

THE NORTH CAROLINA STATE BAR

JOURNAL

FALL
2021



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Timeshare Fraud

The Timeshare business is notorious for
deceptive sales practices.

Your client may have some of these complaints:

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- I said "no" many times, but I signed documents just to escape.
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- The interest on the mortgage is higher than on the credit card.
- I have tried to use my points, but I can never get a reservation.
- I found out that they rent rooms to the public for less than my dues.
- They say I can never get out - Is that true?
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Jennifer R. Duncan

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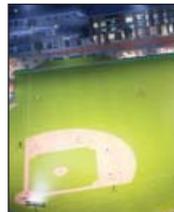
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A Little of This and a Little of That

BY BARBARA R. CHRISTY

On a recent drive to and from Asheville I found myself musing about a variety of things, including the meaning of some terms we tend to use without thinking.

Professionalism is the first such term. We often hear the word “professional” used to describe a really great athlete, but as lawyers we are part of the legal profession and thus, we too are professionals. I never truly understood what that meant until I became a State Bar Councilor in 2009 and had the opportunity to work with terrific lawyers from all around the state, from both small and large firms and a variety of practice areas—attorneys like Darrin Jordan, our president-elect, who has a busy criminal defense practice, but also makes time to chair the Indigent Defense Services Commission because he truly believes that we have a moral obligation to provide legal services to individuals who are unable to afford representation and assistance when they are subject to legal proceedings within our criminal judicial system.

One of the perks of being the State Bar President is the opportunity to serve as an ad hoc member of the Chief Justice’s Commission on Professionalism. The meetings are thought provoking, challenging, and encouraging, as lawyers and non-lawyers from a wide variety of backgrounds come together to discuss ways to enhance professionalism among judges, lawyers, and law students. There is plenty of discussion about the lack of civility among lawyers, but there is also recognition of the many wonderful examples of professionalism in our legal system. At the commission’s July meeting, Chief Justice Paul

Newby closed with a challenge to all members to share their thoughts about professionalism, what it means to them, and how it might be improved—a worthy exercise for us all.

I don’t know who Cecil Castle is, but I love this quote attributed to him:

“Professionalism is a frame of mind, not a paycheck.” We were able to celebrate some shining examples of the “professionalism” frame of mind during presentations of the Distinguished Service Award at the July meeting of the State Bar Council. The Distinguished Service Award is the only award presented by the State Bar. The honorees are men and women whose



service to the legal profession is truly outstanding. The list of past award winners can be found on the State Bar’s website (ncbar.gov) under the tab “Bar Programs.” Victor Boone, who was head of the Raleigh office of Legal Aid for many, many years, is a recent recipient of the award and, like the other recipients, exemplifies the highest qualities of professionalism and legal excellence. I read an article about Victor in which a friend of his stated that, “with his boardroom poise, keen intellect, legal skills, and courtly demeanor, Victor easily could have been a partner in a large law firm making five to ten times his Legal Aid salary. Instead he has chosen to spend his entire career providing topflight legal representation in civil cases to the least among us—the poor, the outcast, the inarticulate, and the mentally ill.” Other award recipients recognized at the July meeting included Edward G. (Woody) Connette and Bill Powers of Charlotte and Ashley L.

Hogewood Jr. of Raleigh. Professionals one and all.

My musings then took me down the path from thinking about “professionalism” to thinking about “community.” In addition to being a part of the legal profession, we are part of the legal community. I keep a small journal where I write down Bible verses and other quotations that inspire me, and one that I look at often is from Helen Keller and speaks of the beauty of community. “Alone we can do so little; together, we can do so much.” This is so true. I plan to add to it this quote from Coretta Scott King: “The greatness of a community is most accurately measured by the compassionate actions of its members.” These compassionate actions can be witnessed every day in a variety of ways in the law offices and courtrooms of our state. I challenged myself to select a random issue of *North Carolina Lawyers Weekly* and look for examples of community building. I did not have to look far. The May 24, 2021, issue had a front page article titled “Lessons Learned on the Long Road to the Law.” It told the story of Tim Tomczak who, after spending 24 years with the Raleigh Police Department, earned a law degree through Campbell Law School’s FLEX program and is working to become a prosecutor. Tomczak discussed the importance of serving the community and helping other people. On the very next page of that same edition was an article telling how Raleigh family law attorney Carole Gailor made a significant financial donation to Campbell Law School to help fund a clinic that will enable law students to meet some of the huge unmet need for family law services. They are both community builders.

My wandering mind moved on to the

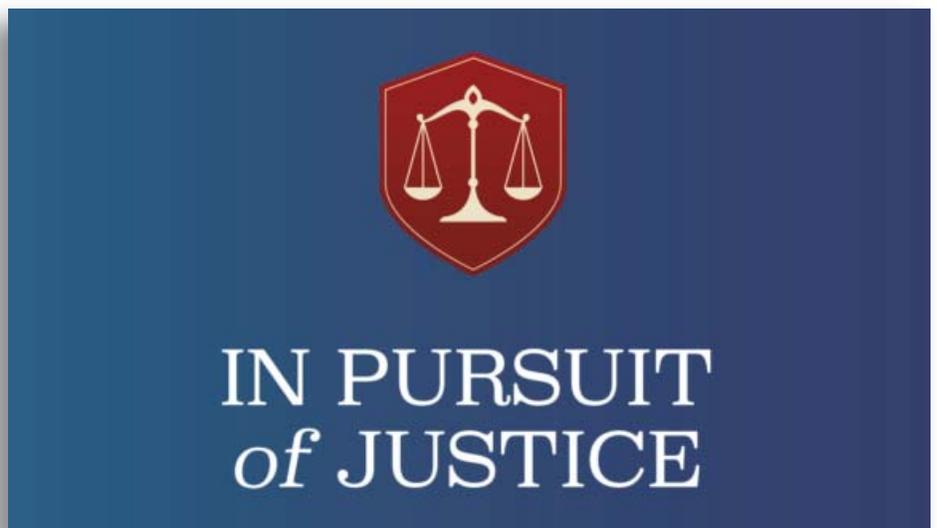
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In Pursuit of Justice—*An Assessment of the Civil Legal Needs of North Carolina*

PREFACE AND CONCLUSION BY JUSTICE ANITA S. EARLS

Imagine facing losing your job, your house, or custody of your children, without knowing whether you have any legal rights, or without the assistance of someone who can reliably explain the legal papers that have just been served on you. This is all too often the reality for North Carolina’s low- and moderate-income families. Indeed, for many case types in our state courts, the vast majority of litigants come to court without representation. Access to justice suffers when people do not have legal advice or representation. This has especially severe consequences for the nearly one and a half million North Carolinians living in poverty, who are likely to experience more legal problems than most people. None of this is new, and all of it has been exacerbated by the impact of the COVID-19 pandemic. What is new, however, is our understanding of the exact nature of the justice gap in North Carolina and which populations are most in need of services.

In 2020, in partnership with UNC Greensboro’s Center for Housing and Community Studies, the NC Equal Access to Justice Commission (EATJC) and the Equal Justice Alliance (EJA) completed the first comprehensive civil legal needs assessment in nearly two decades. The study provides a detailed examination of the legal needs of the poor in North Carolina, as well as an overview of the services available to meet those needs. One significant tool produced by the research team, and now available to all, is a county-by-county fact sheet with 11 pages of local data presented in charts and graphics that summarize the research findings



specific to each county.

As a result of the pandemic, many of the gaps between needs and available services identified in this study will worsen without prompt action, as families in poverty lost whatever slim lifelines they had, and those who experienced the loss of loved ones or employment may be facing poverty anew. We also know that calls for service are increasing as people face the challenges of navigating new programs and policies intended to provide assistance. The data we have now provides a baseline from which we can continue to examine the nature of the civil justice gap we experience and measure our success in working towards narrowing it.

I encourage you to learn more about the civil legal needs in your community by exploring the story maps and 100 county socioeco-

nomic profiles at nclegalneeds.org. This is also an opportunity for the bench and bar to partner with all justice system stakeholders to ensure we are meeting the North Carolina Constitution’s guarantee that “justice shall be administered without favor, denial, or delay.”

I especially want to thank the members of the Steering Committee who provided hours of leadership and insight during this project, and the research team at UNCG who developed and analyzed this incredibly rich data. Together, they skillfully overcame the challenges of conducting the study during a pandemic and helped us understand how the events of the past year will impact the civil legal needs of families in North Carolina.

—Justice Anita Earls, Chair of the Legal Needs Study Steering Committee

Executive Summary

The following is a slightly edited, brief excerpt from the Executive Summary of the study. The complete report is available online at nclegalneeds.org.

Introduction

A large percentage of individuals and households in North Carolina cannot afford the services of a private attorney. Each year, thousands of North Carolinians must navigate one or more complex civil legal issues such as unemployment, foreclosure, or child custody without the benefit of legal advice and representation. As a result, they risk not being able to meet their basic human needs for food, shelter, safety, and healthcare.

Goal and Methodology

Primary goals of this assessment included:

- Documenting the current resources and services available to meet the civil legal needs of low-income communities.
- Gaining a more specific understanding of the gaps in availability of services and what resources are needed to address unmet legal needs.
- Identifying how legal needs and the resources available to meet them may vary among geographic, racial, gender, and other demographic factors.

UNCG researchers obtained economic and demographic contextual data from secondary data sources, such as the Census Bureau's American Community Survey and the Bureau of Labor Statistics. They compiled data for 2015–2019 from the NC Administrative Office of the Courts (NCAOC) for the number and type of civil cases by county. Eight civil legal aid providers in North Carolina provided a snapshot of their caseloads in 2019.

The UNCG team collected primary data over the course of ten months in 2020 using the following methods:

- 28 semi-structured, in-depth, one-on-one interviews with leaders in the legal aid field including managing attorneys, policy directors, program officers, executive directors, legal scholars, and frontline attorneys from agencies across the state.
- Focus groups with legal aid lawyers, staff

of non-profit community service providers, and people who have been legal aid clients or who have struggled to find affordable legal help (57 total participants).

- Statewide surveys of 1,176 stakeholders and 708 potential, current, or past clients.

Primary Findings

Legal aid and social services providers were unanimous on one point: low-income North Carolinians face a severe and growing shortfall in affordable legal resources. Over the past 20 years, some of the resources available to serve people in poverty have expanded while others have contracted—but the needs have far outpaced the resources.

- Some populations are underserved even relative to the larger population of low-income people in need of civil legal services. These populations include veterans, the elderly, people with disabilities, and Native Americans.

- The income limits imposed by the Legal Services Corporation (LSC), a significant source of funding for many legal aid offices, excludes middle-income clients from eligibility for assistance, despite the fact that they often cannot afford a private attorney.

- Legal aid providers are forced to turn away many eligible people with meritorious cases due to a lack of resources.

- While housing cases dominate the number of cases filed in state court, family law (particularly custody proceedings) was by far the area most often mentioned by stakeholders as an area of underserved practice. The second most cited underserved practice area was immigration.

- Funneling additional resources into more routine practice areas like expunctions and traffic law has the potential for tremendous impact on many individuals' ability to be economically self-sufficient.

- Significant barriers make it difficult for low-income people to gain access to legal

Fast Facts: Legal Aid in NC

More than 2 million low-income North Carolinians were eligible for the services of legal aid providers in 2018.

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.

The coronavirus pandemic has significantly increased the need for civil legal aid.

There is 1 legal aid attorney for every 8,000 North Carolinians eligible for legal services, compared to 1 private lawyer for every 367 North Carolina residents.

services. Researchers asked client respondents to name the greatest barriers. By far the most frequent was costs, which was identified by 91.2% of respondents.

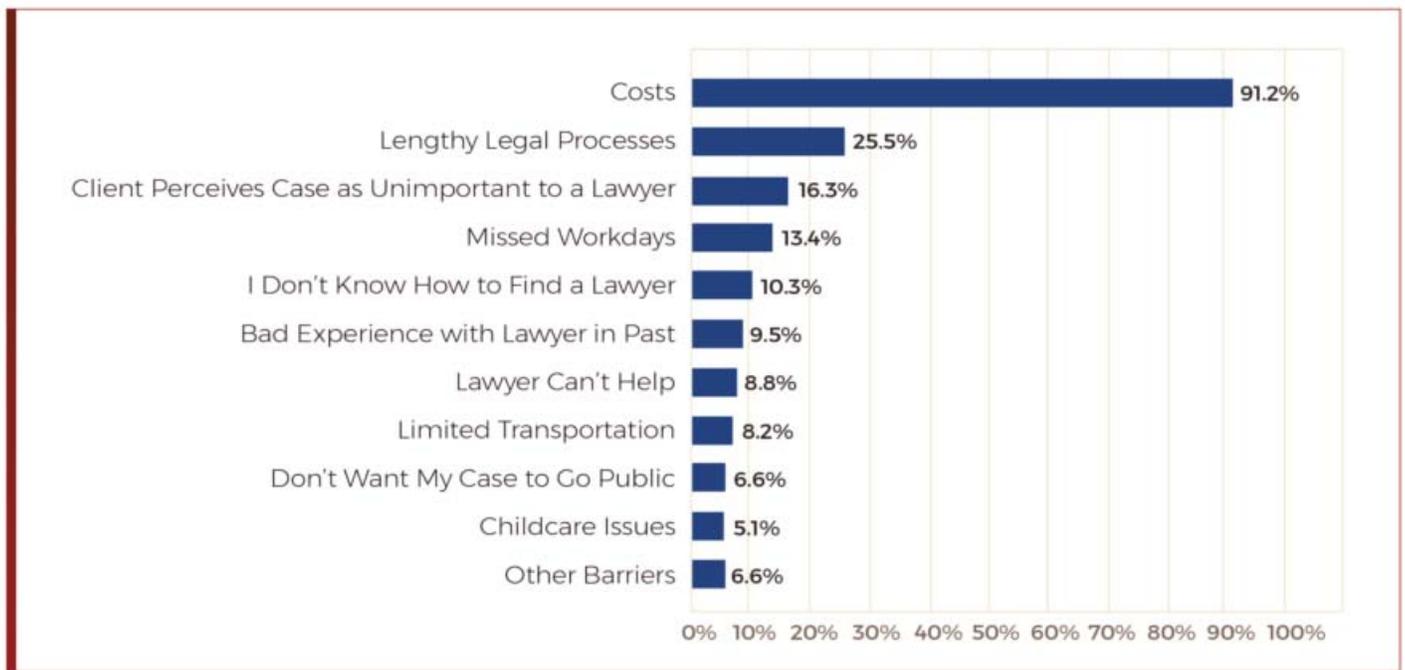
- A lack of internet access can significantly hamper the ability of rural and low-income communities to access legal services.
- The need for legal services for low-income families is growing, and poverty drives a large percentage of this need.

Geographic Disparities

In some geographic and issue areas, the gap between service need and service availability has reached a crisis stage. If a low-income individual is also a member of another marginalized group such as veterans, they are even more unlikely to obtain services. North Carolinians with incomes that narrowly surpass the limit to be eligible for legal aid are particularly underserved because they earn too little to pay for the services of a private attorney.

Interviewees noted that it is much more challenging for low-income people in rural areas to access civil legal aid for a variety of reasons. They indicated that rural populations are:

- Less likely to have access to public transport.
- Less likely to reside near a legal aid office.
- Less likely to have access to high-speed



Barriers to Seeking Assistance with Civil Legal Issues, Client Survey Respondents

internet.

- More likely to be older and have more health issues.
- More likely to suffer from the aftereffects of a weather-related disaster.
- More likely to be generally isolated and therefore less likely to know about available services.

They also pointed out there are fewer *pro bono* attorneys and less locally-based philanthropic activity to support fundraising efforts in rural counties.

Costs Are Largest Barrier to Receiving Services

Clients overwhelmingly reported that the cost of seeing a lawyer is the most significant barrier to obtaining assistance with civil legal issues (see graph above). In 2018, approximately 15% of North Carolinians lived in poverty, which is disproportionate by race—affecting 23.5% of Black households and 12.1% of white households.

The percent of households receiving SNAP (Supplemental Nutrition Assistance Program) in 2018 was 14.1%. One in five (20.7%) homeowners and 44.1% of renters were cost-burdened, spending more than 30% of income on housing-related costs. Finally, the median annual household income in North Carolina in 2018 was \$53,855, or about \$8,000 lower than that of

the United States as a whole, with great variability between counties.

The top three most frequently mentioned barriers noted in the figure above were consistent across race, income, and level of trust in lawyers. The professionals interviewed further identified the following barriers: lack of childcare, inability to get time off work, lack of transportation, limited language and literacy, lack of internet access, health issues, lack of trust, and lack of awareness.

Low Level of Trust in Lawyers

A notable barrier that came to light in the interviews and focus groups is that members of low-income and immigrant communities often have a low level of trust in lawyers, the court system, and the legal system in general. Client survey respondents were asked to rate on a scale from 0 (no trust) to 100 (total trust) their level of trust in lawyers.

The average level of trust (mean) was 63.6. The highest trust level was seen among those with high incomes. Notably, veterans had the lowest level of trust in lawyers.

Categories of Legal Services with High Need

To assess which areas of legal representation had the highest need, UNCG researchers

analyzed all data collected through interviews, focus groups, and surveys of nearly 2,000 people. The areas of high need they identified are:

Housing Issues for Owners: Housing legal services ranked at or near the top in each component of this assessment of civil legal needs in North Carolina. The most commonly identified legal issues for homeowners were foreclosure and mortgage issues, followed by home repair problems.

Housing Issues for Renters: Housing legal issues for renters were a top category of need and included general affordability issues, rent increases, threats of eviction, and tenants' rights.

Family Legal Services: Statewide NCAOC data and data supplied by legal aid providers indicated that family legal services are in high demand. Among the surveyed issues in the category of family law, more than half of respondents indicated a great need for legal services for domestic violence and partner abuse, followed closely by child custody, child visitation, and child support issues.

Immigration and Naturalization: Legal services for immigration and naturalization also ranked high on the overall assessment of legal needs, as well as in interviews and focus groups. All subfields ranked relatively high in need, and the most significant areas of

need were related to deportation, immigration court hearings, problems resulting from not having a driver's license, and Deferred Action for Childhood Arrivals (DACA).

Seniors: The most prominent issues for seniors were fraud, Medicare/Medicaid issues, and powers of attorney and living wills. Guardianship and abuse of the elderly, while still high need, ranked lowest comparatively.

Healthcare: Medical-legal issues included addressing Medicaid eligibility issues and Medicaid nursing home benefits, as well as the provision of home and community-based services.

Income Maintenance: The most common legal services needs in this area were help with applying for or receiving SNAP, unemployment compensation, and Social Security Disability Insurance (SSDI).

Consumer Rights: Respondents indicated the greatest needs for consumer legal programs were related to collection agency abuse, student loan debt, and creditor harassment.

