three-year term)—There are three appointments to be made. Matthew Smith and Benita Angel Gwynn Powell are eligible for reappointment. Patty Clapper (paralegal members) is not eligible to be reappointed.

The nine-member Board of Paralegal Certification is responsible for administering the plan for certification of paralegals. The Paralegal Certification Program assists in the delivery of legal services by identifying qualified paralegals for certification.

**IOLTA Board of Trustees** (three-year term)—There are two appointments to be made. Jane V. Harper and Kerry A. Friedman are both eligible for reappointment.

NC IOLTA is a nonprofit program created by the NC State Bar that works with lawyers and banks across the state to collect net interest income generated from lawyers' general, pooled trust accounts for the purpose of funding grants to providers of civil legal services for the indigent and programs that further the administration of justice.

**Disciplinary Hearing Commission** (three-year term)—There is one appointment to be made. Allison C. Tomberlin has resigned with one year remaining in her term.

The Disciplinary Hearing Commission (DHC) is an independent court that hears all contested disciplinary cases. It is composed of 12 lawyers appointed by the State Bar Council and eight public members appointed by the governor and the General Assembly. The DHC sits in panels of three: two lawyers and one public member. The DHC also hears cases involving contested allegations that a lawyer is disabled and petitions from disbarred and suspended lawyers seeking reinstatement.

# Barbara Christy, Board Certified Specialist in Commercial Real Property Law

BY SHEILA SAUCIER, CERTIFICATION COORDINATOR, BOARD OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Barbara Christy, a board certified specialist in commercial real property law.

**Q: Tell us about yourself.**

I met and married my husband Rick while we were both undergrad students at Appalachian State University. After earning a degree in criminal justice, I was accepted to UNC Law School, so we moved to Saxapahaw (a tiny mill village about 30 minutes from Chapel Hill). Shortly after graduating from law school, we bought about 90 acres of land in Snow Camp (Alamance County) with a 100-year-old farmhouse where we happily raised our children and an assortment of animals. I have worked with the firm of Schell Bray PLLC in Greensboro, NC, for the last 34 years, and spend my commuting time listening to podcasts and audiobooks. We are very involved in the life of our church and local food pantry, but when we do get away, it's usually to spend time with family at Badin Lake.

**Q: With an undergraduate degree in criminal justice, how did you become a real estate lawyer?**

For the first three years of my law practice, I worked in a two-person firm doing a little bit of everything. I found that I really enjoyed everything about a real estate closing. Unlike litigation, where one party wins and one loses, in real estate and other business transactions, everyone is aiming for the same goal—closing the deal. When I joined Schell Bray in 1987, I moved from residential to commercial real estate.

**Q: Why did you decide to become a board-certified specialist in 2005?**

I realized that most of the real estate

attorneys I admired and respected were certified specialists, including my partners, Bill Aycock and Holly Alderman. With their support and encouragement, I decided to seek certification.

**Q: Has this certification been helpful to your practice? If so, in what ways?**

Certification has been helpful to my practice in many different ways. I get a lot of business from attorneys in other states who have clients that are doing real estate transactions in North Carolina. I believe that my certification as a specialist in commercial real property law provides a certain level of credibility for attorneys that may not personally know me. Certification has also helped me meet the criteria for inclusion in some national organizations such as the American College of Real Estate Lawyers. Additionally, because of my certification I have been asked to serve as an expert witness in a few real estate related lawsuits.

**Q: What career accomplishment makes you the most proud?**

I would have to say that my selection to serve as an officer of the State Bar is the pinnacle of my career. Since beginning my service as a State Bar councilor in 2009, I have had the opportunity to work with lawyers from all over the state, from solo practitioners to members of large multi-state firms, and in every practice area. I have witnessed over and over again the dedication of the attorneys in this state to providing the best legal services possible for the benefit of our citizens. They are tireless advocates, wise counselors, and work hard in both their jobs and their communities. What makes me proud is to be a part of this profession.

**Q: How does your work as president of the**

**North Carolina State Bar entwine with your real property law practice?**

I have found that many of the attributes that are required to have a successful real estate practice are attributes that serve me well as a State Bar officer. Closing a real estate transaction requires bringing together several parties, reaching an agreement on the essentials, developing common goals, working through issues, and closing the deal. I need to be a good listener and to understand the positions and concerns of other parties in order to effectively solve the problems that inevitably arise.

**Q: What book, music, movie, etc. has most influenced the person you are today?**

I have always been a bookworm, even though most of my “reading” these days takes place while listening to books or podcasts in my car. I believe I learn something from almost every book I read, though I confess to enjoying an occasional romantic comedy or mystery. The book that most influenced me, that continues to influence me, is the *Bible*. I try to read through it at least every couple of years, and each time I learn something new and am changed.

**Q: Who is your hero and what makes them your choice?**

At this moment I have a group of heroes on my heart—parents of chronically ill children. I have a couple of good friends that have children battling cancer, and I am filled with admiration for the way they handle unimaginably hard decisions. We lawyers could learn a lot about fierce advocacy from a mother fighting for her child.

**Q: How has the COVID19 pandemic affected the practice of real estate law?**

Real estate practitioners, like everyone else, had to shift to remote work almost

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# Home is Where the Heart Is

## *Work is Where the Internet Is—And That's Okay*

BY SUZANNE LEVER, ASSISTANT ETHICS COUNSEL

The practice of law has been gradually transforming. The traditional office-based model is morphing into one in which lawyers practice virtually and remotely. COVID-19 has significantly accelerated this law firm evolution. The pandemic has forced lawyers to work remotely from such exotic locations as the kitchen table, the basement, and even the closet. For a lucky few, the remote location may actually be a vacation home. But what happens when these temporary home offices are not located in the state where the lawyer is licensed to practice?

Rule 5.5 prohibits a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction. The rule also prohibits a lawyer from establishing an office or other “systematic and continuous presence” in the jurisdiction or holding out to the public that the lawyer is admitted to practice law in the jurisdiction. Does the North Carolina lawyer whose basement is not in North Carolina run the risk of being accused of engaging in the unauthorized practice of law?

In an effort to allay lawyers’ fears, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility published ABA Opinion 495 (12/16/2020). The ABA opinion reminds lawyers that the Rules of Professional Conduct are “rules of reason,” and *their purpose* has to be examined to determine *their meaning*. The opinion states that the purpose of the limitations set out in Rule 5.5, as to who can practice law, is to protect the public from unqualified persons providing legal services. According to the ABA, “[t]hat purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is

for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed.” *Id.*

To remain “invisible” to a local jurisdiction, the ABA opinion advises lawyers to avoid holding themselves out as being licensed to practice in the local jurisdiction, avoid advertising or otherwise suggesting that the lawyer has an office in the local jurisdiction, and, of course, avoid providing or offering to provide legal services in the local jurisdiction. In addition, the remote working lawyer needs to make sure that the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law.

More specifically, the opinion advises that the lawyer should not hold out to the public an address in the local jurisdiction as an office, and should not include a local jurisdiction address on letterhead, business cards, websites, or advertisements. Furthermore, these materials should clearly indicate the lawyer’s jurisdictional limitations and refrain from offering to provide legal services in the jurisdiction. *Id.*

The opinion concludes that:

[I]n the absence of a local jurisdiction’s finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer’s licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer’s presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

*Id.* The ABA opinion cites Utah Ethics Opinion 19-03 (2019) which states: “what interest does the Utah State Bar have in

regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? And the answer is...none.”

The North Carolina Rules of Professional Conduct have always allowed a lawyer licensed in North Carolina to provide legal services to their North Carolina clients even if the lawyer is out of state. North Carolina does not have a physical office residency requirement. However, as emphasized on the ABA opinion, a North Carolina lawyer who is working remotely out-of-state needs to be aware of that jurisdiction’s rules on what constitutes the practice of law in that state or otherwise violates their Rule 5.5 equivalent. Even if the lawyer is only providing services to North Carolina clients, the lawyer could potentially violate that state’s UPL statute or rule, which could in turn violate our Rule 5.5(a) (“A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.”).

In addition to considering the local state’s practice of law restrictions, the remote lawyer needs to consider his client’s reasonable expectations when determining what he needs to tell his clients regarding his relocation. For example: Does the client know the lawyer is not actually located in the state where the services are being provided, and does the client know how they can contact the lawyer? A lawyer may not falsely hold himself out as being in the state. A North Carolina licensed attorney, who is working remotely from Hilton Head during the pandemic, cannot give the false impression that they are still physically located in North Carolina. Clients may want to make a choice on representation based upon whether they can meet with the lawyer in person if necessary, so making it look like the lawyer is in the state when

that's not true could be a misrepresentation. To avoid confusion of clients who might presume the lawyer is still present at a physical address in the licensing jurisdiction, the lawyer should include a notation in each publication of the address such as "by appointment only." See 2012 FEO 6 (it is not misleading for a law firm to list a time-shared leased office address on letterhead or in advertising so long as the communication contains an explanation that accurately reflects the law firm's presence at the address (i.e., "by appointment only")).

The remote lawyer also needs to consider any technological limitations presented by his temporary home office. A lawyer needs to be aware of the security level of the services they're employing to "remote-in" to their North Carolina practice. This is particularly important if someone goes international during this time. Different countries will have better or worse technological and security infrastructures, so a lawyer should look into that before moving abroad. It's not as simple as "I'll just take my laptop to France for a year!"

The primary ethical concern with regards to technology in a remote environment is confidentiality. Lawyers working remotely continue to have the duty to protect confidential client information. Rule 1.6(c) states that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Additionally, as a part of maintaining a lawyer's competency, comment [8] to Rule 1.1 states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Simply put, if a lawyer is going to utilize technology to work remotely, the lawyer needs to have a basic understanding of the technology to ensure that the lawyer complies with his or her professional obligations. See also 2011 FEO 6 (Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property) and 2005 FEO 10 (Virtual Law Practice and Unbundled Legal Services).

Lawyers should take the time to review their home or remote office network security to ensure their access to the internet (network equipment, laptops, mobile devices, etc.) is secure. Similarly, lawyers using

online services (cloud storage, practice management programs, etc.) should take the time to vet the reliability and security of those services. While it is not a lawyer's duty to know the intricacies of security protocols employed by the services they utilize, it is a lawyer's duty to take reasonable care in selecting and vetting a particular service to determine if confidential client information will be protected while using the service, what vulnerabilities might exist, and how the lawyer can best protect against those vulnerabilities. See 2011 FEO 6 ("[W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality.") (internal citations omitted).

At a minimum, lawyers should spend some time researching the online services they intend to use. Review the company's information on security, and search for third party reports about the services. Doing so may reveal past breaches and recent security concerns—as well as the company's response to those events—that can inform your selection. Lastly, lawyers should be mindful of who (or what) could overhear confidential conversations taking place while working remotely. From spouses and kids to devices equipped with digital voice assistants (e.g. Amazon Echo or Google Home), remote locations are ripe with listening ears. Step into another room out of earshot of anyone else, or turn off the microphone on your home devices when making a confidential call.

Remember that a lawyer's duty to protect confidential information is constant, and the considerations for maintaining that protection are ever-evolving. Lawyers should continuously educate themselves on the state of technology and the services used to facilitate their practices, and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure. Nevertheless, even

though it is not as simple as "I'll just take my laptop to France (or the basement) for a year," as we have all learned, working from a home office is doable and ethical—even if the home office is located in a jurisdiction where you are not licensed. In conclusion, home is where the heart is. During a global pandemic, work is where the internet, dogs, children, and laundry are. ■

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## Legal Specialization (cont.)

overnight. Fortunately, many of the tools needed to conduct a virtual closing were already evolving. Most land records in the various offices of the registers of deeds are available online, and E-recording has become widely available in the last few years. The legislature moved quickly to provide temporary authorization for remote notarization, and lawyers found novel ways to get documents signed without close contact, i.e. the "parking lot closing." We have all suffered from the enforced separation from family, friends, and colleagues, but I have found a few bright spots as two of my adult children have permanently switched to remote work, which has allowed them to relocate back to this area. I am beyond excited at the prospect of having my grandchildren close by!