Employment Legal Services: Respondents agreed there was moderate to great need for addressing employment issues related to criminal records as well as issues concerning unemployment benefits.

Civil Rights/Discrimination: More services are needed for people facing discrimination due to race or ethnicity. Related was a high need for legal services for discrimination due to criminal record or for police misconduct due to discrimination. The need

was consistently high throughout all categories of civil rights cases.

Veteran/Military Benefits: Denial of veterans benefits was the greatest area of legal need indicated by respondents, while discharge status upgrade or correction was the least needed service.

Education Legal Services: The majority of respondents agreed there was moderate to great need for addressing Individual Education Program (IEP) issues, school enrollment for homeless youth, and issues of youth being turned down for special education programs. The need was consistently high throughout all categories of educational legal cases.

Disability Benefits: The majority of respondents also recognized moderate to great need for legal services for cases where disability benefits were denied, reduced, or terminated; for Social Security Disability Insurance (SSDI) claims; and for mental illness or commitment hearings.

Wills and Estates: Respondents indicated roughly equal need in the following four areas of wills and estates: estate planning, probate, household members had a problem with a will or estate of a deceased person, and unspecified legal problems with a will or estate.

How Can We Address the Identified Access to Justice Gap?

The report itself does not offer opinions on policy or other recommendations to bridge the justice gap. However, researchers

asked survey respondents to identify programs and efforts in their area that are successful in the current provision of civil legal services. Respondents provided 227 write-in responses, and key themes included the emergence of new programs, strong civil legal aid providers, effective community partnerships, and improvements in court training.

Funding: Legal aid providers throughout the state receive funding from a variety of sources. Federal funds through LSC furnish the greatest amount of funding for civil legal representation for low-income people in our state but exclude many people who need services. Additional federal, state, and local government grants are important sources as well. Respondents frequently mentioned the Governor's Crime Commission, which allocates funding to agencies under the Violence Against Women Act (VAWA) and the Victims of Crime Act (VOCA). These funds primarily support services to victims of domestic violence and sexual assault. Additional sources that respondents identified were NC IOLTA, philanthropic foundations, individual and corporate contributions, attorneys' fee awards, and nominal fees from clients who exceed income levels.

As discussed, the funding for services to address North Carolinians' civil legal needs is severely inadequate. The lack of stability of funding emerged as a key issue. Many respondents also commented that restrictions on funding hampered their efforts to provide services efficiently.

Top 10 Civil Legal Case Types Closed by Eight NC Legal Aid Providers

Rank	Case Type	Closed 2019	Percent of All Cases Closed
1	Domestic Abuse	7,679	22.6%
2	Private Landlord/Tenant Issue	5,046	14.8%
3	Federally Subsidized Housing	1,873	5.5%
4	Other Miscellaneous	1,801	5.3%
5	Custody/Visitation	1,659	4.9%
6	Wills/Estates	1,568	4.6%
7	Advance Directives/Powers of Attorney	1,437	4.2%
8	Collection (including Repossession/Deficiency/Garnishment)	1,388	4.1%
9	SSI Benefits	1,050	3.1%
10	Immigration/Naturalization	1,021	3.0%

Source: Eight Legal Aid Providers.

Pro Bono: In conversations about resources, study participants repeatedly mentioned the private bar as an important resource available to support the provision of legal services. Some legal aid providers reported receiving significant support from private attorneys who provide *pro bono* services to low-income families. These volunteers take on individual and appellate cases, as well as partner with legal aid attorneys for complex civil litigation cases. In many cases, bar associations also organize *pro bono* projects such as phone banks to provide answers to legal questions and clinics that help low-income people prepare documents. Training and supporting *pro bono* attorneys can, however, be labor intensive for legal aid providers. Opinions varied regarding the

efficiency of utilizing *pro bono* services to assist clients.

Leveraging Non-Lawyers: Civil legal aid providers struggling with limited resources told researchers they need community partners who can play supporting legal roles. Respondents identified potential allies in local social services agency staff, social workers, navigators, advocates, housing counselors, victim witness assistants, paralegals, law students, and volunteers. Respondents also indicated that working closely with other social services organizations allows attorneys to meet client needs more effectively. Community partners need training on how to identify when legal advice would be helpful and can serve in a variety of support roles. Examples include providing more training for police and court officials regarding the dynamics of domestic violence, training housing counselors to assist in eviction and foreclosure cases, and utilizing prison staff to screen for needs like record expungement. Non-lawyer advocates, with the appropriate support from lawyers, could be utilized to a greater extent to accompany clients to the courthouse to help them file *pro se* or represent themselves in court in some types of cases.

Partnerships within the Legal Civil Aid Community: Professionals serving low-income clients report dramatic growth in the effectiveness of their partnerships with other members of the civil legal aid community. Increasingly, they work together to support each other as well as their clients. They collaborate to educate clients and the wider community about legal issues. This interdependence sometimes also extends to the relationships between legal aid firms and the private bar.

Regarding structural change, some study participants recommended that steps be taken to reduce poverty and oppression. Ideas ranged from greater access to food and child care to increasing the minimum wage and the amount of affordable housing available. Many supported a civil right to counsel.

Short of sweeping systemic change, study participants generally felt that lack of funding is the key issue in explaining and remedying the shortfall in civil legal services. Many participants mentioned the need for far greater resources. Others advocated that funding be more flexible so that it can be used to cover nonprofit operational costs or small expenses of clients such as bus fare.

In terms of regulatory reform, several respondents mentioned Medicaid expansion. Other ideas were reinstating the earned income tax credit as an anti-poverty measure for children and reforming the unemployment insurance system in North Carolina.

The domestic violence sector gave rise to a number of policy recommendations. Among other suggestions, one practitioner urged that domestic violence protective orders be issued for longer periods and that courts take greater advantage of the statutory authority to award child and spousal support, as well as housing allowances, with protective orders. Reform of the campus sexual assault system was also mentioned.

Other policy reforms that would reduce the service gap include expansion of the property tax reduction available to disabled and elderly homeowners, liberalization of bankruptcy rules to permit restructuring of a mortgage on a primary residence, and expansion of Department of Agriculture's rules to allow low-resource farmers to have more access to credit and conservation programs. Several informants recommended that the Self-Serve Center in Mecklenburg County be expanded to other counties. Remote court and administrative hearings and a system for remote notarizations were suggested as other ways to increase access.

Final Thoughts from Justice Earls

We do not yet know the full picture regarding the civil legal needs emerging from the pandemic.

This study relied on court data from 2019 and interviews conducted throughout 2020. We know that pandemic-related effects such as unemployment, lack of educational opportunities, housing instability and other issues will have a prolonged impact on our state, and we will continue to monitor gaps in services over the coming months and years.

You can help. There are real steps that citizens can take to help bridge the justice gap. We need attorney volunteers. Sign up at ncprobono.org. Support your community's second responders by giving to civil legal aid organizations in North Carolina: ncequaljusticealliance.org. Finally, spread the word—tell others how civil legal aid is vital for North Carolina's citizens and how it can solve problems early, make communities more resilient, and strengthen the economy. For more details, visit nclegalneeds.org. ■

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Inclusion and Belonging in the Age of Social Distance

A “DEI-19” Checklist for the Legal Profession

BY MICHAEL G. MORRISON II AND MONICA WEBB-SHACKLEFORD

America is currently battling two pandemics: COVID-19 and the diversity, equity, and inclusion (“DEI”) problem in organizational culture, or “DEI-19.” DEI-19 rears its head in the form of institutional, historical, and systemic inequities. These inequities are shaped by the deep and abiding residue of racism in America.



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Respectively, COVID-19 and DEI-19 contribute to feelings of isolation, loneliness, and exclusion. COVID-19 demands mask wearing, social distancing, and self-quarantining, while DEI-19 demands masking identities, creating façades of conformity,¹ and avoiding disruptions to established organizational culture. These demands are increasingly vital for individuals deemed “high risk.”² Similar to COVID-19, many racial and ethnic minority groups are at an

increased risk of contracting DEI-19.

The term “essential” has been repeated ad nauseam by leaders fighting the spread of COVID-19. Whether referring to essential travel, essential contact, essential businesses and operations, or essential workers, society has seemingly adopted essentiality as the standard for safe decision making. With respect to the workplace, DEI-19 thrives in the everyday disregard of workers’ innate essentiality. While the legal profession was

deemed essential to the operational needs of society, we further contend that all legal actors—from attorneys to supporting staff—are essential to the operational needs of the legal profession. Employers must identify, affirm, and support their essential workforce. In an age tempered by an emphasis on what is and is not essential, it is more essential than ever that legal employers develop the ability to perceive subtlety, appreciate difference, and cultivate

a culture of belonging to create organizational change.

Belonging

“Belonging” can be defined as the experience of being accepted and included by those around you, and is linked to physical health, emotional well-being, and overall performance.³ In agreement with Deloitte Insights,⁴ we contend belonging consists of three mutually reinforcing attributes:

1. Employees should feel *comfortable* at work, including being treated fairly and respected by their colleagues;

2. Employees should feel *connected* to the people they work with and the teams they are a part of; and

3. Employees should feel that they *contribute* to meaningful work outcomes—understanding how their unique strengths are helping their teams and organizations achieve common goals.⁵

In the workplace, one cannot unpack belonging without first understanding a term we used early on: organizational culture, or “the way things are done.”⁶ Organizational culture describes the unique social and psychological environment of an organization and directly influences employee identity, behavior, and human interaction within an organization.⁷ An organizational culture of comfort, connection, and contribution achieves belonging by making employees feel essential to their organizational culture.

Why has Belonging at Work Become a Top Organizational Priority Now?

Individuals’ need to establish a certain amount of stable and positive interpersonal relationships makes the cultivation of workplace belonging a top organizational priority.⁸ As the world becomes less stable, more volatile, and increasingly divided, employees are struggling to find a sense of peace and belonging in their workplace.⁹ Deep polarization and accelerating tribalism have led to growing intolerance of people with different beliefs and backgrounds.¹⁰ This has resulted in employees being hesitant to bring their authentic selves to work.¹¹ Contributing factors to this phenomenon include rising inequality, stagnant incomes, and job insecurity. This is aggravated by changes in technology with the increased use of social media and changing partisan media landscapes.

In addition to individuals feeling uncomfortable bringing their full selves to work, shifts in traditional workplace composition have complicated organizational belongingness. Increasing workplace technology has expanded the conventional office setting by creating more opportunities for alternative work arrangements.¹² Indeed, with virtual working arrangements on the rise, loneliness has become a growing concern.¹³ Weakening social connectedness and eroding communal spaces are strangling personal relationships and widening racial, religious, and ideological divisions.

The Business Case for Investing in Workplace Inclusion

“Organizational culture is an important parameter for business survival and growth.”¹⁴ Diverse teams bring together different skills, personalities, and perspectives that often result in fresh ideas and smarter problem solving. A 2018 research study from McKinsey & Company found that organizations in the top quartile for ethnic/cultural diversity on executive teams were 33% more likely to have financial returns above their respective national industry medians.¹⁵ While more organizations are beginning to recognize the business value of diversity, one critical component is often overlooked in DEI strategies: cultivating a culture of belonging for all employees.

Results from a nationwide survey of 1,789 full-time employees across a diverse set of industries showed that a sense of belonging impacts employee and organizational performance in multiple ways.¹⁶ The study found that employees with a high sense of belonging take 75% fewer sick days than employees who feel excluded. These sick days equate to almost \$2.5 million worth of lost productivity each year per 10,000 workers. Employees who feel excluded also have a 50% higher turnover rate than employees who feel they belong, costing organizations about \$10 million annually per 10,000 employees.¹⁷ For a 10,000-person company, if all employees felt a high degree of belonging, this would correlate with an annual gain of over \$52 million from boosts in productivity.¹⁸ This study also conducted online simulations of exclusion in team settings and found that excluded employees were 25% less productive in working toward their team goals. This remained true even if the individual’s

reduced productivity harmed their own financial interests.

The aforementioned confirm that workplace belonging is vital for employee well-being and business outcomes. Leaders who want to promote top performance in their law firms or legal departments should not only recruit diverse attorneys, but should also institute practices to promote an inclusive culture and cultivate a sense of belonging at work.

DEI-19 Checklist for the Legal Profession

While most of us have seen various iterations of the COVID-19 checklist,¹⁹ there seems to be no such guidance for DEI-19 prevention. In the spirit of the former, the following general checklist contains important suggestions for legal employers to “flatten the curve” of DEI-19 by providing a list of strategies to promote belonging in the workplace.

Be an Effective Ally

The presence of a single ally on a team, someone who demonstrates fair and inclusive behavior amidst exclusion from other team members, can prevent the negative consequences of social exclusion.²⁰ However, promoting a culture of belonging at work, for better or worse, depends on all members of the team. While we cannot control the behavior of others, we can control our own behavior, and it is well within our control to act in a fair and inclusive manner in the office. To boost your effectiveness as an ally:

- Consistently remind yourself of the importance of inclusive behaviors. Check in and ask yourself, “Am I making others feel they belong here?”

- Consider ways you can proactively support and include others in your office, legal department, or law firm. For example, engage the support of other attorneys in the office to tackle a challenging legal issue or sticking point in your case or matter.

- As a leader, verbally compliment fair and inclusive behavior to demonstrate that this behavior is something your law firm values.

Keep in mind that being an ally does not mean going out of one’s way. It means including all participants equally, even within a brief social interaction. While being an ally might imply strong action, in practice it can be as simple as acting in a fair and inclusive manner within any social context.

Additionally, acknowledge and appreciate attorneys' contributions and make them feel valued for their unique efforts and accomplishments. This can be achieved through the use of clear mechanisms, such as incentives or peer/supervisor feedback, to show employees how their work makes a difference in the pursuit of broader shared goals.

Find Opportunities to Connect

Bringing people together can foster an environment where people feel they belong. In your office or firm, explore opportunities to create social bonds through the way teams are structured, how offices are designed to create opportunities for social interactions, and in the COVID-19 era, how and where remote teams are brought together to build social connections. Further, engineer empathy by sharing experiences and stories to gain perspective about the broader aspects of your colleagues' lives, such as their hobbies or outside interests, concerns, or hardships. By nature, we are social beings and generally enjoy hearing and telling stories. In fact, that is how many of us recall details about matters we worked on from years past. For example, tell someone about a case where a client attempted to bring his pet snake into court and all the details will come flooding back; but tell only the client's name or a particular date, and the person is more likely to draw a blank. Sharing stories can dissolve interpersonal barriers and help us recognize the universality of certain experiences. To connect through remote work environments created by the pandemic, some law firms are scheduling virtual lunches where partners and associates check in with each other and discuss not only work, but also aspects of their lives outside of work (including the challenges of helping children with online school and the annoyance of barking dogs during calls and Zoom meetings).

Cultivate Mentorships and Sponsorships

Mentoring is important for attorneys as they progress through their careers. Those who have a trusting relationship with a mentor are better able to take advantage of critical feedback and other opportunities to learn. You can facilitate trusting mentor relationships by having a formal or informal mentorship program and coaching mentors on how to get the best out of one-to-one meetings. Importantly, take the concept of mentoring one step further towards the role of sponsor by helping lawyers gain exposure

to office or firm leaders with whom they would not normally interact.

Practice Candor and Give Employees Opportunities to Share their Honest Opinions

Changing culture in the workplace is a challenging and ongoing process that cannot be accomplished in one meeting, one week, or even in one month. One must first seek to understand. We all have experience-tinted lenses that affect how we perceive the world. It is important, therefore, to look outside of what we think we know and what we have experienced and try to understand things from others' perspectives—including the perspectives of those we work with. This starts with one's willingness to engage. Organizations must be willing to dive into discomfort.

Similar to the discussion of politics, race is considered taboo in the workplace. Consequently, with leadership being hesitant to discuss race, many employees are uncomfortable discussing it as well. This results in employees feeling as if they cannot bring their whole selves to work. Though potentially uncomfortable, listening to another's painful stories and experiences allows employers to better understand trauma-based behavior and become more sensitive to the dynamic needs of historically underrepresented populations. Additionally, this act of compassion and empathy can instill trust and inspire vulnerability. If you are not sure what to say in a particular situation, it is okay to tell the person that. A good place to start a difficult conversation is to acknowledge its difficulty.

Challenge Unconscious Biases

In order to build stronger relationships with employees, employers must challenge their assumptions, take inventory of their blind spots, and monitor impact more than intent. It is difficult to tell if unconscious bias is at work at any given moment. After all, it is, by definition, unconscious. Knee-jerk reactions often serve as reminders to pause and be more deliberate and less reflexive. For example, in evaluations, supervising attorneys can mitigate the risk of unconscious bias by asking themselves if they would give the same feedback if they were evaluating a man and not a woman or if they were evaluating someone white rather than a person of color.

Race, ethnicity, gender, and age are generally what people think of when considering

biases, but we are all capable of harboring unconscious biases and perpetuating microaggressions.²¹ These biases and attendant microaggressions can be triggered by a myriad of characteristics such as where someone attended college or law school, introversion and extroversion, as well as hobbies or extracurricular activities. All of these characteristics and many others can influence who gets interviewed and who gets hired, as well as who gets promoted and who gets fired. These characteristics can also affect how employees socialize with each other, the way people are mentored, who is given plum assignments, who is invited to networking and business development opportunities, and much more.

Conclusion

By utilizing our checklist above, the legal profession can assume its role as an apparatus of organizational change. Regardless of our recommendations, it is up to employers to "take the virus seriously." Organizations must operate with motivated awareness and inclusive integrity,²² or remain attached to the ineffective and inequitable status quo. Vaccines, public health initiatives, and acquired immunity all threaten the staying power of COVID-19. DEI-19, on the other hand, will continue to devastate this nation until we destroy the last vestiges of racism and erect structures of inclusion and belonging in the ruins. ■

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Endnotes

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President's Message (cont.)

word "legacy," which took me back to the recently concluded July State Bar meeting. At that meeting, Root Edmonson and Fern Gunn Simeon, two long-time attorneys in the State Bar's Office of Counsel, were recognized on the occasion of their retirement. As colleague after colleague rose to pay them tribute, sharing stories of what role models they were; of their tremendous work ethic; and of their dedication, integrity, and good humor, those of us listening alternately

laughed and blinked away tears. It was clear they both embody what it means to be a professional and part of a community. Their legacy is not that of great riches or fame (well, maybe a bit of infamy in the case of Root). Their legacy is far more important. A well-known quote describes this legacy: "People will forget what you said, people will forget what you did, but they will never forget how you made them feel." Root and Fern both have a gift for bringing out the best in others as was evidenced by the outpouring of love and respect from their peers.