**Q: What would you say to other lawyers to encourage them to pursue certification as a specialist?**

I would tell them not to do it just because they think it will attract clients. If that happens, it is an added bonus. I did it because I believed I was in fact a specialist, and I wanted to show my commitment to my practice area. Completing the process of specialization was a professional achievement that I value. I was also able to spend a few years on the Real Property Specialization Committee and really enjoyed that connection with some of my colleagues in the practice area. Specialization is well worth the initial time and commitment, and I would definitely encourage others to participate. ■

*For more information on board certification for lawyers, visit us online at [nclawspecialists.gov](http://nclawspecialists.gov).*

# Committee Publishes Four Opinions, Including Revised Opinions on Ex Parte Communications and Responding to Negative Reviews

## Council Actions

At its meeting on April 16, 2021, the State Bar Council adopted the ethics opinion summarized below:

### 2021 Formal Ethics Opinion 1

#### *Contemporaneous Residential Real Estate Closings*

Opinion addresses conflicts of interest, communication, funding issues, and accountings in contemporaneous closings for residential real property.

## Ethics Committee Actions

At its April 15, 2021 meeting, the Ethics Committee received reports and recommendations from two subcommittees studying proposed rule amendments: one studying the adoption of anti-discrimination language in the Preamble of the Rules of Professional Conduct, and the other studying the adoption of language in the comment for Rule 1.1 (Competency) recognizing a lawyer's responsibility to be aware of how implicit bias and cultural differences can impact the representation of a client. After discussion, the Ethics Committee voted to recommend the publication of the proposed amendments to the Preamble and the comment to Rule 1.1. The proposed amendments are published for comment in this edition of the *Journal*.

In addition to the proposed rule amendments, the Ethics Committee considered a total of 11 ethics inquiries, including the opinion adopted by the council referenced above. Six inquiries were sent or returned to subcommittee for further study, including inquiries addressing a lawyer's professional responsibility when asked by a client to take possession of evidence constituting contraband, the confidentiality of informa-

tion contained in the public record, and a lawyer's professional responsibility in utilizing machine learning/artificial intelligence in a law practice. Lastly, the committee approved the publication of four proposed opinions which appear below.

### Proposed 2019 Formal Ethics Opinion 4 Communications with Judicial Officials April 15, 2021

*Proposed opinion discusses the permissibility of various types of communications between lawyers and judges.*

Note: In connection with the adoption by the council of the opinion below on [date to be determined], the following prior ethics opinions were withdrawn: RPC 237, 97 FEO 3, 97 FEO 5, 98 FEO 12, 98 FEO 13, 2001 FEO 15, 2003 FEO 17.

The Ethics Committee has issued a number of opinions interpreting and applying the Rules of Professional Conduct to various lawyer-judge communications. See RPC 237, 97 FEO 3, 97 FEO 5, 98 FEO 12, 98 FEO 13, 2001 FEO 15, 2003 FEO 17. However, these opinions—spanning 30 years—were based upon different iterations of the Rules of Professional Conduct. This opinion addresses and clarifies a lawyer's responsibilities under the current Rules of Professional Conduct in communicating with a member of the judiciary while acting in a representative capacity. As a result, upon adoption of the present opinion, the State Bar Council withdrew the aforementioned opinions.

Additionally, this opinion addresses a lawyer's professional responsibility in communicating with a member of the judiciary

## *Rules, Procedure, Comments*

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at its next quarterly meeting. Any comment or request should be directed to the Ethics Committee at [ethicscomments@ncbar.gov](mailto:ethicscomments@ncbar.gov) no later than June 25, 2021.

## *Public Information*

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

during the course of litigation where the opposing party is represented by counsel. While this scenario is common, it is very

possible that a lawyer may need to communicate with a member of the judiciary during the course of litigation where the opposing party is self-represented. A lawyer's professional responsibility to avoid improper communications with the tribunal applies equally to situations where the opposing party is represented and where the opposing party is *pro se*. To preserve the integrity of and instill confidence in the justice system, a lawyer should take great care to ensure his or her conduct in communicating with a tribunal is compatible with the Rules of Professional Conduct, particularly when dealing with an unrepresented party.

Lawyers communicate with judges on a daily basis. Communicating with members of the judiciary is required for the effective representation of clients and the administration of justice. Lawyers' communications with judges generally fall into one of three categories: 1) clearly permissible communications, e.g., formal pleadings and arguments during public proceedings and other communications authorized by law or court order; 2) clearly prohibited communications, e.g., spontaneous, in-person *ex parte* communications about the merits of a case; and 3) informal communications (e.g., email communications about scheduling dilemmas). This opinion primarily addresses informal communications.

Communication between lawyers and the courts by way of formal filings are the backbone of an effective justice system. The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal's rules of procedure does not create the appearance of granting undue advantage to one party. Presuming the filings comply with the Rules of Civil Procedure, the local rules, and any other requirements imposed by law or court order, such communication is entirely permitted under the Rules of Professional Conduct.

The Rules of Professional Conduct impose some limits on lawyers' communications with judges. These limits are designed to ensure fair and equal access to the presiding tribunal by the parties and their representative counsel. To this end, Rule 3.5(a)(3) prohibits a lawyer from communicating *ex parte* with a judge or other official unless authorized to do so by law or court order. Rule 3.5(d) defines "ex parte

communication" as "a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record."

The following are some common scenarios involving informal communications with judges.

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

Lawyer A represents Wife in a domestic case against Husband, who is represented by Lawyer B. Lawyer A's young child is sick, requiring Lawyer A to stay home to care for his child for the rest of the week. Lawyer A is scheduled to appear in court for a hearing in Wife and Husband's domestic case tomorrow, but can no longer attend the hearing due to childcare issues. May Lawyer A inform the court of his inability to attend court and informally request that the hearing be continued by email or text message to the judge presiding in the domestic case, without copying Lawyer B?

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

No. The definition of *ex parte* communications encompasses all communications concerning a matter that is pending before a tribunal, including scheduling issues. Rule 3.5(d). The Rules of Professional Conduct do not exempt scheduling matters from the prohibition on *ex parte* communications. Accordingly, although *ex parte* communications concerning scheduling matters are often limited and innocent in nature, they are prohibited unless authorized by law or court order. In this instance, Lawyer A's communication is sent a) on behalf of himself and his client, b) concerning a matter pending before the tribunal (the domestic proceeding), c) outside of the record, d) without notice to the opposing counsel, and e) in the absence of opposing counsel. Accordingly, Lawyer A's communication is an *ex parte* communication with the court, and thus prohibited unless authorized by law or court order. See Rules 3.5(a)(3) and (d).

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

Same scenario as Inquiry #1. Does Lawyer A cure the *ex parte* nature of his communication by sending an email or text message to all judges in his district concerning his inability to attend court that

week and requesting all hearings for which he is responsible during the week be continued, without copying Lawyer B or any other opposing counsel or party?

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

No. If Lawyer A has a matter pending and the communication is sent to the judge presiding in that matter, amongst other judges, the communication remains *ex parte* and is prohibited. See Opinion #1. If Lawyer A has multiple cases pending, the single, generic communication described in this inquiry may constitute multiple instances of prohibited *ex parte* communication.

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

Same scenario as Inquiry #1. May Lawyer A inform the court of his inability to attend the day's hearing and informally request that the hearing be continued via email or text message to the presiding judge, with Lawyer B copied on the email or text message?

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

Yes, provided the communication is not prohibited by law, local rules, or the presiding judge, and does not address the merits of the underlying case (see Opinion #4, below). Pursuant to Rule 3.5(d), a communication by a lawyer to a judge is a prohibited *ex parte* communication if made "in the absence of an opposing party" (or in the absence of opposing counsel). A communication to a judge that is simultaneously provided to the opposing party/counsel is not made "in the absence of an opposing party" and therefore is not an "ex parte communication" as defined in Rule 3.5. This is true of both hard copy communications and electronic communications, including text messaging and emails.

Lawyers are encouraged to remember that simultaneous provision of a communication does not necessarily result in simultaneous receipt of that communication. When possible and appropriate, a lawyer should provide reasonable advance notice to opposing counsel of the need and intention to communicate with the presiding judge about the subject of the communication.

However, even a communication that is not a prohibited *ex parte* communication may nevertheless be prohibited by law or

court order, including local rules or administrative orders entered by the tribunal. A presiding judge or the rules of a tribunal may also provide guidance and/or instruction to lawyers concerning such communications, as the Rules of Professional Conduct are not meant to disable or abridge “the inherent powers of the court to deal with its attorneys.” N.C. Gen. Stat. § 84-36. Lawyers are advised to review all relevant laws and court orders, including local rules, prior to engaging in such communication.

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

Same scenario as Inquiry #1. May Lawyer A communicate his inability to attend the hearing and informally request a continuance via email or text message to the presiding judge, with Lawyer B copied on the email or text message, if the email or text message contains additional argument from Lawyer A on the matter to be heard by the court in the upcoming proceeding?

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

No. Even though such a communication may not be a prohibited *ex parte* communication, it is still improper. Unsolicited communications addressing the merits of the underlying matter made outside the ordinary or approved course of communication with the court are prejudicial to the administration of justice in violation of Rule 8.4(d). As noted above, the purpose of the prohibition on *ex parte* communications is to ensure fair and equal access to the presiding tribunal by parties and their counsel. Allowing one party unfettered access to make off-the-record arguments to the presiding judge via electronic communication undermines the principle of fair and equal access to the presiding judge. *See* Rule 3.5 cmt. [8] (“All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.”). It is also antithetical to the notion that cases are tried in a public forum rather than in private discussions behind closed doors. Providing notice and copying the opposing party/counsel on

such a communication does not remedy these problems. Unless the communication is authorized by law or court order, or unless the communication is solicited by the presiding judge, informal communications that address the merits of the case are improper and constitute misconduct under Rule 8.4(d).

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

Judge has instructed Lawyers A and B to send trial briefs concerning a pending motion to the judge via email, with a copy to opposing counsel. May Lawyers A and B submit substantive argument on the merits of a pending matter via email as the court has requested?

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

Yes. If the presiding judge has instructed counsel to communicate directly with the court, the communication is not a prohibited *ex parte* communication under Rule 3.5 and is not prejudicial to the administration of justice under Rule 8.4(d) even if the requested communication will be on the merits of a pending matter. This conclusion applies to any appropriate request from a judge to all counsel for communication, including trial briefs and proposed orders. Again, the Rules of Professional Conduct are not meant to disable or abridge “the inherent powers of the court to deal with its attorneys.” N.C. Gen. Stat. § 84-36. The presiding judge has the authority to determine how counsel are to communicate with the court; except as prohibited by law or court rule, such communications are within the discretion and preference of the tribunal and the presiding official.

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### **Proposed 2020 Formal Ethics Opinion 1 Responding to Negative Online Reviews April 15, 2021**

*Proposed opinion rules that a lawyer is not permitted to include confidential information in a response to a client’s negative online review but is not barred from responding in a professional and restrained manner.*

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

Lawyer’s former client posted a negative review of Lawyer’s representation on a consumer rating website. Lawyer does not have

the ability to edit or remove reviews posted on the 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 #1:**

In response to the former client’s negative online review, Lawyer may post a professional and restrained response that does not reveal any confidential information. Lawyer may deny the veracity of the review, but lawyer may not use confidential client information to contradict specific facts set out therein. Online reviews are written by current or past clients and posted publicly. Typically, reviews will include a comment from the client regarding the lawyer’s services as well as some type of “rating.” Once the review is posted, it is visible to the public. Online reviews are today’s personal recommendations. Many potential clients will read—and rely on—online reviews as the first step to finding a lawyer.

Because online reviews are so important to a lawyer’s practice, online reputation management is crucial. Therefore, it may be in the lawyer’s best interest to respond to a negative review. Nevertheless, 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 disclosure is impliedly authorized in order to carry out the representation; (2) the client gives informed consent; 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. Responding to a negative online review is not necessary to “carry out the representation.” 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) recognizes three circumstances in which the self-defense exception to the lawyer's general duty of non-disclosure may apply: (1) in a controversy between the lawyer and client; (2) when a *criminal charge or civil claim* has been asserted against the lawyer based upon conduct in which the client was involved; or (3) 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). Because online criticism, standing alone, does not constitute a "criminal charge," "civil claim," or "proceeding," the remaining question is whether a negative online

review creates a "controversy" between the lawyer and client as to which the lawyer may disclose otherwise protected client-related information in order "to establish a claim or defense."

Several jurisdictions conclude that a negative online review does not amount to a controversy that triggers the self-defense exception. In addition, the ABA Standing Committee on Ethics and Professional Responsibility concludes that, "alone, a negative online review, because of its informal nature, is not a 'controversy between the lawyer and the client' within the meaning of Rule 1.6(b)(5), and therefore does not allow disclosure of confidential information relating to a client's matter." ABA Formal Op. 496 (2021). We agree with the analyses set out in these ethics opinions. For example, the Pennsylvania Bar Association concludes that while 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 states:

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.

Penn. Bar Ass'n Ethics Comm. Op. 2014-200. Likewise, the New York State Bar Association opines 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 Professional Ethics Committee for the State Bar of Texas opines 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 Association states 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. 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).

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, we agree with the Pennsylvania Bar Association that there must be an action or proceeding in contemplation for the exception to apply. See Penn. Bar Ass'n Ethics Comm. Op. 2014-200. The Restatement explains 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. 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.* It is the “manifestation of intent” that makes the disclosure of confidential client information “reasonably necessary” under Rule 1.6(b)(6). The online posting of negative comments about a lawyer does not amount to the requisite “manifestation of intent” to initiate proceedings against the lawyer that would permit the lawyer to rely on the self-defense exception. Furthermore, as noted in ABA Formal Op. 496, “even if an online posting rose to the level of a controversy between lawyer and client, a public response is not reasonably necessary or contemplated by Rule 1.6(b) in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.”

**Inquiry #2:**

An individual who is not a current or former client, and has never consulted with Lawyer with respect to a particular matter, posts a negative review of Lawyer’s legal services on a consumer rating website. May Lawyer respond to the post by stating that he has never represented the individual?

**Opinion #2:**

Yes. The duty of confidentiality set out in Rule 1.6 only applies to information obtained during a lawyer-client relationship.

**Inquiry #3:**

A potential client contacts lawyer for representation. Lawyer declines the representation—perhaps because he does not practice in the relevant area of law, he has a conflict, or he does not believe the case has merit. The potential client posts a negative review of Lawyer on a consumer rating website.

May Lawyer respond to the post by stating that he has never represented the individual?

**Opinion #3:**

Yes, unless the client is entitled to the protections set out in Rule 1.18 for prospective clients. Comment [2] to Rule 1.18 provides:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communica-

tions, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response. In such a situation, to avoid the creation of a duty

to the person under this Rule, a lawyer has an affirmative obligation to warn the person that a communication with the lawyer will not create a client-lawyer relationship and information conveyed to the lawyer will not be confidential or privileged. *See also* Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal infor-

**In Memoriam**

**Fred Alphin Jr.**  
Raleigh, NC

**Charles Fuller Blanchard**  
Raleigh, NC

**Ronald G. Blanchard**  
Oak Island, NC

**Paula Marie Booth**  
Lewisville, NC

**Sarah Jane Brinson**  
Arapahoe, NC

**Paul Anthony Daniels**  
Greensboro, NC

**Richard Benjamin Faulkner**  
Greenville, NC

**Miles B. Fowler**  
Clinton, NC

**Fred Thurman Hamlet**  
Greensboro, NC

**Larry Edwin Harrington**  
Monroe, NC

**James Clarence Hord**  
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**Robert William Kirby**  
Cherryville, NC

**Bobby Alvin Ledford**  
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**Carl Wainwright Loftin**  
Asheville, NC

**Julian Sidney Mack**  
Chapel Hill, NC

**Daniel Alston Manning**  
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**John Vivian Matthews Jr.**  
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**John Patrick McNeill**  
Cary, NC

**Don Gilbert Miller**  
Trinity, NC

**Anthony J. Ruggiero Jr.**  
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**Robert Bristol Schwentker**  
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**Lawrence Bruner Shuping Jr.**  
Raleigh, NC

**Vernon Gilbert Snyder III**  
Greenville, NC

**Robert Charles Soles Jr.**  
Tabor City, NC

**Samuel McDonald Taylor**  
Raleigh, NC

**Ben Spears Thomas**  
Mooresville, NC

**Russell Etheridge Twiford**  
Elizabeth City, NC

**M. Marion Watts**  
Windsor, NC

**William Robert Whitehurst**  
Lexington, NC

**Lillian G. Wilson**  
Charlotte, NC

mation of general interest. Such a person is communicating information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a “prospective client.”

Pursuant to Rule 1.18(a), a person who consults with a lawyer with respect to a particular matter is a prospective client. Prospective clients are entitled to some of the protections afforded clients. Rule 1.18, cmt. [1]. Specifically, Rule 1.18(b) prohibits a lawyer from using or revealing information obtained during a consultation with a prospective client—except as permitted by Rule 1.9—even if the lawyer decides not to proceed with the representation. Notably, the duty exists regardless of how brief the initial conference may be. Rule 1.18, cmt. [3].

Lawyer may not confirm or deny his representation of a prospective client. Lawyer may, however, state that it is not possible for him to accept every prospective client’s case. Lawyer may enumerate the various reasons that a prospective client’s case may be declined.

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

A relative or a friend of a former client posts a negative review of Lawyer’s representation of the former client on a consumer rating website.

Lawyer believes that the 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 comments?

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

Lawyer may respond that he never represented the relative or friend. *See* Inquiry #2. In addition, Lawyer may post a professional and restrained response to the negative review but may not disclose confidential client information obtained during the representation of the former client, unless the former client consents. *See* Inquiry #1.

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

Lawyer’s former client posted a negative review of Lawyer’s representation on a con-

sumer rating website. Lawyer believes that the former client’s comments are false and libelous. May Lawyer sue his former client for defamation and disclose confidential client information to establish the claim?

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

Yes. If there is a basis in law and fact for a defamation suit against the former client, the Rules of Professional Conduct do not prohibit Lawyer from filing such a suit. Pursuant to Rule 1.6(b)(6), Lawyer may reveal information protected from disclosure by Rule 1.6(a) to the extent the lawyer reasonably believes necessary to establish the defamation claim.

#### **Inquiry #6:**

May Lawyer include the following provision in his representation agreement?

A lawyer is generally prohibited from using or revealing confidential information of a former client. Client agrees that confidential information may nonetheless be revealed by Lawyer in the event Client publishes or causes the publication of a claim on the internet that Client’s representation by Lawyer was deficient in some respect, but only to the extent reasonably necessary to directly rebut such a claim.

#### **Opinion #6:**

No. Rule 1.6(a) 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. Pursuant to Rule 1.0(f), “informed consent” denotes the agreement by the client to a proposed course of conduct “after the lawyer has communicated adequate information and explanation appropriate to the circumstances.” The proposed representation agreement provision does not provide adequate information and explanation such that the client could give informed consent to the prospective disclosure of confidential client information in the hypothetical circumstance set out in the proposed provision.

#### **Inquiry #7:**

May Lawyer give a client something of value in exchange for the client altering or

removing a negative online review?

#### **Opinion #7:**

No. Lawyer may respond to a negative online review with a request that the former client contact the lawyer to discuss the former client’s concerns, but there can be no *quid pro quo* for a revised or withdrawn review. *See* 2018 FEO 7.

A lawyer may, however, attempt to resolve disputes with an unhappy client, including disputes over the value of legal services provided by a lawyer. *See* ABA Formal Op. 496. A lawyer may not condition the negotiation, or his willingness to offer a refund, on a client’s withdrawal of a posted negative online review. If a lawyer is able to resolve such a fee dispute, the lawyer may request that the client remove the negative online review, but the lawyer may not provide anything of value in exchange for the removal.

Nothing in this opinion should be construed to prohibit a lawyer from pursuing and/or resolving a legitimate legal claim against the author of a negative review, which may include removal of the review as a term for the ultimate resolution of the claim. For example, Lawyer may offer to dismiss or not pursue a legitimate claim for defamation against the author of a false, negative online review in exchange for removal of the review.

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## **Proposed 2021 Formal Ethics Opinion 2 A Lawyer’s Professional Responsibility in Identifying and Avoiding Counterfeit Checks April 15, 2021**

*Proposed opinion discusses a lawyer’s professional responsibility to safeguard entrusted funds by identifying and avoiding purported transactions involving counterfeit checks.*

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

Client contacted Lawyer seeking to collect debt from a third party. Client’s communication with Lawyer was unsolicited—Lawyer does not advertise for his practice, and Lawyer had not previously solicited Client’s business. Client provided Lawyer with documentation supporting Client’s claim. Lawyer made preliminary investigation and verified the existence and address of third party. Lawyer contracted with Client to file a lawsuit against third party

for the amount owed to Client. A few days after Lawyer sent third party a letter introducing himself as Client's representative, third party contacted Lawyer stating that he wished to pay the amount owed to Client without the need for litigation, and that third party would be back in touch to make payment arrangements. Without further communication with third party, Lawyer subsequently received a cashier's check from third party drawn on an out-of-country bank. The cashier's check was dated prior to third party's earlier conversation with Lawyer, and third party did not mention the cashier's check to Lawyer. Third party's note also stated that he would pay the remainder of debt owed to Client within weeks. Lawyer did no further investigation of third party and did not investigate the authenticity of the foreign bank cashier's check.

Did Lawyer violate the Rules of Professional Conduct by not investigating the authenticity of the foreign bank cashier's check?

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

Yes. Lawyer violated his duties of competency and diligence in representing Client because the scenario described above raises a number of red flags that should alert a lawyer practicing today to the potential for fraud in both the representation and the receipt and disbursement of funds. Rules 1.1 and 1.3.

A lawyer's duty of competency requires the lawyer to have the necessary "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 further states,

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

The fraud accomplished through the counterfeit check scam described in the present inquiry is, unfortunately, not a new problem for the legal community. State and federal agencies have alerted the public to the existence and persistence of these counterfeit check scams for some time. *See, e.g.,*

*Counterfeit Check Scams*, North Carolina Department of Justice, <https://ncdoj.gov/protecting-consumers/sweepstakes-and-prizes/counterfeit-check-scams/>; *How to Spot, Avoid and Report Fake Check Scams*, Federal Trade Commission, <https://www.consumer.ftc.gov/articles/how-spot-avoid-and-report-fake-check-scams>. Similarly, state and national bar associations, lawyer regulatory bodies, and malpractice carriers have reported on and alerted lawyers to the reality that such scams often target members of the legal profession. *See, e.g., Six Indicted in \$32M Internet Collection Scam That Snagged 80 Lawyers*, ABA Journal (Nov. 22, 2010), [https://www.abajournal.com/news/article/six\\_indicted\\_in\\_32m\\_internet\\_collection\\_scam\\_that\\_snagged\\_80\\_lawyers/](https://www.abajournal.com/news/article/six_indicted_in_32m_internet_collection_scam_that_snagged_80_lawyers/); *Counterfeit Check Scams Continue to Target Law Firms*, California Bar Journal (January 2012), <https://www.calbarjournal.com/January2012/TopHeadlines/TH6.aspx>; New York City Bar Formal Ethics Opinion 2015-3, *Lawyers Who Fall Victim to Internet Scams* (April 22, 2015), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2015-3-lawyers-who-fall-victim-to-internet-scams>; Laura Loyek, *Counterfeit Check Scams are Still Snaring Lawyers*, Lawyers Mutual North Carolina (March 22, 2019), <https://www.lawyersmutualnc.com/risk-management-resources/articles/counterfeit-check-scams-are-still-snaring-lawyers>; Joanna Herzik, *Scams Continue to Target Texas Attorneys*, Texas Bar Blog (July 14, 2020), <https://blog.texasbar.com/2020/07/articles/law-firms-and-legal-departments/scams-continue-to-target-texas-attorneys/>; *E-Mail Scams and Lawyer Trust Accounts*, Illinois Attorney Registration and Disciplinary Commission, <https://www.iardc.org/information/alert.html>. The North Carolina State Bar has also published a number of warnings to the legal profession in North Carolina about these scams. *See, e.g., New Variation of Fake Check Scam Targets Law Practices*, North Carolina State Bar (December 6, 2010), <https://www.ncbar.gov/news-publications/news-notices/2010/12/fake-check-scam/>; Bruno Demoli, *Bruno's Top Tips: Protect Yourself from Financial Con-Artists*, North Carolina State Bar Journal (Fall 2011 pp. 34 & 37); *Alert: Beware of Scams that Target NC Law Practices*, North Carolina State Bar (January 8, 2016), <https://www.ncbar.gov/news-publications/>

news-notices/2016/01/scams-targeting-nc-law-practices/. These publications describe the scenarios associated with the scams and identify the relevant warning signs to assist lawyers in detecting and avoiding such scams.