The State Bar is often associated with lawyer discipline, but we should instead be celebrating the vast majority of our lawyers, who are dedicated to the highest values of the profession, involved in building community, and creating a legacy of service for future lawyers to emulate. ■

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A Framework for Lawyer Well-being

BY ROBYNN MORAITES

Part of the challenge of being a self-regulating profession is that regulators must determine whether a lawyer who commits an ethical violation is a bad actor deserving discipline, someone who made an honest mistake (from trivial to egregious), or an impaired lawyer who, but for his or her impairment, would not have committed the ethical violation. For a lawyer falling into the latter category, discipline will have no deterrent effect whatsoever. The behavior will continue until the underlying ailment is treated and addressed. It is this third category with which we are concerned in this article. It is an integral part of the self-regulating function.

Lawyer well-being influences and correlates to ethical behavior, professionalism, and competence. It can be tricky to discuss lawyer well-being because there are not objective, measurable well-being standards. We are only alerted that something is amiss when a lawyer begins to have malpractice claims, ethical violations, or behaves unprofessionally enough that colleagues start to notice. It is often helpful to frame the discussion on a well-being continuum rather than to think of well-being and impairment as either/or propositions. Figure 1 illustrates the continuum.

Lawyers and judges move along this continuum over the course of a career. Where an individual falls on the continuum at a given point in time can be influenced by several factors ranging from the stress of a certain legal matter or life situation—say, the death of a close family member—to medically-based illnesses like depression or alcoholism. By the time a lawyer is committing malpractice or violating the Rules of Professional Conduct,

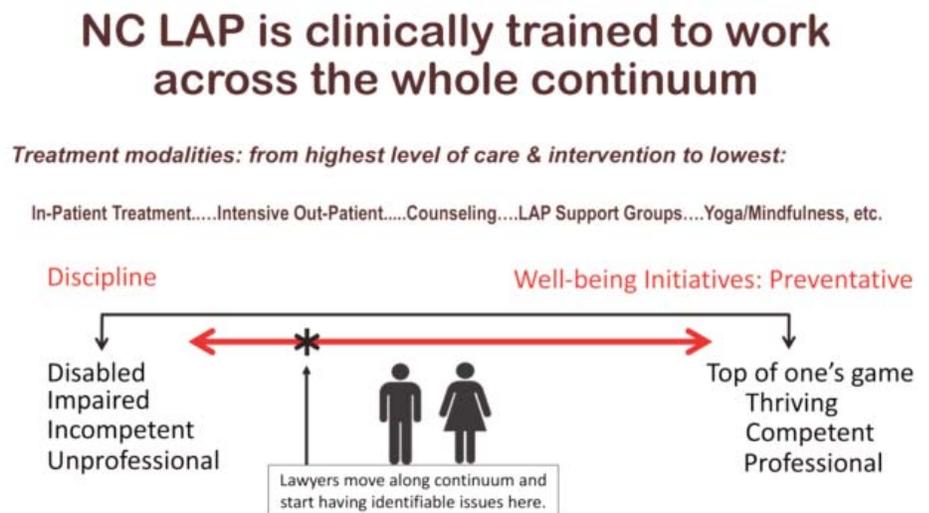
the lawyer has moved very far down the well-being continuum. The asterisk in Figure 1 is an indicator of where a lawyer in a cycle of impairment usually hits the regulator’s radar. Graphically illustrating this another way in Figure 2 is a slide often used in LAP’s compassion fatigue/burnout CLE presentation.

Well-being initiatives are preventative in nature. They are meant to make us aware of our circumstances so that we can intervene upon ourselves, try some new approaches to our stress management, and stay further up on the right side of that well-being continuum or at the top of the happiness/stress cliff. Once a lawyer or a judge slides past a certain point on the continuum, well-being techniques alone will not work. Whether the issue is stress, drinking, depression, or all of the above, brain chemistry has changed to the point that unhealthy or harmful neural pathways have

been established. No well-being tools are going to reverse that situation and interventional treatment is required.

The range of interventional strategies follows the continuum as well. For example, by the time most lawyers are to the far left side of the continuum in Figure 1, they will need a higher level of care. LAP regularly refers lawyers to in-patient treatment for substance use disorders, chronic unremitting depressive disorder, untreated or unmanaged bipolar disorder, and other conditions that require greater intervention and care to get stabilized. Towards the middle of the continuum of Figure 1, LAP refers out to services like intensive out-patient groups and counseling, which can also be a step down in services once a lawyer leaves in-patient treatment. On the far right side of the continuum in Figure 1, where a lawyer is functioning well but needs some tools and strate-

Figure 1



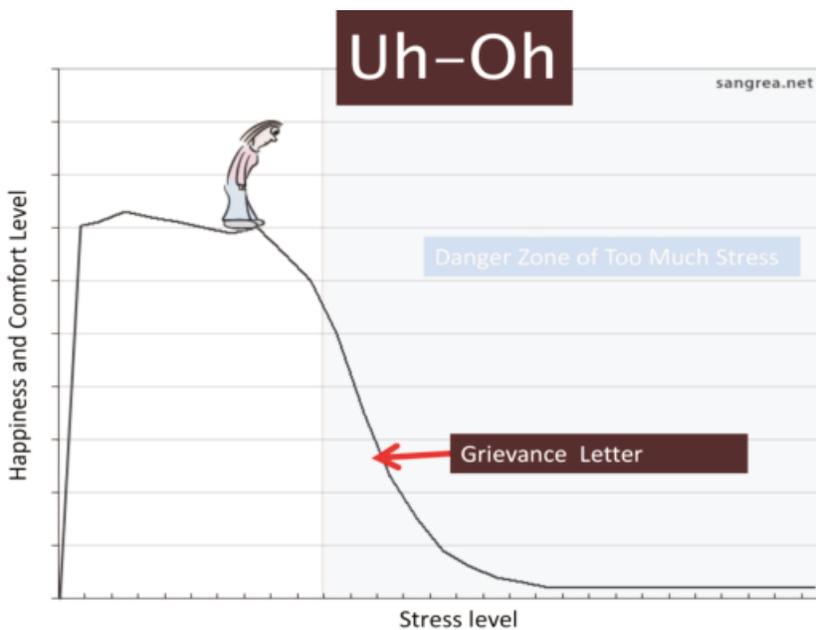


Figure 2

gies for how to better navigate life or a particular issue, LAP refers out to therapists and counselors. LAP's support groups fall somewhere from the middle of the continuum to the right. LAP is clinically trained to work across the whole continuum.

All of the well-being, preventive strategies work to keep lawyers healthy and to prevent them from sliding to the left, but if they start on the far left, they need more assistance to effectively push them to the right in Figure 1.

Let's use a cancer metaphor. Take diet, for example, or smoking. It is well established that eating habits can influence one's propensity to get cancer or to avoid it based on the processing or pesticides used in food and one's genetic predisposition. Similarly, smoking causes lung cancer in many. Of course, nothing is a guarantee, but to minimize one's chances of getting cancer, you might want to eat clean and quit smoking. Once a person has cancer, however, eating clean and stopping smoking are not going to cut it as treatment for the cancer. Cancer requires powerful interventions and treatments like surgery, focused ultrasound, immunotherapy, chemotherapy and/or radiation.

As the saying goes, an ounce of prevention is worth a pound of cure. LAP has been on the forefront of well-being messaging for years. Our electronic newsletter, *Sidebar*, is chock full of articles, tips, techniques, insights, and inspiration. Most of our CLE programs fall into this well-being category. Topics like work-life balance, compassion fatigue, mental health, and well-being during COVID, all fall into this

preventative category. How much harm has never come to pass because lawyers suddenly saw the writing on the wall in a CLE talk and headed in a new direction?

I have been giving LAP CLE talks for ten years now. I cannot tell you how many lawyers approach me to report they made direct changes in the way and manner they were practicing after seeing a CLE presentation a few years back. They are happy, resilient, and having more fun in their lives and practices. They moved further to the right on that continuum. I ran into a judge at a restaurant one night who told me after attending the LAP training on compassion fatigue at a judicial conference, he went to therapy for two years and it changed his life, both professionally and personally. So I know firsthand our prevention efforts are indeed effective. But they are not enough. They are not a substitute for the services LAP provides when lawyers and judges slide off that cliff and hit the metaphorical wall.

There is a misperception that LAP only touches a small population of the bar. Based on data beginning in the mid-1990s, we know that LAP has actively worked with +/- 15% of the bar (including judges) with less than .05% involved in any discipline or regulatory process. Despite this recent national focus on holistic lawyer well-being, the trend continues that lawyers typically do not seek assistance in the early stages of any mental health issue. So, while LAP welcomes and works with folks all along the continuum, LAP is uniquely posi-

tioned and experienced in working with those who are dealing with more severe issues that may be starting to interfere with their practices. LAP's work and its efficacy are largely hidden from view due to the strict confidential nature of the services provided. With the recent well-being focus, there is a risk that the very serious issues LAP deals with day-in and day-out and the vital regulatory purpose it serves will be minimized or overlooked.

There is also a misperception that we only help lawyers and judges with alcohol and drug problems. Some of our volunteers had a very public downfall. They are, therefore, more willing to speak at CLE and share their personal stories publicly. We have volunteers who would never speak at a CLE, and we do not ask them to. No one knows they have received help from LAP, which is as it should be. We are a confidential program, and it is their prerogative to maintain or break their own anonymity or confidentiality. Some of our volunteers who struggled with a family member with a drug or alcohol problem, or who struggled with anxiety, or compassion fatigue (having still hit the metaphorical wall before seeking help) are more than willing to help other lawyers one-on-one or to visit with law students during our law school office hours. They prefer a more private approach to their volunteer work. That suits us just fine. The point being, it is easy to see how perceptions of what we do at LAP and who we help can become distorted based on only a glimpse into the full range of services and the population with which we work.

Recovery includes well-being; not all well-being includes recovery. Many cancer survivors in remission are the cleanest eaters I know, and none of them smoke. If you want to see well-being practices being put to the test day in and day out, just take a look at our active volunteers. They are walking demonstrations of the power of these tools. But there are plenty of folks who are trying to treat their depression or alcoholism with mindfulness, yoga, or running. It won't work. We at LAP endorse all of these well-being tools, but sometimes more is needed. Just like quitting smoking won't rid one of lung cancer. But these attempts are an integral part of the process of getting ready to ask for help. As we often say, "Recovery is not for people who need it. It's for people who want it." ■

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Doctors vs. the Dead Man

The Problem with Application of North Carolina Rule of Evidence 601(c) in Wrongful Death Suits Arising from Alleged Medical Malpractice

BY ADAM PEOPLES AND TAYLOR BELKNAP

The purpose of the dead man statute is to protect the estate from fraudulent claims by survivors that are often made in contractual disputes and will proceedings. It serves as a remedy for situations in which, “[t]he survivor c[an] testify though the adverse party’s lips would be sealed in death.”¹ However, these statutes have been substantially criticized, and as a result only a handful of states have retained them.²

Limiting our thoughts strictly to contractual transactions or will proceedings, the application of the rule seems straightforward.³ Often in these scenarios, an interested party claims that contractual obligations accepted by the decedent have not been fulfilled or that they were promised some asset of the estate, thus the estate must perform or be held liable for breach. North Carolina Rule of Evidence 601 § (c) prohibits testimony that recounts oral communications with the decedent, which prevents a fraudulent claim of this nature against the estate. However, in wrongful death suits arising from alleged medical malpractice (WDM suits), the application of Rule 601 § (c) proves problematic and confusing for lawyers and litigants alike.

Imagine a scenario in which prior to surgery, a doctor and patient discuss the operative plan, the expected results, and other pre-procedure plans via phone call. There are no other individuals on the call, just the doctor and the patient having a final conversation prior to surgery in which they agree that the doctor will perform the surgery on her own. During surgery, complications arise, and the patient dies. Years after the operation, the decedent’s estate files a wrongful death suit against the doctor, alleging that she negligently performed the surgery because her decision to operate alone did not meet the standard of care. While testifying, the doctor attempts to discuss the conversation in which she and the patient agreed that the doctor would proceed



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alone. However, when the doctor attempts to deliver this testimony, plaintiff’s counsel objects and the doctor is prohibited from mentioning the phone call under 601 § (c). Not only is the doctor subjected to a lawsuit that requires her to recall the emotional experience of losing a patient, one that questions her professional judgment while her career hangs in the balance, but during that lawsuit, the doctor is unable to defend herself by recounting private conversations which ultimately led to the course of action.

As this example illustrates, although the

dead man statute serves a noble purpose, in WDMM suits, application of these statutes is counter-intuitive.

North Carolina's Former Dead Man Statute and Rule of Evidence 601 § (c)

North Carolina's former dead man statute, originally codified in N.C. Gen. Stat. § 8-51, has since been repealed, and was replaced by its substantive equivalent, Rule of Evidence 601 § (c).⁴ The rule provides that, "a party shall not be examined as a witness in his or her own behalf or interest...against the executor, administrator, or survivor of a deceased person...concerning any oral communication between the witness and the deceased..."⁵ Rule 601 § (c) also names three exceptions in which the rule does not apply. The first is when the executor herself is examined on her own behalf regarding the subject matter of the oral communication. The second is when the testimony of the decedent is given in evidence concerning the oral communication. The third is when "[e]vidence of the subject matter of the oral communication is offered by the executor..."⁶ The first and third exceptions are commonly referred to as the plaintiff "opening the door" to otherwise incompetent testimony. Thus, if the plaintiff estate first opens the door to incompetent testimony by testifying on their own behalf about the subject matter of the oral communication, or by offering evidence about the subject matter of the communication, any protection afforded to the estate by Rule 601 § (c) is waived.

The Problem with Application of Rule 601(c) in WDMM Suits

A. The application of Rule 601(c) in WDMM actions is inconsistent with the stated purpose of the rule.

Rule 601 § (c) was included in the North Carolina Rules of Evidence because of a concern that "fraud and hardship could result if an interested party could testify concerning an oral communication with the deceased[.]"⁸ The Supreme Court of North Carolina further detailed the purpose of Rule 601(c) in *Carswell v. Greene*.⁹

In *Carswell*, the Court discussed the dead man statute at length, ultimately issuing an opinion that is widely quoted throughout North Carolina case law.¹⁰

[The dead man statute] is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack

the survivor...In offering evidence of [the decedent] and objecting to the evidence of [the defendant] the plaintiff sought to pick up the shield, having first used the sword. This the law does not permit.¹¹

Similarly, in *Smith v. Dean*,¹² the Court stated that

[t]he plaintiff used the defendant's words as a sword and then attempts to use the shield of the statute to prevent the defendant from [testifying]...[s]uch a construction of the statute would permit the plaintiff to open the door...wide enough for him to enter but deny the defendant the right to enter at the same door.¹³

WDMM actions are unique because by nature they are suits in which the plaintiff is the estate or some representative of the decedent, and the doctor or hospital is the defendant. In other words, WDMM suits by necessity are cases where the deceased patient is suing some medical professional for improper care. As such, there will never be a counterclaim by the defendant doctor or hospital that can affect the rights or the value of the estate. Instead, any defense used by the doctor will simply diminish the extra gain available to the estate because of a finding of negligence, but will not take from the assets originally included in that estate. Thus, the doctor will not have a stake in the litigation aside from avoiding liability. In other words, any defense will likely be some version of comparative fault, which is merely a defense (or shield) to the claim brought against them, not a counterclaim that functions like a sword.¹⁴ Consequently, any WDMM suit will necessarily be an instance of the estate first seeking to use the rule as a sword rather than a shield, running contrary to the rule's stated purpose, and presenting a unique scenario that remains unconsidered by North Carolina courts.

This argument also holds up in North Carolina case law for wrongful death actions generally, not only WDMM actions. In these cases, testimony has been rejected on the basis of rule 601 § (c) only when there is a counterclaim by the defendant.¹⁵

In *Redden*, a wife sued by her husband's estate for constructive fraud, conversion, and breach of fiduciary duty testified about a conversation between herself and the decedent in which the decedent told her to move the money at issue. This testimony was found incompetent when the defendant wife had filed a counterclaim against the estate.¹⁶

Because the wife had filed a counterclaim, the purpose of the rule—namely, to protect estates from fraudulent and unfounded claims—is pertinent, and effectively justified the application of the rule to the testimony in this case.

Similarly, in *Weeks v. Jackson*,¹⁷ interrogatory responses by defendant debtors recalling oral communications with decedent about the terms of a loan were rejected where defendant debtors had filed a counterclaim against the estate.¹⁸ Because of the counterclaim, the rights of the estate were vulnerable to a judgment, thereby invoking the underlying purpose of 601 § (c).

In WDMM suits doctors and hospitals merely defend using claims of comparative fault, as noted previously. Comparative fault simply prevents a finding of negligence on the part of the defendant. The filing of a counterclaim is distinct because a counterclaim affects the rights of the estate and its assets. A counterclaim creates a possibility of the defendant obtaining a judgment against the estate, thereby diminishing it. In short, a counterclaim results in the defendant having a stake in the proceeding, justifying application of 601 § (c) on the basis of its stated purpose—to protect the estate.

As a result of the foregoing analysis, it is clear that WDMM actions pose a unique problem for Rule 601 § (c). North Carolina case law essentially leaves unanswered the question of how Rule 601 § (c) should apply in WDMM actions. This gap in precedent not only makes defending these actions difficult, but it also means that with respect to an entire category of actions, application of Rule 601 § (c) is largely discretionary.

B. North Carolina case law is silent regarding the application of North Carolina Rule of Evidence 601 § (c) to WDMM suits.

The principal case in North Carolina that applies the former dead man statute to a WDMM suit is *Spillman v. Forsyth Mem'l Hosp.*¹⁹ In *Spillman*, the facts are markedly different from a typical WDMM action, diminishing its precedential value in the context of this analysis. In *Spillman*, the plaintiff brought a WDMM action on behalf of her deceased son, but the defendant doctor was also deceased.²⁰ The court admitted the testimony largely because the witness's account was the only one available, thus the witness could recount what she had observed as a third party.²¹

No North Carolina cases specifically

address the unique issues associated with the application of the former dead man statute, nor Rule 601 § (c), in a WDMM suit. There is, however, a plethora of wrongful death suits generally (outside the realm of medical malpractice) in North Carolina where testimony has been admitted following a waiver by the plaintiff.²²

North Carolina courts depend heavily on facts and circumstances in their application of waiver of Rule 601 § (c). This mode of analysis has resulted in a body of case law that stretches to its limits in order to ultimately allow the testimony at issue. Because of these supererogatory efforts by courts to ultimately admit testimony, the purpose of the rule is diminished. What good is a rule that limits testimony if courts are eager to apply exceptions and will stretch their reasoning to do it?

Additionally, the frequency of unintentional waivers by plaintiffs, and the fierce litigation that ensues, indicates that parties often lack an understanding of the rule in the first place. The facts and circumstances analysis required to discern a waiver is unpredictable, making the issue difficult for parties to litigate. Finally, the facts and circumstances approach is cumbersome and inefficient.²³

Although courts are receptive to arguments by defendants that Rule 601 § (c) has been waived, it is unwise for doctors in WDMM suits to rely on this defense because of the court's discretion in applying it. The question arises, what options do doctors have to defend themselves in a WDMM suit when the estate seeks to bar their testimony about their oral communications with the decedent? As the rule stands now, not many.

What Have Other States Done?

In *Hicks v. Ghaphery*,²⁴ West Virginia's Supreme Court held that its dead man statute did not bar any party in a WDMM suit from testifying about conversations with a deceased patient.²⁵ West Virginia's statute is comparable to Rule 601 § (c) as it reads, "[n]o party...shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased..."²⁶ In finding the rule inapplicable, the *Ghaphery* court reasoned that

the focus of a medical malpractice case is the care and treatment of the patient. In the instance where the patient is deceased, it would be patently unfair to exclude evidence of a patient's complaints...[i]n some

cases, a patient's subjective description of their ailments may be the sole basis for a physician's diagnosis and treatment.

The Court also noted that "justice ordinarily will not prevail where only a part of the available evidence affords the only support for the judgment rendered."²⁸

Another West Virginia court later rejected the dead man statute entirely, holding that the statute inaptly presumed that witnesses would commit perjury when asked to testify about communications with a decedent and "presumes that oath, cross-examination, and witness' demeanor will be insufficient to enable the trier of facts to detect the insincerity of the survivor witness."²⁹ The court's reasoning imparts the idea that doctors as witnesses and defendants in WDMM suits are under oath, cross examined, and scrutinized by a jury. These measures have effectively ensured truthful testimony for years, thus there is no need for a rule to serve an identical purpose, especially when doctors in these cases have nothing to gain from fraudulent testimony and there are often medical records that would support their account. Thus, in accordance with the reasoning employed by other jurisdictions, a categorical rejection of application of Rule 601 § (c) in WDMM actions could be warranted.

Conclusion

Although North Carolina has repealed their former dead man statute in accordance with a number of jurisdictions, Rule 601 § (c) is functionally the same. Application of Rule 601 § (c) in WDMM actions has not been considered by North Carolina courts, and is inconsistent with the Rule's purpose. WDMM suits are distinguishable from case law in which 601 § (c) has previously been applied, which illustrates the turbidity of the rule and the problems it poses for prospective litigants in WDMM suits. As such, a categorical rejection of application of Rule 601 § (c) in WDMM suits may be warranted. ■

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Endnotes

1. Kenneth S. Broun, George E. Dix, Michael H. Graham, D.H. Kaye, Robert R. Mosteller, and E. F. Roberts, *McCormick on Evidence* 250 (John W. Strong ed., 4th ed. 1992) [hereinafter Broun].
2. See J. Wigmore, *Evidence* § 578 at 822-23 (1979); See also Broun, *supra* note 1, at 250-51; See also Ed Wallis, *Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 *Cleveland St. L. Rev.* 75, 82 (2005).
3. See N.C. Gen. Stat. § 8C-1 § 4-6A.
4. N.C. Gen. Stat. § 8C-1, 601(c) (2019).
5. § 8C-1, 601(c).
6. § 8C-1, 601(c).
7. See *Breedlove ex rel. Howard v. Aerotrim, USA, Inc.*, 142 N.C. App. 447, 452, 543 S.E.2d 213, 216 (2001).
8. § 8C-1, 601(c).
9. 253 N.C. 266, 116 S.E.2d 801 (1960).
10. See *Id.*
11. *Id.*
12. 2 N.C. App. 553, 163 S.E.2d 551 (1968).
13. *Id.* at 559-60, 163 S.E.2d at 555.
14. To avoid or limit liability on the basis of a patient's negligence, a physician sued for malpractice must show that the patient failed to adhere to the appropriate standard of care and that the patient's negligence was a proximate or contributing cause of his or her injury. With respect to a defense of assumption of the risk, the patient's knowledge or awareness of the adverse consequences of his or her action must be shown. 108 A.L.R.5th 385 (2003).
15. See, e.g. *Estate of Redden ex rel. Morley v. Redden*, 194 N.C. App. 806, 670 S.E.2d 586 (2009); see also, e.g. *Weeks v. Jackson* 207 N.C. App. 242, 700 S.E.2d 45 (2010).
16. *Id.* at 807, 670 S.E.2d at 587.
17. 207 N.C. App. 242, 700 S.E.2d 45 (2010).
18. *Id.* at 249, 700 S.E.2d at 50.
19. 30 N.C. App. 406, 227 S.E.2d 292 (1976).
20. *Id.*
21. *Id.*
22. *Bryant v. Balance*, 13 N.C. App. 181, S.E.2d 315 (1971), *Brown v. Moore*, 286 N.C. 664, 213, S.E.2d 342 (1975), *Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956).
23. Oftentimes, individual lines of deposition transcripts or a single interrogatory response result in an entire proceeding to determine whether there was a waiver. See *Redden, supra* note 21.
24. 212 W.Va. 327, 340, 571 S.E.2d 317, 330 (2002) (applying W. Va. Code § 57-3-1).
25. *Id.*
26. *Id.* at 338, 571 S.E.2d at 328.
27. *Id.* at 340, 571 S.E.2d at 330.
28. *Id.* at 339-40, 571 S.E.2d at 329-30.
29. See *State Farm Fire & Cas. Co. v. Prinz*, 231 W.Va. 96, 104 743 S.E.2d 907, 915 (2013).

Why Minor League Baseball Has Real Estate Developers and Local Governments Singing, “Take Me Out to the Ballgame”

BY MAC MCCARLEY AND LAURA GOODE

Minor league baseball has become major league business for a collection of cities large and small

across North Carolina. At the heart of every minor league

ballpark project is a commercial real estate deal: a build-

ing, on a budget, on a schedule, with agreed building ele-

ments, and an agreed quality standard. What has changed in recent years is that there is also now an economic development deal.

Many potential team owners are first and foremost real estate developers. Their business plan is to break even on minor league baseball, and to make a profit developing or redeveloping the surrounding property. As you can imagine, that suits local governments just fine. (While we focus on baseball in this article, the concepts we discuss gener-

ally apply to any sports facility.)

The Impact of COVID-19

There’s no sugarcoating it: the COVID-19 pandemic resulted in an awful 2020 season for minor league sports, like other industries centered around large public gatherings. However, with the rollout of multiple widely

available and highly effective vaccines, data evidencing lower transmission risks in outdoor settings, and the lifting of most restrictions, it looks like blue skies are ahead for minor league ballparks. Outdoor ballparks in warm climates (see: North Carolina) seem to be perfectly positioned to address the large pent-up demand for safe entertainment out-



Rendering of a ballpark in Kannapolis.

side of the house. This will apply both for ballgames and for the variety of other outdoor events these venues can host. Indeed, preliminary data from multiple North Carolina minor league ballparks show strong attendance for the 2021 season. Take the Kannapolis Cannon Ballers, who played the first game in their new ballpark in May. It took them only a third of this season to surpass their total attendance numbers from their last full season in the old ballpark.

However, game and event attendance aside, the real profit driver for minor league ballparks is the real estate play—and real estate development around ballparks is charging ahead. Interest rates for construction loans are at record lows. While development took a pause in the early days of the pandemic (along with the rest of the economy), and supply shortages have increased prices, there has been no slowdown in much of the state's real estate industry since last summer.

Why Ballparks Can Be a Good Deal for Developers

So what makes minor league baseball attractive to a commercial real estate developer? Let's start with free land, which is often how the deals are structured with local governments. That's because if the ballpark drives development and economic activity in the surrounding area, it increases tax values and creates new jobs, all of which bring more revenue into local coffers. It's a win-win as long as the developer meets the standards in the economic development agreement, which usually include developing the property within five years and increasing the local tax revenue over a longer period of time. (More on those details later.)

Developers are also getting in on the ground floor of what could become some of the most valuable property in an area. They are not only getting to manage the ballpark and get all the high-profile benefits of that, but they also often develop the property around it that turns into apartments, brew-pubs, and other mixed-use space. Additionally, if they partner with the local government on the overall plan, that makes it much easier to navigate zoning, which can be a significant challenge for other types of development. Reducing the time, costs, risks, and uncertainties tied to land use and zoning are huge benefits for developers. Further, the developer-turned-team-owner gains a new



Rendering of a ballpark in Gastonia.

line of revenue through sponsorships. And since the local government acts as a partner in making the area feel like the new exciting place to be, the developer essentially gets free advertising for their other developments around the stadium.

Why Ballparks Can Be a Good Deal for Local Governments

Local governments have seen ballparks drive economic development in several ways. These include the redevelopment of a troubled site or blighted area, a catalyst for development and redevelopment in the surrounding area, a boost to the travel and tourism sector of their local economy, an increase in direct spending in the local economy, a rise in community profile to assist in business recruiting efforts, and a new entertainment amenity to attract new residents to the community.

Where local governments want to put a new ballpark is different for every city. Most are now either in or right around downtown areas. High Point and Gastonia's minor league ballparks, for example, are in urban redevelopment neighborhoods right beside downtowns, while the new one in Kannapolis is in downtown. In each case, the plan was to completely revitalize the area with a mix of entertainment, residential, and retail development, as you can see in the renderings included with this article.

While all three are in different stages of development, there is already significant new investment happening around each. That happened with Charlotte, Durham, and Fayetteville's minor league ballparks as well.

In addition to this upside, local governments can structure the deals to limit downside risks and protect themselves from the team moving to another town, as we'll detail below.

The Four Major Issues in Ballpark Deals

Now that we have walked through the "why" of building ballparks, let's turn to the "how," which is where lawyers primarily come in. Most minor league baseball developments involve negotiating four major issues.

1. Sources and Use of Money—The local government's goals will be driven by what revenue sources are available under state law, the amounts that can reasonably be expected to be generated by the identified sources, and the political feasibility of using those sources. In North Carolina, the typical sources are hospitality taxes (i.e., rental car taxes, prepared food and beverage taxes, hotel/motel occupancy taxes), sales or property tax increment based revenues, sales of surplus property, and borrowed funds. However, in considering a borrowing by the city, both the city and the developer will be hesitant to consider general obligation bonds that require a vote of the people. A bond referendum adds significant time, costs, and uncertainty to the deal, and experience has shown that votes on sports facility deals are not a good bet.

The local government will expect the developer to contribute to the initial costs as well, such as by upfront capital contribution toward construction cost, rent for the term of the deal, or shared revenues out of operations. On that last point though, the devel-



Rendering of a ballpark in High Point.

oper-turned-team-owner wants or expects sole control of most sources of team-generated revenue: ticket sales, suite rentals, naming rights, sponsorships, advertisements, and food and beverage sales. Sharing of parking revenues may be an area on the table for negotiation, especially if the city owns the parking lots.

Another key issue is paying for maintenance and repairs. The team owner normally pays for day-to-day maintenance, almost like a typical landlord/tenant situation. The local government will want a reliable capital expenditure fund that it can use to update the stadium over the years, both so that residents keep going and the team doesn't get tempted to find a new home. A scoreboard alone can cost \$1 million or more, and every team wants one that's bigger and can do more stuff (make sound, shoot fire, pop out the mascot) than every other ballpark's. It's important that both sides are happy with what's earmarked for those kinds of improvements. Funding might come from savings in construction (rare), joint contributions from project or operating revenues, or growth in tax revenues dedicated to the project.

2. The Building Program (i.e., the Ballpark)—The team owner and the local government are likely to compete for control in the design, development, and construction of the project. Team owners will focus much

of their design on revenue generation, including banquet space, themed bars and food concessions, premium seating options, and adaptability for concerts and other purposes. They may engage their own design firm and not want to change. They will also want to get every parcel that's available adjacent to the ballpark for additional development.

The local government will have legitimate concerns about project design and negotiate hard to be an equal partner in this area. The city will want a sustainable building with low maintenance and repair costs. Both sides will be in agreement on one aspect of the building program: complying with the requirements of whatever league the team will join. It is essential to take this into consideration before construction, as making adjustments midstream will add costs and delays. Either the developer or the local government can lead construction of the project. But local government construction may add time, requirements, and cost to the project, so it may not always be in the municipality's best interest. On the other hand, local government contracting for the construction may yield sales tax rebates on procurement of building materials along with furniture, fixtures and equipment (FF&E). Unique local concerns, state law requirements such as bid laws, and how much time is available will drive the choices for construction. Both sides

will agree that the drop dead date for completion has to be in time for the start of a designated upcoming season about 18 to 24 months away.

3. The Use and Operating Agreement—The local government usually owns the stadium, but the developer/team owner demands control of its operations, and the local government is probably going to agree. If the team owner is carrying the financial risk of operations and controlling the lion's share of operating revenues, there is no reason for the local government to want to be in charge. It may want audit or inspection rights to make sure the team is living up to its commitments, though.

Here are two examples of provisions that are almost always part of the back-and-forth for that agreement: public use and non-relocation. With public use, the two sides will work through how many days to reserve for local government-sponsored events such as graduations or conventions. While this is almost universally requested and included, the public use days, ironically, tend not to get much use. Non-relocation, on the other hand, is one of the biggest issues in the whole deal. Think of it as "play or pay."

Local governments will want a guarantee that the team isn't going anywhere before the construction debt is paid off. The ballpark won't produce much revenue if it's empty. The team owners don't want to commit to anything more than they have to so they can keep the door open for a bigger, better deal five to ten years down the road, either with the same local government or a different one. The typical structure is for the team to play its home games in the ballpark for the term of the agreement or else pay liquidated damages. The length of the agreement and the amount of damages can be the subject of intense negotiations.

Outside of non-relocation, the basic tenet of the use and operating agreement is that if the team makes money, it keeps it. And if it loses money, it owns the loss. Very rarely will a local government be willing to trade acceptance of downside financial risk for a share of upside participation. The risks of participating in an operating loss for a local government are high, the rewards unpredictable, and the political cost of being wrong is extremely negative. Besides, the city limiting its downside risk creates incentives that are a fundamental part of the strategy here: it encourages the developer to want to

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have another way to make money, which is now why minor league ballparks are an economic development play.

4. The (New) Economic Development Deal—Stadiums have become an expensive proposition over the past five years. Most minor league ballparks today cost roughly \$40 to \$50 million. If the local government is going to handle the bulk of that cost, it does not want to also own the downside operating risk. Hence the use and operating agreement described above, and the developer/team owner looking for every possible way to make money off the facility.

That means hosting concerts, business conferences, wedding receptions—anything and everything possible in the ballpark. It also means developing apartments, retail, bars and restaurants, and other money-makers around the ballpark. The local government plans to cheer it all on as tax values increase and sales tax revenues rise.

This part of the deal is memorialized in an economic development agreement authorized under North Carolina General Statute 158-7.1. That statute allows local

governments to incentivize private enterprises with land, buildings, infrastructure, or other assistance in return for driving economic development. It also lays out required terms and procedures for adopting a formal agreement. These include holding a public hearing on the agreement, requiring the developer to finish construction within five years, and laying out how the local government would “claw back” property or other money if the agreement is breached. (The non-relocation provision is typically mentioned in the economic development agreement, too.) The agreement also includes a projection for how the benefits to the local government will outweigh the costs, including through new jobs and higher local tax revenues, and over what time frame. Essentially, the economic development agreement lays out the master plan for how the deal will spur growth in the area.

Conclusion

Real estate developers and local governments are charging ahead with redevelopment around minor league ballparks in sev-

eral North Carolina cities. The increase in the cost of stadiums in recent years has in fact contributed to why they are used as an economic development play: the local governments prefer a structure that protects them from downside risk, and in turn, the developer/team owner wants to drive activity in and around the ballpark as much as possible. Although negotiating certain provisions can get sticky and heated, minor league ballparks can end up as strong examples of win-win development—a home run, so to speak. (And the crowd goes wild!) ■

Mac McCarley and Laura Goode are attorneys at Parker Poe who have helped negotiate and draft minor league ballpark agreements. Mac is a former city attorney for the City of Charlotte and the City of Greenville who advises local governments and private sector clients on regulatory and public policy issues. Laura concentrates her practice on commercial real estate, including land use and municipal infrastructure. They can be reached at macmccarley@parkerpoe.com and lauragoode@parkerpoe.com.

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.

Disbarments

Martin M. Brennan of Huntersville withheld funds from his employees' paychecks for health insurance premiums and state and federal taxes and instead used the funds for his own purposes. Brennan also did not file and pay his state and federal income taxes for five tax years. He surrendered his license to the Disciplinary Hearing Commission and was disbarred.

Janet Reed of Jacksonville embezzled money from her stepfather while serving as his attorney-in-fact. Her answer was stricken because she did not respond to discovery requests. Reed was disbarred.

While serving as attorney-in-fact for a client, **Cabell J. Regan** of Pittsboro breached his fiduciary duty, engaged in dishonest conduct, collected an excessive fee, entered into a business transaction with the client, misappropriated the client's entrusted funds, did not properly maintain and disburse entrusted funds, and did not maintain required trust account records. He is enjoined from handling entrusted funds and from serving in any fiduciary capacity. He was disbarred by the DHC.

Hayley C. Sherman of Mayodan pled guilty to the felony offenses of possession of marijuana with intent to manufacture, sell, or deliver in violation of N.C. Gen. Stat. § 90-95(a) (three counts); sale or delivery of marijuana in violation of N.C. Gen. Stat. § 90-95(a) (two counts); conspiracy to sell or deliver marijuana in violation of N.C. Gen. Stat. § 90-98 (two counts); maintaining a store, dwelling, vehicle, boat, or other place for use, storage, or sale of controlled substances in violation of N.C. Gen. Stat. § 90-108(a)(7) (three counts); and one count of possession of a Schedule IV substance with intent to manufacture, sell, or deliver in violation of N.C. Gen. Stat. § 90-95(a); and to two counts of

Wire Fraud - Heightened Discipline

Six years ago, in 2015, the State Bar began receiving reports of criminals hacking into the email accounts of lawyers, their clients, real estate brokers, and others, altering wiring instructions, and diverting loan payoffs and other disbursements from real estate and other transactions. Since 2015 the State Bar has written and spoken extensively about this danger in the *Journal*, social media accounts, and continuing legal education programs. The State Bar has also issued Formal Ethics Opinions (2015 FEO 6 and 2020 FEO 5) about this topic. Lawyers Mutual Insurance Company and title insurance companies have also continued to broadcast warnings and educational information about these scams. To date, the State Bar's Grievance Committee has opened 55 grievance files when lawyers failed to take adequate precautions to protect entrusted funds from these wire fraud scams. Initially, the Grievance Committee issued dismissals accompanied by letters of warning, advising respondent lawyers of their professional obligation to protect entrusted funds. After nearly three years of extensive education on this topic, the Grievance Committee concluded that

lawyers should be fully aware of the danger posed by these email scams. At its July 2019 meeting, the Grievance Committee began issuing permanent discipline—one reprimand and two admonitions—in wire fraud cases. Since then, the Grievance Committee has referred one lawyer to the Disciplinary Hearing Commission and has issued one reprimand, nine admonitions, three dismissals with letters of warning, and three dismissals with letters of caution. Special alerts were also published in The Disciplinary Department section of the State Bar *Journal's* Fall 2019 and Winter 2019 issues. Unfortunately, although North Carolina lawyers have now received two additional years of notice and education on this issue, the State Bar continues to receive reports of lawyers who failed to take adequate precautions to prevent wire fraud scams. **ACCORDINGLY, THE GRIEVANCE COMMITTEE IS PROVIDING NOTICE THAT LAWYERS WHO FAIL TO TAKE ADEQUATE PRECAUTIONS TO PROTECT AGAINST WIRE FRAUD SCAMS CAN EXPECT IMPOSITION OF MORE SERIOUS PROFESSIONAL DISCIPLINE.**

the misdemeanor offense of possession of marijuana paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(a). The State Bar sought imposition of discipline based upon the criminal convictions and the underlying misconduct. Sherman was disbarred.