Lawyer's mistaken reliance on the counterfeit check is unexcused. Given the breadth of notice provided to the legal profession on this common scam, Lawyer should have realized that the circumstances surrounding this purported representation required additional investigation. As noted above, Lawyer has a duty to represent his clients with competency and diligence. Rules 1.1 and 1.3. Lawyer's duty of competency includes the need to "keep abreast of changes in the law and its practice[.]" Rule 1.1. For at least ten years, lawyers have been warned about being targets of scams such as the one at issue in this inquiry. Lawyer should have been alerted to the suspicious nature of this transaction based upon the circumstances in this scenario, including the unsolicited request for the representation; the willingness of the purported defendant to quickly resolve the dispute without much effort from Lawyer; the cashier's check drawn on an out-of-country bank; and the cashier check being dated prior to Lawyer's conversation with the purported defendant. Although one of these circumstances standing alone may not give cause for suspicion, the totality of the circumstances should have alerted Lawyer to the suspicious nature of the representation and the transaction. Lawyer's failure to recognize the scam given the vast notice and information directed to lawyers on the topic demonstrated his lack of competency in violation of Rule 1.1. Furthermore, given the suspicious nature of the representation and transaction, Lawyer should have diligently investigated the legitimacy of the cashier's check. Lawyer could have accomplished this by contacting the bank that issued the cashier's check to confirm authenticity, or Lawyer could have informed Client of his concerns and waited to see that the cashier's check was in fact honored and accepted by the issuing bank.

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

Lawyer deposited the cashier's check into his firm's trust account. Lawyer notified Client of Lawyer's receipt of payment

from third party. Client directed Lawyer to promptly deduct 20% of the cashier's check for Lawyer's fee and to disburse the rest of the money via two disbursements: one to an account in another state and the remainder to an account in a different country. The day after Lawyer deposited the cashier's check into his trust account, Lawyer called his bank and was informed that the funds from the cashier's check were available. Without clarifying what available means, Lawyer then proceeded to make the disbursements from his trust account per Client's direction.

Subsequently, the foreign bank upon which third party's cashier's check was drawn became suspicious and determined that the cashier's check was counterfeit. Lawyer was unable to recall and recover the trust account disbursements made to Client's accounts. Lawyer then replenished the disbursed funds, including his fee, to his trust account using funds from his operating account. Lawyer reported the incident to the State Bar's Trust Account Compliance Counsel, expressing remorse and stating that his reliance on the counterfeit cashier's check was an unintentional mistake.

Did Lawyer violate the Rules of Professional Conduct by depositing the check into his trust account and making the disbursements as directed by Client from the trust account?

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

Yes. By disbursing funds from Lawyer's trust account on Client's behalf when Lawyer did not actually have funds belonging to Client in Lawyer's trust account, Lawyer disbursed entrusted funds belonging to other clients in violation of Rules 1.15-2(a), (k), and (n). Safeguarding entrusted client funds is one of the most important professional responsibilities that a lawyer possesses. The Rules of Professional Conduct require lawyers to deposit and hold entrusted client funds in the lawyer's general or dedicated trust account, and to only disburse those funds for the client's benefit upon the client's directive. Rules 1.15-2(a), (b), and (n). Rule 1.15-2(k) specifically prohibits a lawyer from using "any entrusted property to obtain credit or other personal benefit for . . . any person other than the legal or beneficial owner of that property."

Although Lawyer believed he was dis-

bursing Client's funds from his trust account after depositing the purportedly valid cashier's check, Lawyer actually disbursed funds belonging to his other clients because the cashier's check was counterfeit and resulted in no actual deposit of funds belonging to Client into Lawyer's trust account. Lawyer's disbursement of other clients' funds to Client and to himself occurred without his other clients' permission. By disbursing his other clients' funds from his trust account without their permission and for the benefit of someone other than the client, Lawyer misappropriated entrusted client funds in violation of Rules 1.15-2(a), (k), and (n).

RPC 191 references N.C. Gen. Stat. § 45A-4 (Good Funds Settlement Act) and rules that a lawyer may make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are deposited in the form of cash, wired funds, cashier's check, or by specified instruments which, although they are not irrevocably credited to the account upon deposit, are generally regarded as reliable. However, a lawyer should never disburse against any provisionally credited funds unless he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. RPC 191. When reasonably identifiable suspicious circumstances are present surrounding the receipt and disbursement of funds, a lawyer should not disburse on provisional credit—even if statutorily authorized to do so—until the lawyer satisfies him or herself that the instrument is authentic and the transaction is legitimate. Lawyer's failure to do so in this situation not only unnecessarily put other clients' funds at risk, but also resulted in actual harm to his clients through the misappropriation of his clients' funds.

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

Does Lawyer have a duty to replace the funds that were improperly disbursed as a result of the counterfeit check scam?

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

Yes. Under these circumstances, Lawyer failed to follow the Rules of Professional Conduct with regards to competency, diligence, and safekeeping of funds. See Opinion #1. Because Lawyer's failure to

follow the Rules of Professional Conduct is a proximate cause of the loss of entrusted client funds, Lawyer is professionally obligated to replace the misappropriated funds. See 2015 FEO 6.

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

Does Lawyer have a duty to report to the State Bar's Trust Account Compliance Counsel the misappropriation of funds from Lawyer's trust account resulting from the deposit and disbursement of the fraudulent cashier's check?

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

Yes. Rule 1.15-2(p) states that, "[a] lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel." Even if Lawyer promptly replenished the funds disbursed after learning the cashier's check was counterfeit, a misappropriation of funds belonging to other clients occurred that requires reporting to the State Bar under Rule 1.15-2(p).

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### **Proposed 2021 Formal Ethics**

#### **Opinion 3**

#### **Charging Fees to Opposing Party in Residential Real Estate Closing April 15, 2021**

*Proposed opinion rules that a closing lawyer representing the buyer in a residential real estate transaction may not charge a fee to a separately represented opposing party unless the party consents to the fee and the lawyer complies with Rules 1.5(a) and 1.8(f).*

Buyer retained Lawyer A to represent Buyer in a residential real estate transaction. Seller declined to be represented by Lawyer A and retained separate counsel for the transaction, Lawyer B. Leading up to the closing, rather than using her standard documents for the transaction, Lawyer A received documents prepared by Lawyer B to be used at closing, which differed substantially from the documents Lawyer A planned to use at closing. As a result, Lawyer A was required to review Lawyer B's work and make changes to the proposed documents for the benefit of her client, Buyer. At closing, Lawyer A charged a \$100 fee to Seller for the work Lawyer A completed in reviewing and responding to

Lawyer B's proposed documents. Lawyer B and Seller objected to the fee charged by Lawyer A to Seller.

**Inquiry #1:**

May Lawyer A charge a fee to Seller for the work completed in reviewing and responding to Lawyer B's proposed documents?

**Opinion #1:**

No, unless a) Seller agrees to pay the fee, b) Buyer consents to Seller's payment of Lawyer A's fee, and c) the fee charged is not illegal or clearly excessive.

Rule 1.8(f) prohibits a lawyer from receiving compensation for representing a client from a person other than the client unless these three requirements are met: "(1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6." Additionally, Rule 1.5(a) states that "[a] lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee[.]"

Lawyer A has been retained by Buyer to represent Buyer (and presumably Buyer's lender, if applicable) in the acquisition of real property from Seller. Although representation of multiple parties to a real property transaction is possible without violating Rule 1.7's prohibition on engaging in a concurrent conflict of interest during a representation (*see, e.g.*, CPR 100, RPC 210, 2006 FEO 3, and 2013 FEO 4), Seller has elected to obtain separate counsel for the transaction. Accordingly, Lawyer A's representation is limited to Buyer, and all work completed in the transaction by Lawyer A is for the benefit of her client, Buyer. Under these circumstances, the only way Lawyer A could collect a fee for the legal services provided to Buyer from anyone other than Buyer would be through compliance with Rule 1.8(f). Specifically, Lawyer A must a) obtain Buyer's informed consent to Seller paying all or a portion of Lawyer A's fee for completing her representation of Buyer in the transaction, b) ensure that Seller's payment of Lawyer A's fee does not interfere with lawyer's independence of professional judgment or with the client-lawyer relationship; and c)

ensure that all information deemed confidential pursuant to Rule 1.6 remains appropriately protected in accordance with that rule. Furthermore, any fee collected by Lawyer A from Seller or a third party for the benefit of Buyer must not be illegal or excessive pursuant to Rule 1.5(a). *See* 2006 FEO 3 and 2013 FEO 4.

Of course, the scenario contemplated by Rule 1.8(f) whereby a third party (or opposing party) pays the lawyer for legal services provided to the lawyer's client presumes the third/opposing party is offering or agrees to pay the lawyer's fee. Nothing in the Rules of Professional Conduct permits or empowers a lawyer to charge a third or opposing party for legal services performed for the benefit of her client without that party's consent. This is true even if the work completed by the lawyer for the benefit of her client also benefits the opposing or a third party. Under the present inquiry, should Seller refuse to pay Lawyer A's proposed fee, Lawyer A may not unilaterally charge a fee to Seller without Seller's consent. Whether statutory law, court order, or some other legal obligation between the parties (such as a purchase agreement) permits Lawyer A to charge a fee to Seller in this or a similar scenario is a legal question outside the purview of the Ethics Committee. *See* 2006 FEO 3 and 2013 FEO 4.

**Inquiry #2:**

May Lawyer A charge an additional fee to Buyer for the work completed in reviewing and responding to Lawyer B's proposed documents?

**Opinion #2:**

Yes, provided the fee charged is not illegal or excessive. *See* Rule 1.5(a).

**Inquiry #3:**

During Lawyer A's review of the property's title, Lawyer A discovered that Seller acquired the property from an estate. Lawyer A's initial review revealed that the estate from which Seller acquired the property went through a highly contested probate proceeding, with the estate's real property (including the property involved in the present transaction) divided amongst the heirs. As a result, Lawyer A spent additional time reviewing that estate to ensure her

client (Buyer) will obtain clean title to the property from Seller.

May Lawyer A charge a fee to Seller for the time spent reviewing the estate to ensure Seller's title was clean for Buyer's transaction?

**Opinion #3:**

No, unless a) Seller agrees to pay the fee, b) Buyer consents to Seller's payment of Lawyer A's fee, and c) the fee charged is not illegal or clearly excessive. In this scenario, Lawyer A is completing work for the benefit of her client, Buyer, to ensure Buyer's goals for the representation are realized (namely, obtaining clean title to the property sought). Any additional work completed that warrants an additional charge by Lawyer A should be addressed with Lawyer A's client for whom the work is completed. *See* Rule 1.8(f) and Opinion #1.

**Inquiry #4:**

When Seller originally acquired the subject property, Seller obtained a mortgage loan from a lender to fund his purchase of the property. As a result, Seller's lender obtained a lien on the property to secure the loan to Seller. As part of closing, a portion of the proceeds from the sale of Seller's property was paid to Seller's lender in satisfaction of the mortgage loan Seller previously obtained to purchase the subject property. With Seller's loan now satisfied, and to ensure Buyer obtains clean title from Seller, Lawyer A needs to file a cancellation of lien to remove the lien held by Seller's lender.

May Lawyer A charge a fee to Seller for the work completed in cancelling Seller's lender's lien?

**Opinion #4:**

No, unless a) Seller agrees to pay the fee, b) Buyer consents to Seller's payment of Lawyer A's fee, and c) the fee charged is not illegal or clearly excessive. Similar to Inquiry #3, in this scenario, Lawyer A is completing work for the benefit of her client, Buyer, to ensure Buyer's goals for the representation are realized (namely, obtaining clean title to the property sought). Any additional work completed that warrants an additional charge by Lawyer A should be addressed with Lawyer A's client for whom the work is completed. *See* Rule 1.8(f) and Opinion #1. ■

## Amendments Approved by the Supreme Court

On February 3, 2021, and April 21, 2021, the North Carolina Supreme Court approved the amendments that follow. (For the complete text see the Fall 2020 and Winter 2020 editions of the *Journal* or visit the State Bar website: [ncbar.gov](http://ncbar.gov).)