Karen C. Wright of Shelby was disbarred by the DHC for conduct including embezzling entrusted funds, committing perjury, and making false statements.

Suspensions & Stayed Suspensions

Guangya Liu of Durham habitually over-disbursed her trust account in real estate trans-

actions; continued to do so after representing to the State Bar that she had amended her practices; and habitually left earned fees in her trust account. The DHC suspended her license for two years. The suspension is stayed for three years upon her compliance with enumerated conditions.

Patrick Megaro of Orlando, Florida, represented two brothers with IQs in the 50s, both of whom were sentenced to death and imprisoned for decades after being wrongfully convicted of the rape and murder of a child. They have now been exonerated. The DHC found that Megaro entered into a contract

with the clients when he knew they did not have the capacity to understand it, charged an “irrevocable” fee, charged an excessive fee, made misrepresentations to his clients and to tribunals, and made arguments against his clients’ interests in an effort to protect his own fee. The DHC suspended Megaro’s license for five years. He will be eligible to petition for a stay after serving three years’ active suspension upon satisfaction of all enumerated conditions, including the requirement that he reimburse \$250,000 to the clients.

Kenneth Ording of Hampstead did not adequately supervise assistant(s) to whom he delegated trust account duties, did not conduct required monthly and quarterly trust account reviews and reconciliations, disbursed funds from his trust account for clients in excess of any funds held for the clients in the trust account, had bank charges paid with entrusted funds, did not promptly disburse entrusted funds, did not always create and maintain client ledgers, did not ensure client ledgers were accurate, submitted inaccurate client ledgers to the State Bar altered to make it appear that clients for whom he had over-disbursed funds had zero balances with no excessive disbursements, and engaged in several other violations of the trust account record-keeping rules. Ording took corrective action with respect to some but not all of the trust account issues. Ording was suspended for four years. The suspension is stayed for four years upon his compliance with enumerated conditions.

James E. Rogers of Durham commingled personal funds with entrusted funds, disbursed funds for the benefit of clients from his trust account in excess of funds held for those clients in the account, did not timely and properly conduct quarterly reconciliations, did not deposit entrusted funds into his trust account, did not maintain accurate trust account records, did not promptly disburse entrusted funds, did not send required annual accountings to clients, did not properly supervise staff, and gave inaccurate information to a client and to the Grievance Committee. Rogers was suspended for three years. The suspension is stayed for three years upon his compliance with enumerated conditions.

Wesley S. White of Charlotte did not communicate with his client, did not adequately respond to discovery, and did not appear at multiple scheduled hearings, which resulted in his client’s arrest for contempt. He was suspended for two years. After serving

three months of the suspension, White will be eligible to petition for a stay of the balance upon demonstrating compliance with enumerated conditions.

Petitions for Reinstatement

In April 2019, **James Goard** of Gaston County was suspended for five years for his conviction of two counts of driving while intoxicated and for engaging in the unauthorized practice of law, for failing to communicate with a client, and for misrepresenting information to a client and to the Grievance Committee. After serving two years of active suspension, Goard petitioned for a stay of the balance. The State Bar did not contest the petition because Goard had satisfied all conditions for a stay. A stay was entered on June 16.

In October 2020, **Charles L. Morgan Jr.** of Charlotte was suspended for three years for trust account mismanagement and violating the injunction prohibiting him from handling entrusted funds. After serving six months of active suspension, Morgan petitioned for a stay of the balance. The State Bar did not contest the petition because Morgan had satisfied all conditions for a stay. A stay was entered on June 29.

In June 2018, **Julie A. Parker** of Mocksville was suspended for five years for failing to truthfully account for and timely remit employment taxes to the IRS. After serving 18 months of active suspension, Parker petitioned for a stay of the balance. The State Bar did not contest the petition because Parker had satisfied all conditions for a stay. A stay was entered on July 1.

Completed Grievance Noncompliance Actions before the DHC

The DHC suspended **Christi Misocky** of Monroe for noncompliance with the investigation of several grievance files.

Censures

Eric Applefield of Charlotte was censured by the Grievance Committee. While serving as in-house counsel for real estate development companies, Applefield used the companies’ client records and other proprietary information acquired in his capacity as in-house counsel to divert business to his own LLC.

Jody P. Mitchell of Dobson was censured by the Grievance Committee. He presented an unfiled, facially defective, fictitious complaint to a judge to wrongfully subpoena un-

necessary records of the opposing party in a domestic action, thereby engaging in abuse of process. Mitchell also did not serve the complaint on the opposing party.

Reprimands

The Grievance Committee served **Raymond Godfrey** of Fairmont with a letter of notice to which he was required to respond within 15 days of service. Godfrey did not respond to the letter of notice. The Grievance Committee reprimanded Godfrey for knowingly failing to respond to a lawful demand for information from a disciplinary authority.

R. Steve Monks of Raleigh did not comply with notice requirements before seeking an *ex parte* child custody order and did not disclose material facts to the court. In another case, Monks communicated with a represented party without opposing counsel’s consent. Monks was reprimanded by the Grievance Committee for failing to comply with known local customs of courtesy or practice of the bar, knowingly disobeying an obligation under the rules of a tribunal, failing to inform the tribunal in an *ex parte* proceeding of material facts that would enable the tribunal to make an informed decision, communicating with a represented party, and conduct prejudicial to the administration of justice.

Peter Romary of Hillsborough communicated with various City of Greenville officials in an effort to obtain law enforcement surveillance video footage of then-ECU Interim Chancellor Dan Gerlach allegedly engaging in inappropriate behavior while intoxicated. During these communications, Romary asserted that he was representing members of the UNC Board of Governors and the ECU Board of Trustees, members of the North Carolina General Assembly, and the State (and National) Police Benevolent Association. These assertions were misrepresentations in that a reasonable lawyer under the circumstances would not have formed the opinion that these individuals and entities were his clients. During these communications, Romary also alleged without basis in fact that the law firm investigating the matter for the UNC system had potentially engaged in misconduct. Romary later filed a petition with the court to obtain the video footage in which he purported to represent an organization that was not his client. Romary was reprimanded by the Grievance Committee for, among other things, making false statements

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Trauma and Resilience

BY ROBYNN MORAITES

Trauma is not necessarily what comes to mind when one thinks of lawyers and judges. Yet a surprising number of us come from traumatic backgrounds and childhoods. In fact, many folks who enter the legal profession do so precisely because of the historic trauma we have experienced. Maybe we want to work in the child welfare arena to stop the type of abuse or neglect we experienced as a child. Or maybe we want to prosecute criminal cases because of an attack we suffered years ago. Trauma is inextricably intertwined in our profession and for many of us as practitioners.

Today, in the fall of 2021, most lawyers understand and easily accept the concept of secondary or vicarious trauma and compassion fatigue in our numerous practice areas. This was not so ten years ago. To say LAP's CLE on these topics was revolutionary at the time we began presenting it in 2012 is not hyperbole. These topics are gaining more research traction and hitting mainstream legal parlance. The *Wake Forest Law Review* recently held an excellent five-hour, free CLE symposium on Secondary Trauma in the Legal Profession.

Trauma—all forms of it—is taking center stage. Lawyers and judges can benefit from understanding it, both personally and professionally. I recently had the pleasure of attending a UNC School of Government training for district court judges on the topic of toxic stress and “trauma informed” court. “Trauma informed” is exactly what it sounds like. Practitioners—from teachers and healthcare workers to police officers and judges—are starting to understand the human trauma response and how it affects behavior and health (both physical and mental) across one's lifetime.

More important than categorizing the type of stress encountered, is our response to it. What is a tolerable stressor to one person, might be a debilitating stressor for another. This discussion is therefore best informed by measuring our responses to stress. We have three types of stress responses: positive,

tolerable, and toxic.

The National Institute for Health provides a framework for categorizing stressful events and the toll they take on our bodies and psyches. I have edited this description for brevity, but at times have included the child development language because it adds important dimensions.

The stress response is a physiologic response to an adverse event or demanding circumstance and includes biochemical changes to the neurologic, endocrine, and immune systems. A positive stress response is a normal stress response that is infrequent, short-lived, and mild. We gain motivation and resilience from every positive stress response, and the biochemical reactions that occur with such an event return to baseline. Examples include meeting new people or learning a new task.

Tolerable stress responses are more severe, frequent, or sustained. The body responds to a greater degree, and these biochemical responses have the potential to negatively affect brain architecture [especially when we are young children]. Examples include divorce or the death of a loved one. In tolerable stress responses, once the adversity is removed, the brain and organs recover fully given the condition that [we have empathetic and] responsive [personal] relationships and strong social and emotional support.

Toxic stress results in prolonged activation of the stress response, with a failure of the body to recover fully. It differs from a normal stress response in that there is a lack of support, reassurance, or emotional attachments. The insufficient support prevents the buffering of the stress response or the return of the body to baseline function. Examples of toxic stress in children include abuse, neglect, extreme poverty, violence, household dysfunction, and food scarcity. Caretakers with substance abuse or mental health conditions also



predispose a child to a toxic stress response. Exposure to less severe yet chronic, ongoing daily stressors can also be toxic.

Implications of exposure to chronic, toxic stress for long-term health and developmental effects are critical, including increased risk for stress-related and inflammatory-related diseases, like heart disease, stroke, cancer, and even some autoimmune conditions. [Most relevant for our discussion here], the toxic stress response is believed to play a role in the pathophysiology of depressive disorders, behavioral dysregulation, PTSD, alcoholism, increase in suicide attempts, and psychosis.¹

The phrase toxic stress developed out of the CDC-Kaiser Permanente Adverse Childhood Experiences (ACEs) Study, which was first conducted in 1998. The research has since been expanded from the original 17,000 (mostly white, middle class, with health insurance) participants to now hundreds of thousands of people across all demographic and socioeconomic groups.

There are ten types of childhood trauma measured in the CDC-Kaiser Permanente ACEs Study. There are many other types of trauma, but these experiences were the focus of the original study. Five are personal—physical abuse, verbal abuse, sexual abuse, physical neglect, and emotional neglect. Five

are related to other family members—a parent who is an alcoholic, a mother who is a victim of domestic violence, a family member in jail, a family member diagnosed with a mental illness, and experiencing divorce of parents. Each type of trauma counts as one. So, a person who was verbally abused as a child, with a depressed parent, and parents who divorced has an ACE score of three. The higher the ACE score, the greater risk for disease in later life, both physical and mental, across almost every disease one can name.

Hidden within all this discussion of trauma is the topic of resilience. In fact, the documentary highlighting this research and the ACEs study is entitled *Resilience*. Most resilience is born out of suffering, out of overcoming difficulty and adversity.

Resilience is the capacity to bend without breaking and the ability to bounce back. George Valliant (1993) defines resilience as the “self-righting tendency” of the person, “both the capacity to be bent without breaking and the capacity, once bent, to spring back.” The American Psychological Association defines resilience as, “the process of adapting well in the face of adversity, trauma, tragedy, threats, or even significant sources of stress, such as family and relationship problems, serious health problems, or workplace and financial stressors, it means ‘bouncing back’ from difficult experiences.” Resilience is primarily defined in terms of the presence of protective factors (personal, social, familial, and institutional safety nets) which enable individuals to resist life stress. Later research has examined how positive childhood experiences (PCEs) (or protective factors), such as your teachers taking great interest in you, can mitigate the impacts of a high ACE score and can help develop resilience.

So how does this play out in our profession?

First of all, those of us who became lawyers in the face of the trauma that we experienced in our youth are pretty resilient. We had to be in order to get here. I saw a meme that showed a cartoon wolf pup collapsed, with an arrow in his back, bleeding out and a mama wolf standing over him with 15 arrows in her back that said, “Life doesn’t get easier, we just get stronger.” Memes circulate because they resonate.

If we had alcoholic parents, were raised in domestic violence, or had a parent who was severely depressed or had other mental health issues, we probably score pretty high in ACEs.

Yet many of us had enough protective factors or PCEs to get where we are today. It is well documented that being raised in an alcoholic home creates PTSD for the surviving children. Many do not begin to recognize and resolve the PTSD until much later in life, if ever. For many of us from alcoholic or abusive homes, we have enough resilience to have a fulfilling legal career and never really need to resolve the PTSD.

In other cases, the PTSD that results from many of the ACEs creates a hyperadrenalized, hypervigilant state in us. Choosing a hyperadrenalized, hypervigilant profession just feels normal. Many of the lawyers we work with do not self-identify as having anxiety, per se, because in reality, it’s all they’ve ever known.

For those of us who parlayed our childhood trauma into this profession, where we diligently work to rectify the pain of the past, it will not heal our personal wounds. That is different work, which, if left unaddressed, can be a real setup. We must recognize that as noble and important as our work is, if we are not healed internally, we will be retraumatized over and over again by the cases we encounter.

I don’t normally share information about the lawyers with whom we work, but I will share this story because the lawyer is deceased. She came from a horrific childhood abuse situation. She worked in the child welfare arena. She was a stalwart child advocate in court. I’m not sure that anyone knew she was crippled by debilitating PTSD, depression, and anxiety. Surprisingly, there was no substance use disorder involved. In most cases like this, the lawyer is heavily medicated, whether self-medicating through alcohol or taking a cocktail of prescription meds. Had she been self-medicating to ease the pain she might still be alive. We explained the neuroscience of what was happening and that she was being retraumatized over and over again. We explained that the work she was doing would not heal her inner pain. We first encouraged and later begged her to get trauma treatment (yes, there is such a thing). We first encouraged and later begged her to change her practice area. She refused. She was on a mission. Until one day she could not take any more pain, and she took her own life.

Like many of my illustrations, I see her as a canary in the coal mine. How often do we ignore, shove back, and press down our personal pain or discomfort with grim determination and carry on like it’s business as usual? We often must hit a personal crisis point, usu-

ally with staggering collateral and professional consequences, that forces us to squarely address these issues. But it does not have to unfold this way. We can seek help earlier in the process. If we have a bum tooth, better to go to the dentist early, rather than have a dull pain turn to sharp, then turn to agonizing over months of discomfort—where we wind up in the dentist’s chair anyway.

But what about those of us who do not come from an adverse childhood experience-based background?

Many lawyers are experiencing toxic stress, and not from adverse childhood experiences. “Toxic stress results in prolonged activation of the stress response, with a failure of the body to recover fully. It differs from a normal stress response in that there is a lack of support, reassurance, or emotional attachments. The insufficient support prevents the buffering of the stress response or the return of the body to baseline function.” In CLE and LAP columns, I have detailed the prolonged fight or flight response that is present not only in the profession, but that COVID exacerbated. The world has gone through a collective trauma. We are all hyperadrenalized and hypervigilant (i.e., feeling on edge) right now. It is imperative that we learn to calm our nervous systems so that we can return to a homeostasis or normal baseline function. Our brains and bodies need that restorative time to repair.

A key differentiating factor between tolerable stress and toxic stress depends upon whether we have social supports and healthy emotional attachments in place. Because of the competitive and adversarial nature of the profession, very few true professional social and institutional supports are in place for most of us. The ABA Task Force Report on Lawyer Well-Being is advocating for structural change within the profession to provide more social and institutional supports. Many mistakenly believe that the Lawyer Well-Being Report talks about yoga and mindfulness. It does not. But I digress.

Lawyers fare far better and are more resilient if they have strong, genuine, and authentic family support and/or thriving, genuine connections in a church or recovery-based community and/or strong friendship alliances (often referred to as a family of choice). LAP involvement provides the latter in that it is a recovery-based community of lawyers-as-friends, supporting each other in practicing

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Litigate or Collaborate? A Mindful Response.

BY LAURA MAHR

What's the connection between collaborative law, divorce, parenting coordination, mindfulness, and resilience coaching? I posed this question to Attorney David Irvine. David and his wife, Stephanie, are partners with Irvine Law Firm in Asheville. David began resilience coaching with Conscious Legal Minds in early 2018. Seeking innovative ways to practice family law and tools to prevent burnout, David sought out resilience coaching to care for his own well-being while representing clients in contentious divorce and custody cases. I asked David if he would share with *Journal* readers some of his insights about implementing mindfulness practices and resilience tools into his legal practice. I also asked that he educate readers about collaborative law and how practicing mindfulness and implementing resilience tools in his work complements a collaborative approach to dispute resolution.

LM: David, what drew you to seek out a mindfulness-based resilience coach a few years back?

DJI: Three years ago was a challenging time for me, as my wife and I were transitioning our lives and law practice from Eastern North Carolina to Asheville. During the transition, I examined which parts of my law practice were causing the most stress. Family law litigation was on the top of the list. Mindfulness coaching seemed to fit well with the parts of my practice I wanted to emphasize—specifically mediation, collaborative law, and parenting coordination.

LM: How has studying and practicing mindfulness and resilience impacted your law practice?

DJI: One of the great benefits of my mindfulness work with you is that it has helped me become more aware of how I interact with my clients, with parents in conflict, and with other lawyers. I learned that others' aggressive or confrontational behavior may be coming from a place of fear or insecurity. Maintaining a mindful curiosity helps me look beyond what is said and done in search of what needs are not being

met. Mindfulness makes me a better listener. Resilience tools have helped restore empathy which can be eroded by years of practice within the adversarial model.

LM: What resilience challenges arise in the adversarial model in family law cases?

DJI: Litigation in family law cases creates a win-lose dynamic which is often both unproductive and a resilience drain. Litigants rarely have wins and losses in divorce, custody, and other family law matters. Coming from a mindful and resilience-informed place helps to promote connection between the parties, which is far better for parents trying to co-parent their children. If we can avoid the expense and trauma of litigation, as well as resolve disputes in a way that promotes connection, communication, and cooperation, both parties to the dispute benefit. I'd also like to point out that the trauma of litigation is not confined to the parties. Lawyers can become consumed by the win-lose dynamic. Many family law attorneys report empathy burnout and compassion fatigue. Mindfulness and resilience are bi-directional: they benefit the transmitter and the receiver. I find that the more mindful and resilient I am as an attorney, the better I feel and the more effective I am helping clients resolve conflicts.