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

Section .0900, Examinations

The requirement in Rules Governing Admission to the Practice of Law that the bar exam to be administered in Wake County has been removed. This change permits the exam to be administered anywhere in North Carolina.

### Amendments to the Student Practice Rules

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

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

### Amendments to Rule 1.5 of the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.5, Fees

Amendments to Rule 1.5 add a specific prohibition on charging a client for responding to an inquiry by a disciplinary authority regarding allegations of professional misconduct by the lawyer; for responding to a Client Security Fund claim alleging wrongful conduct by the lawyer; or for responding to and participating in the resolution of a petition for resolution of a disputed fee against the lawyer.

### Amendments to the Advertising Rules in the Rules of Professional Conduct

27 N.C.A.C. Chapter 2, Rules of Professional Conduct, Rules 7.1-7.5, Information About Legal Services

Comprehensive amendments to the rules on legal advertising in Rules 7.1-7.5, Information About Legal Services, of the Rules of Professional Conduct accomplish the following: strengthen and prioritize the prohibition on false and misleading communications concerning a lawyer’s services; streamline the rules on advertising and eliminate unnecessary or unclear provisions; update the rules to reflect the current state of society and the profession, including the recognition of technology’s presence in per-

### Highlights

- The council adopted proposed amendments to the CLE Rules that add a new category of CLE credit called “Diversity, Inclusion, and Elimination of Bias Training,” and impose a one-time, one-hour requirement in this new category in 2022 for all active members. Supreme Court approval will be sought.
- A statement on the equal, courteous, and respectful treatment of all persons encountered in a professional capacity is proposed for inclusion in the Preamble to the Rules of Professional Conduct.
- A proposed new comment to Rule 1.1, *Competence*, identifies awareness of implicit bias and cultural differences that might affect a representation as an element of competency.

sonal and professional lives and the evolution of the consuming public; and enable lawyers to communicate effectively and truthfully about the availability of legal services.

## Amendments Pending Supreme Court Approval

At its meeting on April 16, 2021, the North Carolina State Bar Council voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for its approval. (For the complete text of the rule amendments, see the Winter 2020 and Spring 2021 editions of the *Journal* or visit the State Bar website: [ncbar.gov](http://ncbar.gov).)

### Proposed Amendments to the Rules on Organization of the North Carolina State Bar

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

The proposed amendments permit notices for district bar elections for State Bar councilors to be sent via email.

### Proposed Amendments to the Rules Governing the Continuing Legal Education Program

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

The proposed amendments add “Diversity, Inclusion, and Elimination of Bias Training” to the definitions in Rule .1501 and, in Rule

.1518, include such training in the 2022 CLE requirements for active members of the State Bar.

The proposed rule amendments were originally published for comment in the Winter 2020 edition of the *Journal*. During publication, comments were received. At the January 2021 quarterly meeting of the council, the Executive Committee sent the proposed rule amendments, together with the comments, to the Board of Continuing Legal Education for reconsideration. The CLE Board reviewed the comments and recommended no revisions to the proposed amendments. Therefore, the proposed amendments were not re-published prior to adoption by the council.

### Proposed Amendments to the Rules for Legal Specialization

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

for Legal Specialization

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

### Proposed Amendments to the Rules for Certain Specialty Certifications

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

cialty; Section .3300, Certification Standards for the Privacy and Information Security Law Specialty.

The rules for some of the specialty certifications require peer references to be mailed. The proposed amendments will make the rules for the various specialties consistent with each other and enable the specialization program to send peer reference forms for all specialties by email.

### Proposed Amendments to the Plan of Legal Specialization

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

The proposed rules create a new specialty certification in child welfare law. The standards are comparable to the standards for the other specialty certifications.

## Proposed Amendments

At its meeting on April 16, 2021, the State Bar Council voted to publish for comment the following proposed rule amendments:

### Proposed Amendments to the Discipline and Disability Rules

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

The proposed amendments provide that a petitioner for reinstatement seven years or more after the effective date of suspension or disbarment must (1) attain the passing score required in North Carolina on the Uniform Bar Examination; (2) successfully complete the North Carolina state-specific component of the bar examination; and (3) attain a passing score on the Multistate Professional Responsibility Examination. A petitioner for reinstatement from disability inactive status may be required to do the same. The proposed amendments also provide the following: (1) failure to comply with any requirement of the rule can result in dismissal of the petition; (2) a petitioner for reinstatement from disbarment or suspension must reimburse the State Bar for fees and expenses paid by the State Bar to any trustee appointed by a court to protect the petitioner's clients (a petitioner for reinstatement from disability inactive status may be required to do the same); and (3) a petitioner for reinstatement from dis-

barment or suspension must properly reconcile all trust or fiduciary accounts, and all entrusted funds of which the petitioner took receipt must be disbursed to the beneficial owner(s) of the funds or the petitioner must take all necessary steps to escheat the funds (a petitioner for reinstatement from disability inactive status may be required to do the same). The proposed amendments also modernize and clarify language in the existing rule.

#### .0129, Reinstatement

(a) After Disbarment

(1) Reinstatement Procedure and Costs - ~~No A~~ person who has been disbarred may have his or her license restored ~~but upon order of the council after the filing of a verified petition for reinstatement, and the holding of a hearing before a hearing panel of the commission, and entry of an order of reinstatement by the council~~ as provided herein. ~~No such~~ **The** hearing will commence ~~until~~ **only if** security for the costs of such hearing has been deposited **by the petitioner** with the secretary in an amount not to exceed \$500.00.

(2) Time Limits - ~~No A~~ disbarred ~~attorney lawyer~~ may petition for reinstatement ~~until~~ **upon** the expiration of at least five years from the effective date of the disbarment.

### Comments

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

### The Process

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

(3) Burden of Proof and Elements to be Proved - The petitioner will have the burden

of proving by clear, cogent, and convincing evidence that

(A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file with the secretary notice of ~~their~~ opposition to or concurrence with the petition ~~the secretary~~ within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to file with the secretary notice of opposition to or concurrence with the ~~raise objections or support the lawyer's~~ petition;

...  
(L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. ~~This section shall not be deemed to permit~~ The petitioner is not permitted to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys petitioners who were disbarred ~~disciplined~~ after August 29, 1984; the effective date of this amendment;

...  
(O) if a trustee was appointed by the court to protect the interests of the petitioner's clients, the petitioner has reimbursed the State Bar all sums expended by the State Bar to compensate the trustee and to reimburse the trustee for any expenses of the trusteeship;

(P) the petitioner has properly reconciled all trust or fiduciary accounts, and all entrusted funds of which the petitioner took receipt have been disbursed to the

beneficial owner(s) of the funds or the petitioner has taken all necessary steps to escheat the funds.

(4) Petitions Filed Less than Seven Years After Disbarment

...  
(B) Factors which may be considered in deciding the issue of competency include

...  
(v) certification by three ~~attorneys~~ lawyers who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law.

...  
(D) Passing Bar Exam as Conclusive Evidence - The a Attainment of a passing grade score on a regularly scheduled written Uniform Bar Examination prepared by the National Conference of Bar Examiners and successful completion of the State-Specific Component prescribed administered by the North Carolina Board of Law Examiners, no more than nine months before filing the petition, and taken voluntarily by the petitioner, shall be conclusive evidence on the issue of the petitioner's competence to practice law.

(5) Bar Exam Required for Petitions Filed Seven Years or More than Seven Years After Disbarment - If the petition is filed seven years or more have elapsed between after the effective date of disbarment, and the filing of the petition for reinstatement, reinstatement will be conditioned upon: the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.

(A) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;

(B) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners; and

(C) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners.

(6) Petition, Service, and Hearing - The petitioner shall file a verified petition for reinstatement with the secretary and shall contemporaneously serve a copy upon the counsel. The petition must identify each requirement for reinstatement and state how the petitioner has met each requirement. The petitioner shall attach supporting documentation establishing satisfaction of each requirement. Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission, and serve a copy on the counsel. The chairperson will within 14 days appoint a hearing panel as provided in Rule .0108(a)(2) of this Subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing panel and the time and place of the hearing, which will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court, pursuant to the procedures set out in Rules .0114 to .0118 of this subchapter. The secretary shall transmit to the counsel and to the petitioner any notices in opposition to or concurrence with the petition filed with the secretary pursuant to .0129(a)(3)(A) or (B).

(7) Report of Findings - As soon as possible after the conclusion of the hearing, the hearing panel will file a report containing its findings, conclusions, and recommendations with the secretary. The order may tax against the petitioner such costs and administrative fees as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition.

(8) Review by the Council Appeal - If A petitioner in whose case the hearing panel recommends that reinstatement be denied, the petitioner may file notice of appeal to the council. The notice of appeal must be filed with the secretary within 30 days after service of the panel report upon the petitioner. Appeal from the report of the hearing panel must be taken within 30 days after service of the panel report upon the petitioner and shall be filed with the secretary. If no appeal is timely filed, the recom-

mentation of the hearing panel to deny reinstatement will ~~become~~ be deemed a final order denying the petition. All cases in which the hearing panel recommends reinstatement of a disbarred ~~attorney's~~ lawyer's license shall be heard by the council and no notice of appeal need be filed by the ~~N.C.~~ North Carolina State Bar.

~~(A)(9)~~ Transcript of Hearing Committee Panel Proceedings -- Within 60 days of entry of the hearing panel's report, the petitioner shall produce a transcript of the proceedings before the hearing panel. The petitioner will have 60 days following the filing of the notice of appeal in which to produce a transcript of the trial proceedings before the hearing panel. The chairperson of the hearing panel, may, for good cause shown, extend the time to produce the record transcript.

~~(10) Record to the Council~~

~~(BA)~~ Composition of the Record - ... The petitioner will provide the proposed record to the counsel not later than 90 days after the hearing before the hearing panel, unless an extension of time is granted by the secretary chairperson of the hearing panel for good cause shown. Any agreement regarding the record will be in writing and will be included in the record transmitted to the council.

~~(CB) Settlement of the Record~~

...

~~(DC) Filing and Service of the Copy of Settled Record to Each Member - No later than 30 days before the council meeting at which the petition is to be considered, the petitioner will file the settled record with the secretary, will make arrangements with the secretary for a copy of the settled record to be transmitted to each member of the council, and will transmit a copy of the settled record to the counsel. transmit a copy of the settled record to each member of the council and to the counsel no later than 30 days before the council meeting at which the petition is to be considered.~~

~~(ED) Costs - The petitioner will bear the costs of transcribing, copying, and transmitting a copy of the settled record to each member of the council.~~

~~(E) Failure to Comply with Rule .0129(a)(10) - If the petitioner fails to comply with any of the subsections of Rule .0129(a)(10) above, the counsel may petition the secretary to dismiss the petition.~~

~~(F11) Determination Review~~ by ~~the~~ Council - The council will review the report of the hearing panel and the record and determine whether, and upon what conditions, the petitioner will be reinstated. The council may tax against the petitioner such costs and administrative fees as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition.

~~(9) Failure to Comply with Rule .0129(a) - If the petitioner fails to comply with any provisions of this Rule .0129(a), the counsel may file a motion to dismiss the petition. The motion to dismiss shall specify the alleged deficiencies of the petition. The counsel shall serve the motion to dismiss upon the petitioner. The petitioner shall have ten days in which to file a response to the motion to dismiss.~~

~~(1012) ...~~

(b) After Suspension

(1) Restoration - No ~~attorney~~ lawyer who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) ~~Eligibility Suspension of 120 Days or Less~~ - No ~~attorney~~ lawyer who has been suspended....No ~~attorney~~ lawyer whose license has been suspended...

(3) If the petition is filed seven years or more after the effective date of suspension, reinstatement will be conditioned upon:

(A) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;

(B) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners; and

(C) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners.

~~(43)~~ Reinstatement Requirements - Any suspended attorney lawyer seeking reinstatement must file a verified petition with the secretary.... The petitioner will have the burden of proving the following by clear,

cogent, and convincing evidence:

(A) ...

~~(D) attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension;~~

~~(DE) ...;~~

~~(EF) Reimbursement of the Client Security Fund - reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner~~

The petitioner is not permitted to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys-lawyers who were suspended disciplined after August 29, 1984; the effective date of this amendment;

~~(FG) ...;~~

~~(GH) Satisfaction of Pre-Suspension CLE Requirements - satisfaction of the minimum continuing legal education requirements, as set forth in Rule .1517 .1518 of Subchapter 1D of these rules...;~~

~~(H1) ...;~~

~~(I1) ...;~~

(J) if a trustee was appointed by the court to protect the interests of the petitioner's clients, the petitioner has reimbursed the State Bar all sums expended by the State Bar to compensate the trustee and to reimburse the trustee for any expenses of the trusteeship; and

(K) the petitioner has properly reconciled all trust or fiduciary accounts, and all entrusted funds of which the petitioner took receipt have been disbursed to the beneficial owner(s) of the funds or the petitioner has taken all necessary steps to escheat the funds.

~~(54) ...~~

~~(65) ...~~

~~(76) ...~~

~~(87) Reinstatement Hearing - ...The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in su-~~

~~perior court, pursuant to the procedures set out in Rules .0114 to .0118 of this subchapter.~~

(98) Reinstatement Order - ...In any event, the hearing panel must include in its order findings of fact and conclusions of law in support of its decision and may tax against the petitioner such costs and administrative fees as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition, ~~against the petitioner.~~

(10) Failure to Comply with Rule .0129(b) - If the petitioner fails to comply with any provision of this Rule .0129(b), the counsel may file a motion to dismiss the petition. The motion to dismiss shall specify the alleged deficiencies of the petition. The counsel shall serve the motion to dismiss upon the petitioner. The petitioner shall have ten days in which to file a response to the motion to dismiss.

(c) After Transfer to Disability Inactive Status

...  
(3) Burden of Proof - The ~~member petitioner~~ will have the burden...

(4) Medical Records - Within 10 days of filing the petition for reinstatement, the ~~member petitioner~~ will deliver to provide the secretary ~~with~~ a list of the names and addresses of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the ~~member petitioner~~ has been examined or treated or sought treatment while disabled ~~and~~. ~~At the same time, the member will also furnish to the secretary a written consent to release all information and records relating to the disability. The secretary will deliver to the counsel all information and records relating to the disability received from the petitioner.~~

...  
(6) Costs - The hearing panel may direct the ~~member petitioner~~ to pay...

(7) Failure to Comply with Rule .0129(c) - If the petitioner fails to comply with any provision of this Rule .0129(c), the counsel may file a motion to dismiss the petition. The motion to dismiss shall specify the alleged deficiencies of the petition. The counsel shall serve the motion to dismiss upon the petitioner. The petitioner shall have ten days in which to file a response to the motion to dismiss.

(8) Reimbursement of Trustee Fees and

Expenses - If a trustee was appointed to protect the interests of the petitioner's clients, the hearing panel may require the petitioner, as a condition of reinstatement, to reimburse the State Bar sums expended by the State Bar to compensate the trustee and to reimburse the trustee for any expenses of the trusteeship.

(9) Entrusted Funds - The hearing panel may require the petitioner, as a condition of reinstatement, to demonstrate that the petitioner has properly reconciled all trust or fiduciary accounts and has taken all steps necessary to ensure that all entrusted funds of which the petitioner took receipt are disbursed to the beneficial owner(s) of the funds or are escheated.

(d) Conditions of Reinstatement - The hearing panel, and the council in petitions for reinstatement from disbarment, may impose reasonable conditions on a lawyer's reinstatement from disbarment, suspension, or disability inactive status in any case in which the hearing panel concludes that such conditions are necessary for the protection of the public. Such conditions may include, but are not limited to, a requirement that the petitioner complete specified hours of continuing legal education, a requirement that the petitioner participate in medical, psychological, or substance use treatment, and a requirement that the petitioner attain a passing score on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within nine months following entry of an order conditionally granting the petition.

...

### **Proposed Amendments to the Rules for the Administrative Committee**

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

As a condition of reinstatement, if a petition for reinstatement is filed seven years or more after the effective date of the order transferring the petitioner to inactive status or administrative suspension, the proposed amendments require, as a condition of reinstatement, a petitioner for reinstatement from inactive status or from administrative suspension to (1) attain the passing score required in North Carolina on the Uniform Bar Examination; (2) successfully complete the North Carolina state-specific component of the bar examination; and (3) attain a passing score on the Multistate Professional Responsibility Examination.

.0902, Reinstatement from Inactive Status

(c) Requirements for Reinstatement

...  
(5) Bar Exam and MPRE Requirement If Inactive Seven 7 or More Years.

~~[Effective for all members who are transferred to inactive status on or after March 10, 2011.]~~

(A) If seven 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to satisfy the following requirements in lieu of the CLE requirements in paragraphs (c)(2) and (c)(4):

(1) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;

(2) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners; and

(3) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners.

(B) A member may offset the inactive status period for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A) as follows:

(A1) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the seven 7 years necessary to actuate ~~this provision~~ the requirements of paragraph (A). If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A) as a consequence of offsetting, the

member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of seven 7 years.

(B2) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the seven 7 years necessary to actuate the requirements of ~~this paragraph (A)~~. If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A) as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of seven 7 years.

...

#### .0904, Reinstatement from Suspension

(d) Requirements for Reinstatement

...

(4) Bar Exam and MPRE Requirement If Suspended Seven 7 or More Years

~~[Effective for all members who are administratively suspended on or after March 10, 2011.]~~

(A) If seven 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must ~~obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to~~ satisfy the following requirements in lieu of the CLE requirements in paragraphs (d)(2) and (d)(3-):

- (1) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;
- (2) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners; and
- (3) attainment of a passing score, within nine months following an order

conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners.

(B) A member may offset the suspended status period for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A) as follows:

(A1) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the seven 7 years necessary to actuate ~~this provision~~ the requirements of paragraph (A). If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A) as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of seven 7 years.

(B2) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the seven 7 years necessary to actuate the requirements of ~~this paragraph (A)~~. If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A) as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of seven 7 years.

...

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

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

The proposed rule amendments require sponsors of CLE programs to remit sponsor fees within 90 days following the completion of a program or risk having future applications for program approval denied.

#### .1519, Accreditation Standards

The board shall approve continuing legal education programs that meet the following standards and provisions.

...

(g) A sponsor of an approved program must timely remit fees as required in Rule .1606 and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations. Participation in an online program must be verified as provided in Rule .1601(d).

...

#### .1606, Fees

(e) Failure to Timely Pay Sponsor Fee - A sponsor's failure to pay sponsor fees within 90 days following the completion of a program will result in the denial of that sponsor's subsequent program applications until fees are paid.

#### Proposed Amendment to the Preamble of the Rules of Professional Conduct

27 N.C.A.C. Chapter 2, Rules of Professional Conduct, Rule 0.1, Preamble

The proposed amendment adds a paragraph to the Preamble on equal treatment of all persons encountered when acting in a professional capacity.

#### Rule 0.1, Preamble: A Lawyer's Responsibilities

[6] The North Carolina Constitution requires that "right and justice shall be administered without favor, denial, or delay." Public confidence in the justice system is strengthened when all participants are treated equally, fairly, honestly, and respectfully within the system. A lawyer, as a representative of and crucial contributor to the justice system, should foster public confidence in the administration of justice by treating all persons the lawyer encounters in a professional capacity equally, courteously, respectfully, and with dignity regardless of a person's race, sex, national origin, religion, age, disability, sexual orientation, gender identity, marital status, or socioeconomic status.

[subsequent sections renumbered]

#### Proposed Amendment to the Comment to Rule 1.1 of the Rules of Professional Conduct

27 N.C.A.C. Chapter 2, Rules of Professional Conduct, Rule 1.1, Competence

The proposed amendment states that competency includes awareness of implicit bias and cultural differences relative to a client that might impact the lawyer's representation of the client.

#### Rule 1.1, Competence

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating

with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

...

Maintaining Competence

...

[9] Competency includes a lawyer's awareness of implicit bias and cultural differences relative to a client or anyone involved in a client's matter that might affect the lawyer's representation of the client. This is to ensure understanding of the client's needs, effective communication with the client and others, and adequate representation of the client.

[subsequent sections renumbered] ■

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## Amendments to the Advertising Rules Approved by the Supreme Court

On April 21, 2021, the Supreme Court of North Carolina approved a set of amendments to the North Carolina Rules of Professional Conduct concerning lawyer advertising/communications regarding a lawyer's services. The court's approval concludes efforts by North Carolina lawyers spanning over two years to review and update the rules on advertising.

By way of background: In April 2018, then-State Bar President John Silverstein appointed a special committee of the State Bar Council to review the ABA's proposed amendments to the Model Rules on advertising. At that time, the ABA was nearly two years into its own study and updating of the Model Rules on advertising. In its study, the ABA identified three primary concerns necessitating the review of and amendments to the Model Rules on advertising. First, the ABA recognized the need for consistency among the different jurisdictions' lawyer advertising rules. The ABA explained that lawyers in the 21st century increasingly practiced in multiple jurisdictions, and that the "breathtaking variety" in advertising rules across the nation made compliance by lawyers and law firms with multi-jurisdictional practices unnecessarily complex. Second, the ABA recognized the substantial presence and impact that social media and the Internet has had on business generally, including the practice of law. Last, the ABA acknowledged recent trends in First Amendment and antitrust law that suggested burdensome and unnecessary restrictions on lawyer commercial speech may be

unlawful. The ABA explained that, with these considerations in mind, the proposed amendments to the Model Rules were intended to accomplish the following: eliminate compliance confusion and promote consistency in lawyer advertising rules; provide lawyers and regulators across the nation with updates to the advertising rules that would protect clients from false and misleading advertising while freeing lawyers to use expanding technologies to communicate the availability of their services; and increase consumer access to accurate information about legal services.

The State Bar's special committee—chaired by David Allen (State Bar councilor from Mecklenburg County) and composed of lawyers from different practice areas, different firm sizes, and different parts of the state—met 14 times between June 2018 and July 2020, with meetings lasting from one to four hours. The committee reviewed each amendment made to the Model Rules on advertising, comparing the Model Rules to the corresponding provision in the North Carolina Rules of Professional Conduct (Rules 7.1 through 7.5), and determined whether to recommend adoption of the Model Rule, retention of the North Carolina Rule, or some alternative. Similar to the stated purpose of the Model Rule amendments, the committee sought to accomplish the following goals and considerations through its work:

- To strengthen and prioritize the prohibition on false and misleading communications concerning a lawyer's services;

- To streamline the rules on advertising and eliminate unnecessary or unclear provisions;
- To increase consistency in the advertising rules across the different jurisdictions;
- To update the rules to reflect the current state of society and the profession, including the recognition of technology's presence in our personal and professional lives and the evolution of the consuming public;
- To enable lawyers to effectively and truthfully communicate the availability of legal services, including utilizing new technologies; and
- To enable the public to learn about the availability of legal services.

With these worthy goals and considerations in mind, the committee determined that, after discussion and when appropriate, it would favor recommending adoption of the new Model Rule provisions in pursuit of consistency with the Model Rules and potentially other jurisdictions. However, the committee remained committed to the ultimate goal of protecting the public in North Carolina; to that end, the committee deviated from the Model Rules when necessary and appropriate.

The committee concluded the bulk of its work in March 2020, and shared its recommendations with the State Bar Council in April 2020. The amendments were approved by the council for publication to the profession in July 2020. The amendments were subsequently published in the *State Bar Journal* and on the State Bar's web-

site. No comments were received on the proposed amendments. Following publication, the State Bar Council approved the amendments for submission to the Supreme Court, and the court adopted the amendments in April 2021.

The amendments include the addition of new provisions and the deletion of long-standing requirements, as well as the relocation of now-former rules to other parts of the Rules of Professional Conduct. For example, while the prohibition on lawyers providing something of value in exchange for a recommendation of the lawyer's service still remains, lawyers are now permitted to offer a "nominal gift" to a person who refers a client to the lawyer. Additionally, in recognition of consumers being more familiar with lawyer communications and advertising, the amendments struck the various provisions for targeted mail communications regarding font size and specific language requirements. The amendments also include an entirely new rule on "intermediary organizations"—this new, broader term replaces prior references to "lawyer referral services" in recognition of the different methods by which consumers search for legal services. A more detailed summary of the approved amendments to the North Carolina Rules of Professional Conduct on communications concerning a lawyer's services (Rules 7.1 through 7.5) follows:

#### **Rule 7.1**

- Provisions on false and misleading communications were consolidated by relocating material aspects of Rule 7.5 (Firm Names and Letterhead) to the comments of Rule 7.1.