LM: You've helped me to better understand collaborative law and collaborative divorce. Can you please share with readers what these terms mean and how they differ from a traditional legal approach?

DJI: With a collaborative approach to a legal dispute, the parties and their attorneys agree in writing to resolve the dispute in a non-adversarial way. This does not mean surrendering or giving up what a party hopes to



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achieve. Rather, the collaborative approach contemplates the parties sharing information and documentation and working together toward a resolution of the dispute that addresses each party's needs. A key element of the collaborative model is the agreement signed by the parties and lawyers. The agreement provides that those lawyers may not represent those parties should litigation become necessary, thereby removing the threat of litigation from the settlement discussions.

Often, in the emotionally-charged disputes you see with divorcing spouses, the parties (and the attorneys) can get locked into strategies and positions that may or may not be helpful to address the actual needs of the parties. Even settlement negotiations often remain in this position-based model. Position-based negotiation implicitly includes the threat of litigation. The collaborative model attempts to replace the adversarial, position-based negotiation with a cooperative, needs-based negotiation. Needs-based negotiation looks behind the legal and strategic positions of the parties and explores what the parties actually seek to achieve by resolving the dispute. When the strategic positioning is removed, we can find creative ways to resolve the conflict in a manner that responds to what each party actually needs.

LM: What are the benefits of the collaborative approach to separating and/or divorcing spouses?

DJI: The biggest benefit is a result-oriented negotiation that promotes and preserves some level of respect and cooperation between two people who presumably loved each other and cooperated in the past. The collaborative model is often better suited to resolving complex, multiple-issue disputes.

Divorcing parents may have issues regarding the division of marital property and debt, cash-flow concerns, child rearing, and child support concerns. As lawyers, we are taught to separate those issues from each other, and from the emotions of our clients. Asking divorcing spouses to deal with one issue in isolation, or ignore the emotional impact of those issues, is really asking them to do something they are not equipped to do while in the midst of the storm. After the legal disputes are resolved, these parents will continue to have a relationship through their children. There may be scholastic and extracurricular events, graduations, weddings, and grandchildren to navigate. Litigation rarely improves the participants' ability to communicate and cooperate with each other. On the other hand, a collaborative approach seeks to preserve mutual respect and the ability to communicate and cooperate.

The collaborative model is private and the process is directed by the parties and their attorneys. Litigated disputes are public and the parties lose most of their ability to control the process. In addition, a collaborative divorce is almost always going to be less expensive and less traumatic than litigation.

LM: How did you first become involved with the collaborative approach?

DJI: I saw myself heading toward empathy burnout. I had been involved in too many cases with parents spending lots of money out of anger toward their former spouse. I saw children who needed therapy because of their parents' dysfunction. I saw people do irreparable damage to relationships between family members. All this appeared to be done in the name of winning or getting even. There is a saying which describes what I observed: "Hatred is a poison that destroys the vessel in which it is kept." I no longer wanted to play an adversarial role in that drama.

Collaborative law training appeared on my radar at about the same time. I had been a mediator for a number of years, so the collaborative model seemed like a natural extension of that. In addition, I am a parenting coordinator. These three aspects of my practice contain the common element of resolving dis-

putes without litigation.

LM: What are some of the connections you see between mindfulness and collaborative law?

DJI: Perhaps the most obvious similarity is that, instead of taking and defending a position, the parties are working together toward the common goal of resolution. Collaborative law represents a paradigm shift in the approach to problem solving. Mindfulness and collaborative law encourage connection as opposed to reaction. When the parties engage in a needs-based negotiation instead of a position-based negotiation, you begin to understand the fear and insecurity that is motivating a party's words and actions. You figure out which needs are not being met and work collaboratively and creatively to address those needs as you negotiate a resolution.

For example, a position-based negotiation in a child custody case might involve one party trying to achieve a result by threatening to air the other party's embarrassing past behaviors in court. This threat creates fear in the other parent, who then reacts by threatening to withhold a settlement of money or property issues. With needs-based negotiation, we ask the parents to focus on what they and their children need. Usually, both parents will agree that their children need safety, security, and a positive relationship with both parents. Starting with that common ground of agreement, a workable custody arrangement becomes more likely.

LM: You mentioned that you do parenting coordination. What exactly does a parenting coordinator do?

DJI: A parenting coordinator can be appointed by the judge in high conflict custody cases. The primary directives for the parenting coordinator are to help the parents learn to cooperate in a more respectful and productive way and to serve the best interest of the children. A parenting coordinator uses skills similar to a mediator in helping parents resolve disputes. However, the parenting coordinator also has some quasi-judicial powers in that he or she can decide certain disputes where negotiation fails. In addition to helping the parents learn to collaborate for the best interest of their children, parenting coordination can also save the parents money by eliminating or reducing the need to have the court decide issues for them.

LM: Is your mindfulness and resilience coaching applicable in your role as a parenting coordinator?

DJI: Absolutely. While I still work within the dynamic of a high conflict family law case, my role as a neutral allows me to be more re-

ceptive and less reactive. In high conflict custody cases, both parents are typically in a heightened state of fear and insecurity. One parent may criticize the parenting decisions of the other parent. This naturally puts the other parent on guard. He or she perceives the criticism as being in the nature of "you are a bad parent" or "you don't love your children." What I generally see in high conflict custody cases is a feedback loop of reactive behavior. The threat of litigation feeds into that loop as well. A mindful and resilient approach with parents caught in that loop would look for areas of agreement or common needs. The goal is to create a different feedback loop; one in which the parties are being heard by the parenting coordinator and by each other.

The mindful approach is not merely words. I have watched as muscles relax, jaws become less clenched, breathing becomes slower and deeper. Sometimes I find myself walking out of meetings with "high conflict parents" amazed that mindfulness works on such a visceral level. I have been pleasantly surprised to find intersections and synergies between collaborative law, mediation, and parenting coordination that seem to have a mindfulness approach at their core.

LM: How has mindfulness, resilience coaching, and collaborative law impacted your personal life?

DJI: Mindfulness has helped me be more present and enjoy life more fully when I'm not practicing law. Integrating mindfulness and collaborative law into my lawyering has brought new inspiration to my career. I feel more creative as a result of practicing mindfulness. Learning about resilience has energized my creativity. I have been able to reignite my involvement with music. I sing and play guitar in a four-piece band (with Stephanie playing drums). I feel more present, attentive, and relaxed when singing, cooking, or walking with our rescued Australian Cattle Dog, Duncan. If I'm preoccupied or distracted when I'm walking Duncan, he will jerk me right into the here and now. He helps me live in the present moment. Performing music is like that too.

LM: In closing, what are your hopes for the future of the legal profession as it relates to mindfulness and collaborative law?

DJI: I am glad to see that some of our law schools now promote mindfulness and work-life balance education alongside academic studies. Mindfulness can help keep

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Neill S. Fuleihan, Board Certified Specialist in Workers' Compensation Law

BY LANICE HEIDBRINK, EXECUTIVE ASSISTANT, BOARD OF LEGAL SPECIALIZATION

"Neill's soft-spoken manner belies the depth at which he thinks about workers' compensation issues. Don't let his quietness pull you off guard. Neill is a top-notch lawyer, an exceptional mediator, and a great person."

—Vernon R. Sumwalt, The Sumwalt Law Group, Board Certified Specialist in Workers' Compensation Law

Neill S. Fuleihan has a calm demeanor and warm personality that instantly puts people at ease. Even with all he has accomplished in his 34 years of practice, he remains humble, kind, and thoughtful. It is easy to understand why he is so beloved and respected by his colleagues. I recently had the pleasure of speaking with him and I quickly learned that behind his unassuming, composed exterior, there is a strong-willed lawyer with an undying dedication to fairness, equality, and treating all people with dignity and respect.

Fuleihan was born in the small, mountain town of Brevard, North Carolina. Located in the western part of the state in Transylvania County, it has a population of just over 8,000 residents. Brevard is known as the "Land of Waterfalls" as it features more than 250 picturesque waterfalls.

Fuleihan earned his Juris Doctor in 1986 from Mercer University-Walter F. George School of Law in Macon, Georgia. Founded in 1873, Mercer University has the distinction of being one of the oldest law schools in the United States, and the first law school in the state of Georgia accredited by the American Bar Association.

Fuleihan was one of the first lawyers to become board certified in workers' compensation law. He was certified in 2000, and was subsequently appointed to the Workers'

Compensation Law Specialty Committee in 2003. He served on the committee for six years, volunteering his time helping to evaluate applications as well as writing and grading exams. Fuleihan, along with his colleagues certified in that first group, played a fundamental part in setting the stage to ensure the success of future workers' compensation specialists. During his 21 years as a specialist, he has remained an advocate of the specialization program.



Fuleihan

Fuleihan started his career in 1989, serving as legal counsel during North Carolina Governor James G. Martin's administration. He has served as counsel to the North Carolina Department of Transportation, deputy commissioner with the North Carolina Industrial Commission, and a partner with Ganly, Ramer, Finger, Strom and Fuleihan before he started his solo practice in Brevard. Fuleihan's current practice consists exclusively of workers' compensation plaintiff representation before the North Carolina Industrial Commission (NCIC) and appellate courts, and mediation of disputed workers' compensation claims. He became a North Carolina Dispute Resolution Commission Certified Mediator in 2006 and has mediated several workers' compensation claims for professional sports players and teams.

Q: What originally motivated you to become a specialist?

I wanted to perform at the highest level of practice I could achieve in workers' compensation law. My workers' compensation career began in 1993 as a deputy commissioner with the North Carolina Industrial Commission. Several high level practitioners, from both sides of the bar who appeared before me, educated me in the law as well as professionalism

in practice. This inspired me to want to achieve that same level of expertise. Specialization is the NC State Bar's highest certification of expertise.

Q: In your opinion, how does certification benefit the public?

The public's perception of a specialist is that they are getting the very best level of representation in that particular area of the law. Because of the periodic recertification process after becoming a specialist, the public continues to have access to an attorney who is proficient with current trends in practice.

Q: How would you explain the benefits of specialization to someone who says, "I've been practicing for years in my area of practice, why do I need to get certified now? Certification is for new lawyers."?

It is always positive to seek a new challenge. Sitting on your laurels for too long becomes dry and prickly. Certification is for any attorney who wants to distinguish themselves in an area of practice and provide to the consuming public the best level of service. This is due, in large part, to the fact that the minimum requirements of becoming certified and for maintaining certification require at least six hours of continued legal education per year in the specialty area and periodic peer review. Your sense of self confidence will rise naturally as a result of certification.

Q: Name the top three benefits you have experienced as a result of becoming a specialist.

1. I have had unique opportunities to become associated with other attorneys in complex workers' compensation claims.
2. The opportunity to speak and present manuscripts for over 35 legal education seminars in workers' compensation law since 1996.
3. Development of a statewide mediation practice.

Q: How has your experience as a deputy commissioner at the Industrial Commission helped you as a mediator?

My experience as a deputy commissioner at the NCIC is invaluable in my practice as a mediator. As a deputy commissioner would allow—and as a mediator should allow—the parties educate you regarding the factual and legal issues in the claim. Having previously adjudicated workers’ compensation claims, when I serve as a mediator, I know what evidence is probative regarding a party’s burden of proof and can conduct a meaningful risk analysis in that context for the parties.

Q: Are there any hot topics in workers’ compensation law right now?

Always, the current hot topic is, “What is the legal burden of proof under Extended Benefits for Total Incapacity under NCGS 97-29(c).” The deputy commissioners’ opinions are just now being issued (May 2021) as of the time of this interview and hopefully there will be Full Commission opinions by the time this article is printed.

Q: Tell me something most people would be surprised to learn about you?

My friends all know me as a quiet and introspective person...but given my reputation as a super talker while I am mediating or speaking at a legal seminar, most folks would be surprised to know that I prefer to listen. My lifestyle is indicative of my true nature.

My wife and I live in a low-density conservation easement community situated on over 400 acres from mountaintops to riverbed, including over one mile of the West Fork of the French Broad River. The joy of listening to nature’s symphony in our peaceful part of the world is what I am really all about, not being the center of attention.

Q: What are you happiest doing when you are not working?

Spending time outdoors enjoying nature on our property with my wife, relieving stress by riding my Triumph Bonneville along the curvy mountain back-roads and the Parkway, and listening to live music with family and friends.

Q: How has specialization changed in your 21 years as a specialist?

With regard to the core requirements of becoming a specialist, it really hasn’t changed...the fundamentals are the same. Initially when I applied to become a specialist, the requirements consisted of a certain number of cases tried to a final award of the NCIC. In the intervening years, mediations have become a greater part of our workers’ compensation practice, thus broadening the requirement of the number of cases tried to final award by allowing successful mediations to count.

Q: Finish this sentence: “I’m excited about the future of legal specialization because...”

Many new emerging fields involving technological advancements are creating new areas of legal practice that will require highly specialized attorneys in these areas of law. This will in turn increase the number and types of areas of specialty in the years ahead.

Q: What piece of advice would you give lawyers who are interested in pursuing certification?

For a workers’ compensation specialty applicant, I would advise beginning the process six to nine months in advance. Make sure you meet the requirements. Set aside at least an hour every other day to read the Workers’ Compensation Act, N.C.G.S. § 97-1 et seq. from front to rear, read all major cases in the annotations to the statutes, and all of the most recent appellate cases.

Q: What would you tell someone who is intimidated by the thought of sitting for a certification exam?

Don’t be intimidated. Read, do your research, and most importantly, reach out to your fellow colleagues who have successfully taken the exam. We are here for support, guidance, and want you to succeed.

Fuleihan lives in Lake Toxaway with his wife of 35 years, Miranda. ■

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

Disciplinary Department (cont.)

of material fact to a third party and to a tribunal. In determining that reprimand was the appropriate discipline, the committee took into consideration Romary’s lack of prior discipline and the isolated nature of this incident.

Robert G. Spaugh of Winston-Salem was reprimanded by the Grievance Committee. The committee concluded that Spaugh did not diligently represent his client, did not respond promptly to his client’s requests for information, and did not respond promptly to the Grievance Committee. The Grievance Committee found as an aggravating factor that Spaugh was reprimanded in 2009 for neglect, failing to keep his client reasonably informed, and failing to respond timely to the

Grievance Committee.

Dismissals

It was alleged that **Melvin L. Wall** of Charlotte did not communicate with his client, did not perfect an appeal, and did not respond timely to the Grievance Committee. The DHC entered a default order establishing the allegations of misconduct and the rule violations. Wall died on May 8, before an order of discipline was entered. The State Bar filed a notice of voluntary dismissal.

Notice of Intent to Seek Reinstatement

In the Matter of Demetrius G. Rainer

Notice is hereby given that Demetrius G. Rainer of Charlotte, NC, intends to file a petition for reinstatement before the Disciplinary

Hearing Commission of the North Carolina State Bar. Demetrius G. Rainer was disbarred in 2009 pursuant to a Consent Order of Disbarment filed on March 5, 2009.

In the Matter of Harry L. Southerland

Notice is hereby given that Harry L. Southerland of Raeford intends to file a petition for reinstatement before the Disciplinary Hearing Commission of The North Carolina State Bar. Southerland was disbarred effective August 9, 2004, by The North Carolina State Bar for misappropriating client funds for his own use.

Individuals who wish to note their concurrence with or opposition to either petition should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611-5908, before November 1, 2021. ■

Highly Contagious: Imputed Conflicts of Interest

BY SUZANNE LEVER, ASSISTANT ETHICS COUNSEL

An issue that consistently keeps the ethics hotline buzzing is “imputed disqualification.” Imputed disqualification refers to the disqualification of an entire group of affiliated lawyers due to an individual lawyer’s disqualification. Said another way, imputed disqualification occurs when a lawyer’s conflict of interest spreads to and “infects” the rest of the firm, rendering all affiliated lawyers infected with the same conflict. However, some conflicts are more contagious than others, while some are unlikely to spread. Lawyers want to know whether the imputed disqualification rule is applicable to their specific scenario, and if it is, whether it can be avoided by screening the disqualified lawyer.

The principle of imputed disqualification is based on the professional obligation of loyalty that a lawyer owes his clients. Rule 1.10 cmt. [2]. The principle also reflects the presumption that lawyers associated in a law firm share client confidences with each other. For purposes of the duty of loyalty, a firm of lawyers is viewed as essentially one lawyer. “[E]ach lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.” *Id.*

In general, when an individual lawyer in a firm has a conflict of interest based on Rule 1.7 or Rule 1.9, that conflict is imputed to all the lawyers associated with the firm. Rule 1.10(a). There are, however, qualifications and exceptions to the general rule. Whether the imputed disqualification rule applies, and whether it can be avoided by screening, often depends on the relationship that exists between the disqualified lawyer and the other lawyers, and on the reasons for the lawyer’s disqualification.

Lawyers Must Be Associated in a Firm—The first qualification is that conflicts of interest are only imputed to lawyers “associated in a firm.” Comment [1] to Rule 1.10 provides a definition of the term “firm”:

For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other associ-

ation authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. *See* Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0, Comments [2] - [4].

Lawyers who are “of counsel” to a law firm are ordinarily considered associated with the firm for purposes of analyzing imputed qualification questions. In contrast, lawyers serving as “co-counsel” with a lawyer employed by a different firm are generally not considered associated with that lawyer’s firm. Whether independent contractors are associated with a firm is a fact-specific determination based upon the terms of the engagement. Lawyers who share office space risk being disqualified from representing adverse parties under Rule 1.10(a) if the lawyers are perceived as practicing together in a law firm.

Conflicts are Not Imputed from Non-lawyers—An exception to the principle of imputed disqualification is that conflicts are generally not imputed from nonlawyers. Comment [4] to Rule 1.10 provides that Rule 1.10(a) “does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary.” The comment notes, however, that these non-lawyers should be screened from any personal participation in the matter. *See* RPC 74 and RPC 176 (lawyer who employs paralegal is not disqualified from representing party with interests adverse to that of a party represented by a lawyer for whom the paralegal previously worked, but paralegal should be screened).

A similar analysis applies to work that a lawyer did prior to becoming a lawyer. A conflict of interest of a lawyer based on work the lawyer did while a law student is generally not imputed to all lawyers in the firm. However, these lawyers should also be screened from any personal participation in the con-

flicting matter. *See* 2010 FEO 12 (law firm may hire recent graduate although the law firm is representing a client in a matter on which the graduate previously worked for the opposing party while clerking at another firm, but graduate should be screened from any participation in the matter). The purpose of screening is to assure the affected parties that confidential information known by the disqualified individual remains protected. *Id.*

Personal Conflicts Arising under Rule 1.7 are Not Always Imputed—When a lawyer in a firm cannot represent a client due to a conflict arising from the lawyer’s personal interests, the disqualification does not always extend to other lawyers in the firm. An exception in Rule 1.10(a) eliminates imputation of a lawyer’s personal conflict in situations where the particular conflict *does not present a significant risk of materially limiting the client’s representation by the remaining lawyers in the firm.* The determining factors are: (1) whether the lawyer’s personal interest would undermine the loyalty of other members of the law firm or (2) pose any threat to client confidences.

Examples of personal conflicts of interest are set out in comments [10] and [11] to Rule 1.7 and include: where the probity of a lawyer’s own conduct is at issue, when a lawyer has employment discussion with an opposing law firm, when a lawyer has related business interests, and where lawyers representing different clients in the same matter are closely related. Comment [11] specifically provides that disqualifications arising from a close family relationship that is personal ordinarily are not imputed. For discussions of imputed conflicts in the context of specific personal conflicts of interests, take a look at 2005 FEO 1 (lawyer appearing before a judge who is a family member), 2016 FEO 3 (lawyer negotiating for employment with a firm that represents a party adverse to the lawyer’s client), and 2019 FEO 3 (lawyer engaging in ongoing sexual relationship with opposing counsel).

Personal Conflicts Arising under Rule 1.8,

on the Other Hand, are Always Imputed—Rule 1.8 sets out specific rules pertaining to several personal interest conflicts with current clients, and it contains its own imputation provision. Rules 1.8(a) – (i) address business transactions with clients; using information relating to representation of a client to the disadvantage of a client; soliciting gifts from clients; obtaining literary or media rights; financial assistance to a client; third party payors; aggregate settlements; agreements limiting lawyer liability; and acquiring a proprietary interest in a client’s matter. When a lawyer cannot represent a client because of any of these prohibitions, the disqualification is imputed to all associated lawyers. Rule 1.8(j). It is important to note that the imputation provision in Rule 1.8(j) is absolute. There is no requirement that the conflict present a significant risk of materially limiting the client’s representation by the remaining lawyers in the firm.

Exceptions Pertaining to Lawyer Mobility—Imputed conflict issues relating to departing associates and to lateral hires can be confusing. Rule 1.10(b) applies when a lawyer leaves a firm and Rule 1.10(c) applies when a lawyer joins a firm. These two rule sections look at the effect of a lawyer’s departure or a lawyer’s arrival on the other lawyers in the firm.

When a lawyer leaves a firm, he carries his conflicts with him. Under Rule 1.10(b), the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless two criteria are met. First, the matters must be the same or substantially related to that in which the formerly associated lawyer represented the client. (Rule 1.9, comment [3] provides general guidance in applying the substantial relationship test.) The second part of Rule 1.10(b) requires that some lawyer remaining in the firm possesses information from the prior representation that is protected by Rules 1.6 and 1.9(c) and is material to the current matter. If lawyers currently with the law firm do not have confidential information about the adverse former client, then the former client’s right to confidentiality is not impaired, and the former client is protected. A lawyer possesses confidential information if he participated in the representation of the client, was privy to confidential information because he participated in discussions with the departed lawyer, or the file (paper or electronic) remains at the firm.

When a lawyer joins a firm, he brings his conflicts with him. However, Rule 1.10(c) rec-

ognizes “screening” measures as a possible means of avoiding imputed disqualification. Pursuant to Rule 1.10(c), no lawyer in the new firm may represent a person in a matter in which the new lawyer is disqualified under Rule 1.9 *unless*: (1) the disqualified lawyer is timely screened from the matter; and (2) written notice is promptly given to any affected former client. Comment [4] to Rule 1.9, which relates to lawyers moving between firms, explains the policy considerations justifying the use of screens in this situation:

[w]hen lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Screening allows a lawyer in a law firm to represent a client even though another lawyer in the firm is disqualified because of a conflict of interest. As noted in comment [6] to Rule 1.10, where the conditions of Rule 1.10(c) are met, “imputation is removed, and consent to the new representation is not required.” Screening isolates the disqualified lawyer from any participation in the matter involving the conflict. The primary purpose of screening is to ensure that confidential information known by the disqualified lawyer remains protected. If a law firm can rebut the presumption that the disqualified lawyer has shared or will share the former client’s confidences with other lawyers in the firm, then the firm may be able to avoid imputed disqualification.

Rule 1.0(l) defines “screening” as “the iso-

lation of a lawyer from any participation in a professional matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” The comments to Rule 1.0 provide further guidance:

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

2003 FEO 8 (Duties to Prospective Clients) provides a discussion of adequate screening and notice procedures. As to the notice requirement, 2003 FEO 8 provides:

Written notice should be given as soon as practicable after the need for screening becomes apparent and before any confidential information is leaked, even inadvertently, to the other lawyers in the firm. The notice should include a description of the screened lawyer’s prior representation and of the

Upcoming Appointments to Commissions and Boards

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

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 member) is not eligible for reappointment. The candidates for this vacancy will be chosen by certified paralegals. (The State Bar Council will select from the two candidates receiving the most votes from CPs.) The rules governing the Board of Paralegal Certification also require the council to appoint the board's chair and vice-chair annually.

This nine-member board is responsible for administration of the plan for certification of paralegals. The paralegal certification program assists in the delivery of legal services by identifying and certifying qualified paralegals.

Board of Continuing Legal Education (three-year term)—There are three appointments to be made. Adrienne Blocker and Leah Kane are eligible for reappointment. George Jenkins is not eligible for reappointment. The rules governing the Board of Continuing Legal Education require the council to appoint the board's chair and vice-chair annually.

This nine-member board oversees the administration of the North Carolina State Bar's mandatory CLE program, which re-

quires lawyers licensed to practice in North Carolina to take 12.0 hours of CLE every calendar year. CLE helps these lawyers to achieve and maintain professional competence for the benefit of the public whom they serve.

Client Security Fund Board of Trustees (five-year term)—There is one appointment to be made. W. Erwin Fuller Jr., is not eligible for reappointment. The rules governing the Client Security Fund require the council to appoint the board's chair and vice-chair annually.

The five-member Board of Trustees administers the Client Security Fund. The purpose of the fund is to reimburse, in whole or in part in appropriate cases, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina.

Board of Law Examiners (three-year term)—There are three appointments to be made. Ronald G. Baker, Calvin E. Murphy, and Ronald L. Gibson are all eligible for reappointment.

The Board of Law Examiners establishes the procedures and rules for examining, investigating, and licensing applicants to practice law in North Carolina. All 11 members of the board are appointed by the State Bar Council and must be members of North Carolina State Bar who do not teach at a law school.

screening procedures employed. Rule 1.18, cmt. [8]. Such procedures may include the following: the screened lawyer will acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter; other lawyers in the firm will not communicate with the screened lawyer concerning the matter; the firm will employ special procedures to ensure the screened lawyer has no contact with other personnel, firm files, or other materials associated with the matter; and there will be periodic reminders of the screen to all members of the firm. Rule 1.0, cmt. [9]

The North Carolina Court of Appeals recently issued an unpublished opinion consid-

ering whether a law firm should be disqualified due to an imputed conflict of interest when a former lawyer for the defendant joined the firm representing the plaintiff. *Van Kampen v. Garcia*, No. COA 20-439, 2021 N.C. App. LEXIS 302 (July 6, 2021). The court held that the firm was not disqualified because the defendant's former lawyer was promptly screened from the case, never shared any information related to the case with plaintiff's counsel, and promptly notified defendant of her change of employment. *Id.* As to the timeliness of the notice, the court found that the notice, which was given 22 days after defendant's former lawyer changed firms, and after defendant filed a motion to disqualify the

lawyer, met the requirements of Rule 1.10(c). *Id.* As noted by the court:

Rule 1.10(c) does not establish a bright line rule on the deadline for the provision of the notice it requires, instead simply requiring that the "notice [be] promptly given[.]" R. 1.10(c). The implicit premise of Defendant's argument is that 22 days cannot constitute prompt written notice within the meaning of Rule 1.10(c), which we reject. Whether notice has been promptly given within the meaning of Rule 1.10(c) is a fact specific inquiry, but we hold that the 22-day delay here complied with Rule 1.10(c), particularly for a change of employment by a "very active family law attorney," as Plaintiff's counsel represented that both she and Defendant's former lawyer are.

Id.

Waiver of Disqualification—Rule 1.10(d) provides that imputed disqualification may be waived by the affected client under the conditions stated in Rule 1.7. To wit, the clients must give informed consent confirmed in writing.

Other Rules—Imputed disqualification is also addressed in three other rules. Rule 1.11 addresses the disqualification of private firms that hire former government lawyers. Rule 1.12 speaks to the disqualification of private firms that hire a former judge, judicial law clerk, arbitrator, mediator, or other "third-party neutral." Rule 1.18 governs disqualification of firms as a result of a lawyer's discussions with a prospective client. These three rules permit law firms to avoid imputed disqualification by screening the individually disqualified lawyer from any involvement in the matter.

Conclusion

Conflicts of interest are some of the most complicated legal ethics issues a lawyer will face; and the fact that they are "contagious" to other members of a law firm (and can follow a lawyer to his next firm) makes the issue that much more difficult. The rules on imputed disqualification, though, are borne of the critical duty of loyalty lawyers owe to their clients. They serve an important role in ensuring confidential information is protected, in providing notice to those impacted, and in fostering confidence by the public in the legal profession. To diagnose a possible infection by an imputed conflict of interest, lawyers should contact the State Bar's ethics staff at ethicsadvice@ncbar.gov. ■

Amid Transition, Let's Get Back to Basics

Many organizations have lived the past year or so in a state of transition, sending employees out of the office, adjusting office procedure and protocols, and then adjusting them again to reflect new realities. Here at the State Bar, we are preparing for a fuller return to the office in September after mostly working remote since March 2020. In September, you can expect staff within the IOLTA department to be on site during regular business hours each day.

During this time of transition, North Carolina IOLTA embarked on a strategic plan, meeting over the course of six months starting in January 2021, exploring how the organization can be most effective, faithfully steward available funds to support civil legal aid, and target our impact. Similar to those transitions we have all experienced of late, this strategic planning process required looking to history and the program's origins, understanding milestones and accomplishments, and also being open to new ideas and imagining the possibilities. We look forward to sharing more with you about North Carolina IOLTA's finalized strategic plan this fall.

In the interim, however, as we return to work in the office and make plans to pursue new opportunities consistent with the strategic plan, we are going back to basics. While we plan for and respond to change, we are reminded of what stays the same. The North Carolina Rules of Professional Conduct and the State Bar's administrative rules provide the guardrails for the IOLTA program's operation. As the rules lay out, each attorney, regardless of where and how you practice, has an important role in the IOLTA program. In North Carolina, IOLTA became mandatory in 2008, and the rules direct attorneys to participate, update our office with changes, and yearly certify as to their continued compliance.

So here are the basic requirements related to the IOLTA program and reminders for all attorneys:

Yearly IOLTA certification is a must. Each year, North Carolina attorneys are required to certify their IOLTA status as part of the annu-

al membership process. Whether paying online or printing your invoice and mailing the required documents to the State Bar, attorneys are asked to check a box certifying whether you have IOLTA accounts or do not have IOLTA accounts holding North Carolina client funds. This information is critical to our program's ability to operate, as it reminds attorneys on a yearly basis of the rule requiring general pooled trust accounts to be set up as IOLTA accounts and it enables the identification of accounts that may not have been properly established.

Attorneys can only open IOLTA accounts at banks that have been approved by North Carolina IOLTA. To be eligible to hold IOLTA accounts in North Carolina, a bank or credit union must be chartered under North Carolina or federal law. See Rule 1.15-1(a). All trust accounts are required to be held at a bank in North Carolina or with branch offices in North Carolina. See Rule 1.15(e). Further, financial institutions must agree to pay IOLTA the highest rate available to the bank's other customers when IOLTA accounts meet the same minimum balance or other account qualifications. See 27 N.C.A.C. 1D, Rule 1317. North Carolina IOLTA maintains a list of eligible banks that have been approved to hold IOLTA accounts for North Carolina attorneys. The list of eligible banks can be found on IOLTA's website at nciolta.org/eligible-banks. If you would prefer to work with a bank that is not on the eligible bank list, the bank can contact our office to determine their eligibility. Want to see the funds in your IOLTA account working even harder to support civil legal aid and the administration of justice? Consider selecting one of IOLTA's Prime Partners for your banking relationship. Prime Partners are financial institutions that go above and beyond the eligibility requirement of the IOLTA rule to support the NC IOLTA program. Prime Partners are identified at the top of the Eligible Bank List.

Don't forget to send your updates to IOLTA. Rule .1316(c) requires every lawyer maintaining IOLTA accounts to communi-

IOLTA Update

- **IOLTA Revenue**—Revenue from participant income through the first half of 2021 has remained steady. Funds received through June exceed \$2.3 million.

- **Cy Pres**—In April, the IOLTA Program received a cy pres award of \$97,000. In North Carolina, the cy pres statute directs residual funds in class action settlement to be equally divided between the North Carolina State Bar for civil legal aid for low-income individuals and the Indigent Person's Attorney Fund for representation of indigent defendants in criminal cases.

- **2022 Grants**—The North Carolina IOLTA program makes grants to support civil legal services for indigents and other programs designed to improve the administration of justice. Grant applications for 2022 grants will be available on August 1, 2021, and will be due on Friday, October 1. Information about the application process and information sessions to be held for new applicants and current grantees is available on IOLTA's website at nciolta.org/grant-programs.

cate changes to the IOLTA office, including the establishment or closing of an account, change in employment, or new contact information. All updates can be submitted on the Information Update Form found on the IOLTA website under Forms for Lawyers, nciolta.org/forms-resources. Again, this information allows the IOLTA program to keep track of accounts for which the program should be receiving interest from the bank and quickly identify issues related to accounts.

Let your clients know where the interest goes. With the program's support, the Supreme Court approved the posting of a

notice to clients explaining the IOLTA program. North Carolina IOLTA will mail you a notice to post in your office. If you have recently opened a new account or would like to receive a fresh copy of the client notice for posting, contact our office at IOLTA@ncbar.gov.

Some lawyers do not need to have an IOLTA account. Many lawyers do not have trust accounts. Those who work for the government, in criminal prosecution and defense, as in-house corporate counsel, and in various other practice areas and settings often do not hold funds on behalf of clients. Even those who do not hold trust accounts still support the IOLTA program's effort by complying with the rules to make yearly certifications and keep us updated with changes in your status.

Even if you are not responsible for managing your firm's trust account, you have a trust account if funds from your client are being held by the firm. We often receive questions from attorneys who practice in medium and

large firms and are unsure how to certify their IOLTA status. Even if you do not have a day-to-day responsibility for managing the money going in and out of a general pooled trust account, if you practice at a firm that does hold funds on behalf of your clients, you do have a trust account and should indicate that you have accounts when you make your IOLTA certification.

The best resource for trust account information is the Trust Account Handbook. When an attorney calls our office for guidance on issues upon opening a trust account, the first resource we share is the *Trust Account Handbook*. The *Trust Account Handbook* provides guidance and practical tips for attorneys to support their compliance with the trust account rules in the establishment, management, and closure of trust accounts. The *Handbook* includes references to the rules and ethics opinions, provides a checklist to follow upon opening a new account, and sample documents. The *Trust Account Handbook* can

be found at ncbar.gov/for-lawyers/trust-accounting.

The State Bar is here to help. In addition to the *Trust Account Handbook*, NC IOLTA's website includes information and Frequently Asked Questions for both attorneys and banking institutions to assist you in fulfilling your responsibilities under the rules related to IOLTA and trust accounting. But we also realize that attorneys sometimes stumble upon an issue that cannot easily be answered without some additional assistance. We are here to help. If the IOLTA office cannot assist, we can connect you to another department at the State Bar to answer your questions. In particular, for questions regarding your ethical obligations pursuant to Rule 1.15 including client records, disbursement guidelines, client communication, required reports and reconciliations, and other trust account practices, contact the Ethics Department at ethicsadvice@ncbar.gov. Contact IOLTA at IOLTA@ncbar.gov or 919-828-0477. ■

Pathways to Well-Being (cont.)

lawyers physically and emotionally healthy. Lawyers who can maintain that sense of empathy and openness can better serve their clients. I have a strong appreciation and respect for the law as a profession. The aspirational goals of just treatment and equity are noble and I think the legal profession has done much to serve those goals. However, the law can also be weaponized. I'm inspired that the legal profession is beginning to embrace all of these approaches to alternative dispute resolution.

LM: If readers would like to find out more about your practice, parenting coordination, collaborative law, or collaborative divorce, where should they go?

DJI: Our website (irvinelawfirm.com) has information about all of these areas. I would also suggest that those interested in collaborative family law in western North Carolina check out the website for the WNC Collaborative Law Group (wncollaborativelaw.com). Recently, the North Carolina General Assembly enacted the Civil Collaborative Law Act (effective October 1, 2020). This act makes the collaborative

model available in civil actions beyond family law cases. For more information about the NC Civil Collaborative Law Act, or about collaborative law generally, readers should check out the website for the North Carolina Civil Collaborative Law Association (nccivilcollaborativelaw.org). ■

Laura Mahr is a North Carolina and Oregon lawyer and the founder of Conscious Legal Minds LLC, providing mindfulness based well-being coaching, training, and consulting for attorneys and law offices nationwide. Her work is informed by 13 years of practice as a civil sexual assault attorney, 25 years as a student and teacher of mindfulness and yoga, a love of neuroscience, and a passion for resilience. If you would like to learn more about CLE course offerings, or to find out more about one-on-one resilience coaching, please email Laura through consciouslegalminds.com.

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.

Lawyer Assistance Program (cont.)

and positively reinforcing recovery tools and resilience skills.

COVID has shown us that we are all in this journey together. By "this journey" I mean this journey of life and a profession in law. Our collective trauma through COVID may have surfaced a personal trauma long buried. Fear not. You are not alone. In fact, you are in quite good company. There is no need to go it alone any longer. Don't let the tooth abscess. Give us a call or reach out by email. ■

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

Endnote

1. ncbi.nlm.nih.gov/pmc/articles/PMC4928741.

Council Adopts Three Opinions, Committee Publishes Two New Opinions, Including an Opinion on Search Engine Local Service Advertisements

Council Actions

At its meeting on July 16, 2021, the State Bar Council adopted the three ethics opinions summarized below:

2019 Formal Ethics Opinion 4

Communications with Judicial Officials

Opinion discusses the permissibility of various types of communications between lawyers and judges.

2020 Formal Ethics Opinion 1

Responding to Negative Online Reviews

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.

2021 Formal Ethics Opinion 2

A Lawyer's Professional Responsibility in Identifying and Avoiding Counterfeit Checks

Opinion discusses a lawyer's professional responsibility to safeguard entrusted funds by identifying and avoiding purported transactions involving counterfeit checks.