- Dramatization disclaimer requirement was relocated from text of Rule 7.1(b) to the comments of Rule 7.1.

#### **Rule 7.2**

- Generally replaced the term "advertising" with "communication concerning a lawyer's services."

- A lawyer is permitted to pay the usual charges of an intermediary organization, as defined in new Rule 7.4 (see below).

- Relocated the considerations of participation in a lawyer referral service to the new rule on intermediary organizations.

- A lawyer is permitted to give nominal "thank you" gifts as an exception to the general prohibition on paying for recommendations.

- Material aspects of current Rule 7.4 (Communication of Fields of Practice and Specialization) were relocated to the text and comments of Rule 7.2.

- Rule 7.2 was revised to reflect North Carolina's historic treatment of the terms "specialist" or "specialize" by specifically prohibiting use of those terms unless the lawyer is certified as a specialist in the field of practice.

#### **Rule 7.3**

- Moved the definition of "solicitation" from the comments to the text of Rule 7.3.

- Retained the North Carolina definition of "solicitation," which is different from the Model Rule definition.

- Lawyers are permitted to solicit persons who routinely use for business purposes the type of legal service offered by the lawyer as an exception to the general prohibition on in-person solicitation.

- Deleted the labeling requirements for targeted communications.

- Streamlined the rule permitting lawyers to participate in prepaid legal service plans.

#### **Rule 7.4**

- Relocated the bulk of Rule 7.4 to the text and comments of Rule 7.2, resulting in the deletion of what was previously Rule 7.4.

#### **Rule 7.5**

- Relocated the bulk of Rule 7.5 to the comments of Rule 7.1, resulting in the deletion of what was previously Rule 7.5.

#### **\*New Rule 7.4\***

- New rule on "intermediary organizations" (services that facilitate the creation of lawyer-client relationships) substituted for prior provisions on lawyer referral services.

- A lawyer is permitted to participate in an intermediary organization if certain conditions are met (loosely based on the prior conditions for participation in lawyer referral services previously located in Rule 7.2); a lawyer is required to make reasonable efforts to ensure intermediary organization's conduct complies with the lawyer's professional obligations, including satisfaction of various conditions designed to protect the public and ensure clear, full, and truthful information to consumers.

As always, the State Bar's ethics staff is standing by to assist with any questions about a lawyer's professional responsibility under the Rules of Professional Conduct, including these newly enacted rules. You may submit your request for ethics advice via email to [ethicsadvice@ncbar.gov](mailto:ethicsadvice@ncbar.gov). ■

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## **Disciplinary Department (cont.)**

guardian did not respond to his letter and Mattocks made no further attempts to obtain possession of the property of the estate. Between 2013 and 2018, the clerk's office sent to Mattocks 24 notices to file an inventory and/or annual accountings. Mattocks ignored those notices until an order to file accounting was served upon him by the sheriff, over six years after his appointment.

**Andre T. McDavid** of Raleigh represented a party in a child custody and support case. McDavid invited the opposing party to attend a "mediation" at his office and sent a text message thanking the opposing party for choosing his firm for answers to his legal questions. The opposing party attended the "mediation" with his current wife. McDavid later filed a motion to compel against the opposing party's current wife and complimented her appearance for no purpose other than to harass her when she appeared at the hearing on his motion. McDavid falsely represented to the State Bar that he did not know who the opposing party's current wife was when he complimented her on her appearance and did not know why she was in the courtroom. While the opposing party was represented by counsel in pending child support litigation, McDavid went to the opposing party's home during a custodial exchange, approached the opposing party, engaged in a verbal altercation with the opposing party, and made derogatory remarks about him and his failure to pay child support. The Grievance Committee reprimanded him.

The Grievance Committee reprimanded **Kathleen G. Sumner** of Hampstead. In a case before the North Carolina Industrial Commission, Sumner made false statements of material fact or law to a tribunal and did not correct false statements of material fact or law previously made to the tribunal.

**James Zellinger** of Greensboro was reprimanded by the Grievance Committee. Zellinger filed a civil action against a couple that he claimed had caused damage to his home. His civil complaint included a claim for legal fees allegedly owed to him for legal services he provided to the couple, but he had not previously notified the couple of the State Bar's Fee Dispute Resolution Program. Zellinger demanded that the opposing party dismiss the grievance they had submitted to the State Bar as a condition of settlement. ■

## Client Security Fund Reimburses Victims

At its April 15, 2021, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$59,020.47 to 11 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$4,520 to former clients of Sarah J. Brinson of Clinton. The clients retained Brinson to file their I-485 and I0130 petitions. Brinson failed to file the petitions or provide any meaningful legal services for the clients prior to her disbarment. Brinson was disbarred on September 6, 2019, and recently died on March 12, 2021. The board previously reimbursed seven other Brinson clients a total of \$18,510.

2. An award of \$3,160 to a former client of Sarah J. Brinson. The client retained Brinson to file an I-601A petition on his behalf. Brinson failed to file the petition or provide any meaningful legal services for the fee paid prior to her disbarment.

3. An award of \$2,520.47 to a former client of George L. Collins of Jacksonville. The client retained Collins for representation in her personal injury claim arising from a motor vehicle accident. After Collins was disbarred on December 31, 2019, he settled the client's matter, accepted the settlement proceeds, and failed to make all the proper disbursements from the settlement funds. Collins died on April 16, 2020. The board previously reimbursed four other Collins

clients a total of \$46,593.

4. An award of \$3,329 to a former client of George L. Collins. The client retained Collins for representation in his personal injury claim arising from a motor vehicle accident. After Collins was disbarred, he settled the client's matter, accepted the settlement proceeds, and failed to make all the proper disbursements from the settlement funds.

5. An award of \$1,000 to a former client of Bruce T. Cunningham Jr. of Southern Pines. The client initially retained Cunningham to file an MAR and then paid an additional \$1,000 for Cunningham to take additional action on his behalf if the MAR was denied. Cunningham died on July 5, 2019, before he could provide any meaningful legal services for the additional fee paid. The board previously reimbursed several other Cunningham clients a total of \$96,075.

6. An award of \$3,200 to a former client of Bruce T. Cunningham Jr. The client retained Cunningham to file an MAR. Prior to his death, Cunningham failed to provide any meaningful legal services for the fee paid.

7. An award of \$3,750 to a former client of Bruce T. Cunningham Jr. The client retained Cunningham to file an MAR and/or other postconviction relief. Prior to his death, Cunningham failed to provide any meaningful legal services for the fee paid.

8. An award of \$30,105 to a former client of Mary March Exum of Asheville. The client retained Exum to file an MAR.

Exum failed to provide any meaningful legal services for the fee paid prior to her suspension, failed to inform the client of her suspension, and collected additional payments from the client after her suspension claiming that she could still provide the legal services for which she was paid. Exum was disbarred on February 28, 2019. The board previously reimbursed one other Exum client a total of \$25,000.

9. An award of \$5,000 to a former client of Clifton J. Gray III of Lucama. The client retained Gray for representation on drug trafficking charges. Upon being terminated by the client due to differences in strategy, Gray refused to refund the unearned portion of the fee paid. Gray was suspended on December 15, 2016. The board previously reimbursed eight other Gray clients a total of \$45,700.

10. An award of \$1,936 to a former client of Van H. Johnson of Hertford. The client retained Johnson to represent her in filing a Chapter 7 Bankruptcy petition. Johnson failed to file the petition or provide any meaningful legal services for the fee paid prior to becoming ill and unable to represent his clients. The board previously reimbursed four other Johnson clients a total of \$8,065.

11. An award of \$500 to a former client of Valerie B. Queen of Raleigh. The client retained Queen for representation in an employment discrimination action. Queen failed to provide any meaningful legal services to the client for the fee paid. ■

## John B. McMillan Distinguished Service Award

### Victor J. Boone

Mr. Boone received his undergraduate degree in political science from the University of North Carolina at Chapel Hill in 1972 and his law degree from NC Central

University School of Law in 1975. Upon graduation from law school, Mr. Boone went to work as a staff attorney at the Wake County Legal Aid Society, which later, after several name changes, merged with Legal Aid

of North Carolina (LANC).

From 2002 until 2020, Mr. Boone served in a dual capacity as the senior managing attorney for the Raleigh office of LANC and regional manager for the Triangle Region

(Raleigh, Durham, and Pittsboro offices).

Mr. Boone handled a variety of cases during his tenure with Legal Aid. He also successfully handled several appeals to the North Carolina Court of Appeals and co-counseled one to the North Carolina Supreme Court, in which success was also achieved. His experience also included numerous administrative hearings, small claims trials, district court appearances, superior court proceedings, and several federal court cases.

Except for a few semesters since 2004, Mr. Boone has served as an adjunct professor at North Carolina Central School of Law, teaching a course on professionalism and educating hundreds of students and future lawyers about ethics and civility in the profession. For a number of years, he participated in the training of students at Duke University's School of Law Pro Bono Project. Mr. Boone served for nine years as a State Bar councilor from the 10th Judicial District, all of them with service on the Ethics Committee. He was the first Legal Aid lawyer to hold such a position.

In 2004, the Legal Services community recognized Mr. Boone with the Julian T. Pierce Award "for outstanding advocacy ensuring equal justice for all." He was also honored with the "Legal Legends of Color" award in 2018 by the NC Bar Association "for serving as an exemplary role model in the North Carolina legal community," and, in a prior year, by the NC Association of Black Lawyers with its Community Service award. In 2014 the Wake County Bar Association awarded him its highest award, the Joseph Branch Professionalism Award.

Until his retirement, Mr. Boone spent his entire legal career representing low income people in Wake County and has a distinguished record of service to clients, the legal community, and the profession. In his semi-retirement, he does *pro bono* work while also engaging in the limited practice of law and teaching a course at NCCU School of Law.

### **Edward G. Connette**

Edward G. "Woody" Connette graduated from Davidson College in 1974 and earned his law degree from UNC School of Law in 1977. After graduation, Mr. Connette relocated to Connecticut, where he worked for the Legal Aid Society of Hartford. He returned to North Carolina in 1980 and began working with Legal Services of the Southern Piedmont in Charlotte before entering private practice in 1984. In 2005, his former law firm merged

with Essex Richards, where he now practices.

Mr. Connette has tried cases and appeals in federal and state courts, representing clients who have suffered catastrophic personal injuries, loss of family members by wrongful death, long-term disability benefit claims, and a wide variety of other litigation matters. He also has participated in class action litigation, including consumer, employment, shareholder, and civil rights class actions. In addition to being a talented litigator, Mr. Connette's breadth of experience makes him an adept counselor, assisting clients in developing strategies to attain objectives without litigation.

Mr. Connette became one of North Carolina's early ERISA litigators. He has spoken on a wide range of topics for bar and community groups, including national ERISA conferences, the North Carolina and South Carolina Bar Associations, American Advocates for Justice, and North Carolina Advocates for Justice. He has also taught trial practice skills for the National Institute of Trial Advocacy.

Mr. Connette has been an active member of the bar and served the legal community for many years. He currently chairs the Development Committee for the North Carolina Bar Foundation. In the past, he was appointed to the Chief Justice's Commission on Professionalism, served a three-year term on the Board of Governors of the North Carolina Bar Association, and has co-chaired the NCBA's Transitioning Lawyers Commission. He has also served on the Lawyers Mutual Charlotte Community Board, as well as the boards of Disability Rights North Carolina, Legal Services of Southern Piedmont, and Carolina Legal Assistance.

Mr. Connette has consistently demonstrated his commitment to the profession and to the public through his unwavering dedication to his clients, his civic leadership, and his commitment to providing access to justice. He serves as a model of kindness, mentorship, and professionalism to younger lawyers. In recognition of his many contributions to the legal community, Mr. Connette received the North Carolina Bar Association's H. Brent McKnight Renaissance Lawyer Award in 2010 and the Mecklenburg County Bar's Ayscue Professionalism Award in 2018.

### **Ashley L. Hogewood Jr.**

Mr. Hogewood earned both his under-

graduate degree and his law degree from Wake Forest University. After passing the bar in 1963, he joined the trust department of First Union Bank in Charlotte and completed active duty in the US Army Reserve. Mr. Hogewood entered private practice in 1965 with Louis A. Bledsoe Jr. Mr. Bledsoe and H. A. Berry Jr. formed Berry and Bledsoe in 1966, and Mr. Hogewood was with the firm and successor firm, Berry, Hogewood, Edwards and Freeman, until joining Parker Poe in 1987.

Throughout his career, Mr. Hogewood has been deeply committed to supporting and improving North Carolina's education system. Governor Scott appointed Mr. Hogewood to a legislative study commission on education in the late 1960s. In 1978 he was elected to the Charlotte-Mecklenburg Board of Education, on which he served for 12 years, including service as vice-chair and chair. Mr. Hogewood's years on the board were complex as Charlotte moved through various court-ordered desegregation plans. Mr. Hogewood and countless others helped usher in a time of advancement and support of public education in Charlotte-Mecklenburg. He later served on the Board of Trustees of Central Piedmont Community College.

Prior to school board service, Mr. Hogewood was appointed to the Mecklenburg County Board of Elections. He also served on boards for the Charlotte Chamber of Commerce, the Better Business Bureau, the Charlotte Area Fund, and the American Lung Association. In recognition of his community contributions, Mr. Hogewood received Mecklenburg County's highest award, the Order of the Hornet, in 1977.

Mr. Hogewood has long been known as one of the state's finest real estate practitioners. He was the long-time chair of the Real Estate and Lending Practice Group at Parker Poe. Mr. Hogewood was real estate counsel to the City of Charlotte in connection with acquisition of the Charlotte Convention Center site, which involved navigating the rights of the North Carolina railroad to preserve trackage that later became routes for Charlotte's light rail transit system.

For many years Mr. Hogewood was the lead lecturer on foreclosure and real estate lending issues for the Wake Forest Annual review. He spoke at CLEs for the North Carolina Bar Association and served on the real property counsel.

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Mr. Hogewood was a marvelous resource for members of his firm and remains a valuable resource for lawyers throughout the state. He maintains an excellent and often humorous mentoring relationship with young lawyers entering the profession. Mr. Hogewood practiced law in a congenial and inclusive manner and has made significant contributions to his country, his colleagues, his profession, and his community.

## **Douglas Carmichael McIntyre II**

Douglas Carmichael "Mike" McIntyre II graduated in 1978 from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar, and from the UNC School of Law in 1981.

Mr. McIntyre has been deeply committed to supporting North Carolina's education system. Upon graduation, Mr. McIntyre founded and chaired the Citizenship Education Committee of the Robeson County Bar. He served on the Executive Committee of the Citizenship Education Committee of the American Bar Association Young Lawyers Division and chaired the North Carolina Bar Association's Youth Education Committee.

He has volunteered in the classroom for 40 years, chaired Robeson County's Bicentennial of the Constitution celebration, served on the American Bar Association Young Lawyers Division's National Community Law Week Committee, and

chaired the local Law Day Committee. He has also served on the North Carolina Bar Association's Lawyers Advisory Committee for the Commission on the Bicentennial of the Constitution and received the Governor's Award for Outstanding Volunteer Service for his work with students and educators.

Mr. McIntyre hosted the Youth Leadership Summit annually for all of the schools in his congressional district, as well as taught his "Classroom from Congress on Citizenship" at schools across the region. He is co-founder of the McIntyre-Whichard Legal Fellows mentorship program at UNC Law. Selected as a fellow for the UNC Institute of Politics, he has helped teach seminars and classes to undergraduates about public service beyond partisanship. He founded the McIntyre Youth Leadership Challenge, which encourages students to practice the principles of good citizenship. The annual competition, held in conjunction with Law Day, was created in 2017 through a Justice Fund established by Mr. McIntyre through the NC Bar Foundation.

Congressman McIntyre served in the US House of Representatives for North Carolina's 7th District from 1997 to 2015, and now serves as senior advisor for government relations and economic development at Ward and Smith, PA, in Raleigh.

In recognition of his many contributions to the legal profession, Mr. McIntyre was named a charter member of the North

Carolina Pro Bono Honor Society by the North Carolina Supreme Court in 2016. In 2018 he received the Chief Justice I. Beverly Lake Jr. Public Service Award. Mr. McIntyre was chosen as Lawyer of the Year by North Carolina Lawyers Weekly in 2019. In 2020 Mr. McIntyre received the Liberty Bell Award from the Young Lawyers Division of the North Carolina Bar Association.

## **Bill Powers**

Bill Powers graduated from NC State in 1988 and Campbell Law School in 1992. He handles DWI charges, criminal defense, and family law cases in Charlotte.

Bill is a board-certified Criminal Law Specialist by the National Board of Trial Advocacy/National Board of Legal Specialty Certification. He is also a member of the International Academy of Collaborative Professionals and the Charlotte Collaborative Divorce Professionals.

Bill is passionate about mental health and substance abuse issues endemic to the profession and enjoys teaching CLE. The depth of his empathy for others is evident in his article "I Lost A Client" recently published in the North Carolina Bar *Journal*.

## **Nominations Sought**

Members of the State Bar are encouraged

CONTINUED ON PAGE 57

## Law School Briefs

### Campbell University School of Law

Campbell Law School Dean J. Rich Leonard has announced the Fall 2021 launch of the law school's newest *pro bono* clinic—the Gailor Family Law Litigation Clinic. The clinic will address challenging family law issues including divorce, property distribution, paternity, child custody, child support, and elder law among other issues where it is often difficult to find representation for low-income individuals. “With the impending retirement of our Senior Law Clinic Director Roger Manus, the law school saw the opportunity to expand some of the services his clinic has provided over the past decade,” Leonard explained. “The Gailor Family Law Clinic is a timely addition as clinical directors and local judges agree that the need for family law legal services is of the utmost importance.” Students working in the clinic will learn a client-centered approach to the practice of family law by engaging in client counseling, case strategy, negotiation, and, in some cases, assisting with trial of family law cases. The Gailor Family Law Litigation Clinic is made possible through the generous donation of \$250,000 from family lawyer Carole Gailor, making her the first woman to have a clinic named after her at Campbell Law. The law school is currently recruiting an assistant clinical professor who will be a full-time member of the law school faculty and will direct the clinic.

Campbell Law School's trial advocacy program once again ranks among the best in the nation, according to *US News & World Report's* latest release of Top Law Schools on March 30, 2021. The 19th place ranking marks Campbell Law's third appearance in the Top 21 of the *US News* list for trial advocacy programs in the past four years. Campbell Law is the lone North Carolina school in the Top 20 of the ranking.

### Elon University School of Law

*Elon Law students selected for prestigious NCBA program*—Four students will take part this summer in an NCBA program

established to promote diversity and inclusion in the legal profession by placing some of the state's most promising first-year law students into top internships. Emmanuel Agyemang-Dua, Vanessa Garcia, Faisal Suman, and Victoria Waddell accepted invitations to work for firms and corporations that participate in the NCBA's Minorities in the Profession 1L Summer Associate Program, which is coordinated through its Minorities in the Profession Committee. It is the fifth year in a row that at least three Elon Law students have secured such placements.

*Professor elected to Society of American Law Teachers Board of Governors*—Assistant Professor Tiffany Atkins has been elected to a two-year term to the Board of Governors of the Society of American Law Teachers (SALT), a community of law teachers, law school administrators, librarians, academic support experts, students, and affiliates “working for more than 40 years to improve the legal profession, the law academy, and expand the power of law to under-served communities.” The Board of Governors is designed to fulfill SALT's basic mission of promoting inclusivity and cultural competency in the profession, enhancing social justice training, and advancing the use of the law to serve under-served persons and communities.

*Accolades in US News rankings*—Elon Law's reputation for the strength of its legal writing and trial advocacy programs earned the school its highest marks to date in specialty rankings of an annual guide published by *US News & World Report*. Released on March 30, Elon Law's new specialty ranking for legal writing places it in the top 20% of law schools. And the specialty ranking for trial advocacy places Elon Law in the Top 100 of law schools for the first time ever.

### University of North Carolina School of Law

*UNC School of Law jumps to 24 in the US News & World Report*—UNC moved up three spots to 24 out of 193 law schools ranked in the *US News & World Report's*

2022 edition of “America's Best Graduate Schools.” Over the last three years, UNC has jumped 21 spots to land in the Top 25 law schools. Of the public university law schools listed in the top 50 schools as ranked by *US News*, UNC is 8th.

*Writing program ranks 9th*—In the specialty areas rankings, the law school's Research, Reasoning, Writing, and Advocacy (RRWA) program, now in its tenth year as a full-year, six-credit program, ranks number 9 in legal writing.

*Dean Martin H. Brinkley '92 reappointed*—Brinkley was reappointed for another five-year term as dean after returning UNC to the top ranks of America's law schools. Brinkley came to the deanship in 2015 directly from practice, the first person to do so in the modern history of the law school.

*3L class reaches 100% pro bono participation*—For the fourth time in the UNC School of Law Pro Bono Program's history, all third-year students, 100% of the graduating class of 2021, have participated in a *pro bono* project.

*UNC Law Alumni Association announces annual awards*—The Law Alumni Leadership Awards will be presented to W. Louis Bissette Jr. '68, of Asheville, Kristi L. Jones '92, of Raleigh, Jonathan “Jon” A. Barrett '78, of Linville, B. Leigh Wicclair '11, of Garner, Professor John M. Conley of Chapel Hill, and Charles T. Plambeck '86, of Princeton, NJ. ■

### Distinguished Service Award (cont).

to nominate colleagues who have demonstrated outstanding service to the profession. Information and the nomination form are available online: [ncbar.gov/bar-programs/distinguished-service-award](http://ncbar.gov/bar-programs/distinguished-service-award). Please direct questions to Suzanne Lever at [slever@ncbar.gov](mailto:slever@ncbar.gov). ■

# July 2021 Bar Exam Applicants

The North Carolina Board of Law Examiners presently intends to administer the July 2021 bar examination remotely on July 27-28, 2021.

Published below are the names of the applicants whose applications were received on or before April 20, 2021. Members are requested to examine the list and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Lee A. Vlahos, Executive Director, Board of Law Examiners, 5510 Six Forks Rd., Suite 300, Raleigh, NC 27609.

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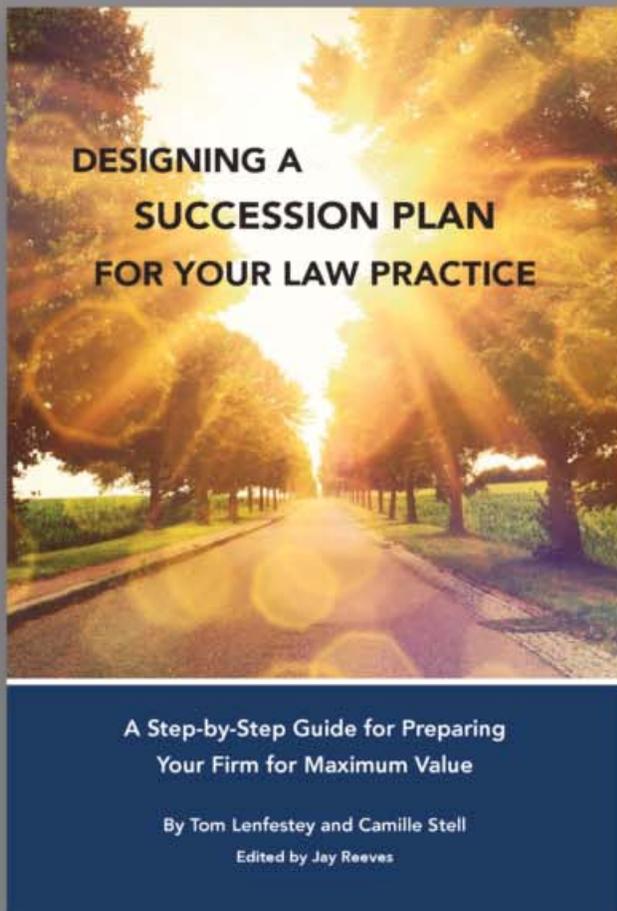
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