Ethics Committee Actions

At its July 15, 2021, meeting, the Ethics Committee received reports and recommendations from two subcommittees studying proposed amendments to the Rules of Professional Conduct: one studying the adoption of anti-discrimination language in both the Preamble and the text of the Rules of Professional Conduct, and the other studying the adoption of language to the comment of 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. Following publication and discussion of proposed amendments to the Preamble and Rule 1.1 during the prior quarter, the Ethics Committee voted to recommend the adoption of the proposed

amendment to the Preamble. The committee also voted to send the proposed amendment to Rule 1.1 back to subcommittee for further study in light of comments received during publication. The subcommittee studying the potential inclusion of anti-discrimination language in the text of the Rules of Professional Conduct will continue its work over the next quarter.

In addition to the proposed Rule amendments, the Ethics Committee considered a total of 11 ethics inquiries, including the opinions adopted by the council referenced above. Five inquiries were sent or returned to subcommittee for further study, including inquiries addressing whether a closing attorney may charge an independently represented seller for services performed in connection with a residential real estate transaction, the confidentiality of information contained in the public record, and a lawyer's professional responsibility in providing limited representation to an indigent client in a criminal matter. The committee also approved an advisory opinion on a lawyer's use of machine learning in the lawyer's practice. Lastly, the committee approved the publication of two proposed opinions, which appear below.

Proposed 2021 Formal Ethics Opinion 4

Taking Possession of Photographs Portraying Minor Committing Sexual Acts

July 15, 2021

Proposed opinion rules that a lawyer may not take possession of photographs portraying a minor engaged in sexual activity.

Inquiry #1:

Lawyer represents Mother in a pending child custody matter. During the consulta-

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment—including comments in support of or against the proposed opinion—or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at its next quarterly meeting. Any comment or request should be directed to the Ethics Committee at ethicscomments@ncbar.gov no later than October 1, 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.

tion, Mother informed Lawyer that she recently discovered an illicit photograph of her minor child on the child's cell phone. The photograph depicts the minor child

engaging in sexual activity. Mother believes the photograph was taken while the minor child was living with Mother's ex-husband and opposing party, Father. Mother believes the photograph is relevant to the custody matter in that it demonstrates Father's lack of proper supervision of minor child and wants Lawyer to introduce the photograph into evidence at the next custody hearing. Mother presents the photograph to Lawyer, who confirms that the photograph contains a visual representation of a minor child engaging in sexual activity. Lawyer believes the photograph is relevant to the court's determination of the best interests of the child.

May Lawyer take possession of the photograph for the purpose of introducing it as evidence in the upcoming custody hearing?

Opinion #1:

No. The Ethics Committee previously opined that a lawyer may not take possession of a client's contraband if possession is itself a crime. 2007 FEO 2. Furthermore, a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal. Rule 1.2(d).

The possession of child pornography is a crime. North Carolina state law provides that a person commits the offense of third-degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity. N.C. Gen. Stat. § 14-190.17A(a). Furthermore, North Carolina law defines second degree sexual exploitation of a minor if the person, knowing the content of the material, duplicates or distributes material that contains a visual representation of a minor engaged in sexual activity. N.C. Gen. Stat. § 14-190.17(a). There is no legal exception allowing a lawyer to possess such material if the possession is in furtherance of the representation of a client. Additionally, federal law prohibits the production, distribution, reception, and possession of an image of child pornography using or affecting any means or facility of interstate or foreign commerce. See 18 U.S.C. § 2251; 18 U.S.C. § 2252; and 18 U.S.C. § 2252A.

Both North Carolina and federal law clearly establish that it is unlawful for Lawyer to take possession of the photograph. Although Lawyer's intent in taking possession of the photograph is for the purpose of

representing a client and not for nefarious purposes, the law provides an absolute prohibition against possessing the photograph that the Rules of Professional Conduct cannot overrule.

Additionally, Lawyer must review the law to determine if he and Mother/client have a legal duty to report the existence of the photograph to either law enforcement or the Department of Social Services. The North Carolina statutes Lawyer should review include, but are not limited to, N.C. Gen. Stat. § 14-318.6 (report sexual offense of a minor to law enforcement) and N.C. Gen. Stat. § 7B-301 (report abuse, neglect, and dependency to the Department of Social Services).

Inquiry #2:

If Lawyer is permitted to take possession of the photograph, what safeguards should Lawyer take to protect the rights of the minor child?

Opinion #2:

Lawyer is not permitted to take possession of the photograph because it is prohibited by law. See Opinion #1. Nevertheless, Lawyer does not represent the child and therefore owes no duty to protect her legal interest. Lawyer, however, may have a duty to report the existence of the photograph to law enforcement and/or the Department of Social Services (DSS). See Opinion #1.

Inquiry #3:

Same scenario as Inquiry #1, except that, without prior notice to Lawyer, Client sends to Lawyer by email photographs of Client's minor child engaging in sexual activity. What are Lawyer's duties regarding the photographs?

Opinion #3

Because a photograph portraying a minor engaged in sexual activity is contraband and it is unlawful to possess contraband, Lawyer cannot possess the photographs. Upon discovering the photographs/contraband in Lawyer's email inbox, Lawyer must promptly review the law on the duty to report to law enforcement and DSS. See Opinion #1. Furthermore, if there is a law requiring Lawyer to disclose the location of the contraband to the authorities, Lawyer must do so after notifying the client and explaining the legal consequences to the client. 2007 FEO 2.

Proposed 2021 Formal Ethics Opinion 5 Lawyer Participating in Pay-Per-Lead Advertising Program July 15, 2021

Proposed opinion rules that a lawyer may not participate in a pay-per-lead advertising program that records communications between the lawyer and potential client.

A search engine company ("company") offers service providers pay-per-lead local service advertisements (LSAs) designed to connect consumers to service providers in their immediate area.¹ For example, a search with the keyword phrase "family lawyer near me" would trigger the display of LSAs from family lawyers close to the consumer's geographic location. LSAs appear above all other paid advertisements and only three LSAs are displayed at a time. When there are more firms with relevant LSAs than there are spots to display them, the company rotates the displayed advertisements based on a rankings algorithm that considers factors such as proximity to the consumer, business operating hours, online reputation, and responsiveness to customer inquiries. In order to participate in the LSA program, service providers must complete a screening and verification process. For lawyers, the process includes a background check, license check, and insurance verification. LSAs appear at the top of a relevant search results page under the heading "Company Screened" with a green checkmark. LSAs generally display the lawyer's name, photograph, search engine rating, years of experience, hours of operation, and a "call button."

Unlike other pay per lead advertisements, LSAs do not link to the participating lawyer's website. A lawyer's LSA links to a profile page created by the company. The profile page provides an overview of the legal services provided by the lawyer and displays the same "call button" displayed on the LSA. The phone number activated by the call button is not the lawyer's number, but rather a number assigned to the lawyer by the company. All phone calls initiated through the lawyer's LSA or company profile page are routed through the company. A lawyer participating in the LSA program authorizes the company, its affiliates, and their agents to access, monitor, and record communications initiated through the program. The lawyer also authorizes the company to disclose the com-

munication to third parties. Recorded communications are kept by the company for a period of 60 days before they are erased.

A phone call routed through the company to a lawyer plays a “whisper message” prior to connecting the call alerting the lawyer that the call is from the company, will be recorded, and may not be privileged. Potential clients hear a whisper message prior to the call being connected stating that the call is being recorded and is not confidential.

Inquiry #1:

Do the Rules of Professional Conduct permit a lawyer to participate in the company’s LSA program?

Opinion #1:

No, because the LSAs do not sufficiently inform consumers about the circumstances and implications of the consumer’s use of the LSA to facilitate communication with the lawyer in violation of Rule 7.1. When a lawyer chooses to advertise through an outside advertising service, the lawyer has an obligation to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional responsibilities. *See* RPC 241; 2004 FEO 1; 2018 FEO 1. Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” Rule 7.1.

The company’s LSAs differ from other online advertisements containing similar information in that the contact information provided is not the lawyer’s personal contact information. Instead, communications through a lawyer’s LSA are routed through the company. During the routing process, the company records and retains the communications. However, there is no indication on a lawyer’s LSA, or the lawyer’s company profile page, that all communication with the lawyer will be routed through, recorded, and retained by the company. Similarly, there is no indication that the company may share the communication with additional third parties. A third party’s recording and retention of these conversations, as well as its access to and potential disclosure of conversations between consumer and lawyer, raise consumer protection con-

cerns and heighten the need for clear and full communication. A consumer seeking a conversation with a lawyer concerning legal services – regardless of the medium or platform of the conversation – should be given adequate, clear, and advance notice if the conversation will occur outside of the reasonable expectation of a consumer, to wit: the conversation will be exclusively between consumer and lawyer and/or a member of lawyer’s staff. A consumer using an LSA as described herein to facilitate their conversation with a lawyer about potential legal services should be given adequate, clear, and advance notice that the conversation will be recorded, retained, and potentially disclosed (without their knowledge or consent) by a third party. The company’s message at the outset of a communication initiated by the LSA that the company may record the call and the call is not confidential is insufficient to correct the omission of material facts causing the violation of Rule 7.1. Any legal implications of a third party’s presence during a consumer’s conversation with a lawyer about legal services is beyond the scope of the Rules of Professional Conduct.

Inquiry #2:

If the company includes clear, adequate, and advance notice on the lawyer’s LSA that satisfies the concerns addressed in Inquiry #1, would the Rules of Professional Conduct permit a lawyer to participate in the advertising program?

Opinion #2:

No, because participating in the LSA program is prejudicial to the administration of justice in violation of Rule 8.4(d).

A person seeking legal advice or other legal services is seeking justice, including the exploration of his or her legal rights and responsibilities, potential legal remedies, or a defense against allegations that could substantially impact his or her life. A foundational component of a person’s pursuit of justice is that person’s reasonable and historic expectations of privacy and exclusivity in communicating with a lawyer. These expectations are recognized in the comment to Rule 1.18, which requires lawyers to affirmatively disclaim the creation of duties owed to prospective clients when speaking with a person seeking legal services. Rule 1.18, cmt. [2] (“[A] lawyer has an affirmative obligation to warn the person that a communication with the lawyer will not create a client-lawyer rela-

tionship and information conveyed to the lawyer will not be confidential or privileged.”). An individual may choose to alter those expectations when communicating with a lawyer (e.g., by bringing a family member to a consultation); but a lawyer may not unilaterally make that choice for the individual.

As explained above, a consumer using the LSA to pursue legal services will have his or her words recorded, retained, and potentially disclosed without prior knowledge or consent. While the Ethics Committee is hesitant to classify a consumer using the LSA program as a prospective client under Rule 1.18, the committee is concerned that the LSA’s structure employs a mechanism through which critically important client confidences could be made vulnerable (e.g., the recordings could be subpoenaed by adverse parties, inadvertently disclosed, or subjected to unauthorized access). These vulnerabilities thwart a consumer’s pursuit of justice in an adversarial system such as ours. Additionally, even with an appropriate disclaimer, the knowledge that a conversation is being recorded has a chilling effect on full disclosure between the consumer and his or her potential lawyer, thereby undermining the very reason the consumer is seeking legal services. Accordingly, the lawyer’s use of a program that is designed to subvert a consumer’s basic expectations of privacy and exclusivity when reaching out to a lawyer about their legal rights and responsibilities does not foster the pursuit of justice; as such, a lawyer’s use of the LSA is prejudicial to the administration of justice in violation of Rule 8.4(d).

Endnote

1. One example of such a program is Google’s “Local Service Ads” advertising program. ■

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Amendments Pending Approval by the Supreme Court

At its meetings on April 16, 2021, and July 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, Spring 2021, and Summer 2021 editions of the *Journal* or visit the State Bar website.)

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 Specialty; 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 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

Highlights

- At its meeting on July 16, 2021, the council adopted an aspirational statement on the equal, courteous, and respectful treatment of all persons encountered in a professional capacity, for inclusion in the Preamble to the Rules of Professional Conduct.
- The proposed new comment to Rule 1.1, *Competence*, which identifies awareness of implicit bias and cultural differences that might affect a representation as an element of competency, was sent back to subcommittee for further study.
- The council approved for publication new standards for the criminal law specialty, including the creation of a federal criminal law sub-specialty.

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 have reimbursed the State Bar for fees and expenses paid by the State Bar to any trustee appointed by the court to protect the petitioner’s clients, and a petitioner for reinstatement from disability inactive status may be required to do so; and (3) a petitioner for reinstatement from disbarment or suspen-

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

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.

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.

Proposed Amendment to the Preamble of the Rules of Professional Conduct

27 N.C.A.C. 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.

Proposed Amendments

At its meeting on July 16, 2021, the council voted to publish for comment the following proposed rule amendments:

Proposed Amendments to the Standards for Certification in Criminal Law

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

The proposed amendments adjust the criminal law specialty rules to recognize separate subspecialties in federal criminal law, state criminal law, and juvenile delinquency law. Currently, the rules recognize a combined federal/state criminal law specialty, a state criminal law subspecialty, and a juvenile delinquency law subspecialty. Specialists currently certified in the federal/state criminal law specialty will remain so until their next recertification when they will have to qualify for recertification in federal criminal law or state criminal law or in both subspecialties.

.2501, Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law (~~encompassing both federal and state criminal law~~), including the subspecialties of state criminal law, ~~and~~ juvenile delinquency law, and federal criminal law, as a field of law for which certifica-

tion of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this Subchapter) is permitted.

.2502, Definition of Specialty

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with ~~misdemeanor and felony crimes~~ criminal offenses in state ~~and or~~ federal ~~trial~~ courts. The subspecialties in the field ~~is~~ are identified and defined as follows:

(a) State Criminal Law. The practice of criminal law in state trial and appellate courts. The standards for the subspecialty are set forth in Rules .2505-.2506.

(b) Juvenile Delinquency Law. The practice of law in state juvenile delinquency courts. The standards for the subspecialty are set forth in Rules .2508-.2509.

(c) Federal Criminal Law. The practice of criminal law in federal trial and appellate courts. The standards for the subspecialty are set forth in Rules .2510-.2511.

.2503, Recognition as a Specialist in Criminal Law

A lawyer may qualify as a specialist by meeting the standards for ~~criminal law or any of the subspecialties of state criminal law, or juvenile delinquency law, or federal criminal~~

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.**

~~law. If a lawyer qualifies as a specialist by meeting the standards for the criminal law specialty, the lawyer shall be entitled to rep-~~

~~resent that he or she is a “Board Certified Specialist in Criminal Law.” If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, ...If a lawyer qualifies as a specialist by meeting the standards for the subspecialty of juvenile delinquency law...If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of federal criminal law, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in Federal Criminal Law.” Effective [Supreme Court approval date to be added], any lawyer previously certified as a specialist in the state/federal criminal law specialty may continue to represent that he or she is a “Board Certified Specialist in State/Federal Criminal Law” until the specialist’s next recertification period, at which point he or she must satisfy the requirements for continued certification as a specialist in state criminal law, federal criminal law, or both.~~

.2505, Standards for Certification as a Specialist in State Criminal Law

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

(a) Licensure and Practice - ...

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of state criminal law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of state criminal law, ...

(2) “Practice equivalent” shall mean:

(A) ...;

(B) Service as a ~~federal~~, state or tribal court judge for one year or more, ...;

(3) For the ~~specialty of criminal law and the subspecialty of state criminal law~~, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant’s significant criminal trial experience such as:

(A) ...;

...

(D) ...

(c) Continuing Legal Education

In the ~~specialty of criminal law and the state criminal law subspecialty~~, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which ~~40 hours~~ must include the following:

(1) ...;

(2) at least 6 hours in the area of ethics ~~and criminal law~~.

(d) Peer Review

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

(2) ...

...

(4) Each applicant must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and/or judges...and (ii)...

(5) ~~A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application. A reference may not be related by blood or marriage to the applicant, may not be a partner or associate of the applicant, and may not work in the same government office as the applicant at the time of the application.~~

(e) Examination - The applicant must pass a written examination designed to test the applicant’s knowledge and ability.

(1) Terms - ...

(2) Subject Matter - The examination shall cover the applicant’s knowledge in the following topics in ~~criminal law, and/or in the subspecialty of state criminal law, as the applicant has elected:~~

(A) the North Carolina ~~and Federal~~ Rules of Evidence;

(B) state ~~and federal~~ criminal procedure and state ~~and federal~~ laws affecting criminal procedure;

...

(E) trial procedure and trial tactics; and
(F) criminal substantive law;

(3) Required Examination Components -:

(A) ~~Criminal Law Specialty.~~

~~An applicant for certification in the specialty of criminal law must pass part I of the examination on general topics in~~

~~criminal law and part II of the examination (federal and state criminal law).~~

(B) ~~State Criminal Law Subspecialty.~~

An applicant for certification in the subspecialty of state criminal law must pass ~~part I~~ of the examination on general topics in criminal law and ~~part III~~ of the examination on state criminal law.

.2506, Standards for Continued Certification as a Specialist in State Criminal Law

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the ~~specialty or subspecialty~~ as defined in Rule .2505(b).

(b) Continuing Legal Education - The specialist must have earned no less than ~~650~~ hours of accredited continuing legal education credits ~~in criminal law~~ as defined in Rule .2505(c)(1), with not less than 6 credits earned in any one year.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, ... Each applicant also must provide the names and addresses of the following: (i) five lawyers and/or judges who practice in the field of criminal law and who are familiar with the applicant’s practice, and (ii) ...

(d) Time for Application - ...

...

.2507, Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in the criminal law ~~the subspecialties of state criminal law, and the subspecialty of juvenile delinquency law, and federal criminal law~~ are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

.2508, Standards for Certification as a Specialist in Juvenile Delinquency Law

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

(a) Licensure and Practice - ...

...

(d) Peer Review -

(1) ...

...

(4) Each applicant must provide for reference and independent inquiry the names and addresses of ten lawyers and/or judges...

(5) ~~A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application~~ A reference may not be related by blood or marriage to the applicant, may not be a partner or associate of the applicant, and may not work in the same government office as the applicant at the time of the application.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of juvenile delinquency law to justify the representation of special competence to the legal profession and the public.

(1) ...

...

(3) Examination Components - An applicant for certification in the subspecialty of juvenile delinquency law must pass ~~part I of~~ the criminal law examination on general topics in criminal law and ~~part IV of~~ the examination on juvenile delinquency law.

.2510, Standards for Certification as a Specialist in Federal Criminal Law [NEW RULE]

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

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of

certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law in the federal courts of the United States.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 600 hours a year to the practice of criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including the handling of matters in federal district court criminal cases, the pre-charge representation of clients in matters being investigated by federal law enforcement agencies, in federal criminal appeals, or otherwise providing legal advice or representation regarding such matters, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of criminal law for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2510(b)(1) above;

(B) Service as an Article III or federal magistrate judge for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2510(b)(1) above;

(3) For the subspecialty of federal criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant federal criminal trial experience such as:

(A) representation during the applicant's entire legal career as principal counsel of record in federal criminal trials, whether concluded by jury verdict or not;

(B) court appearances in other substantive criminal proceedings in the U.S. District Courts of any jurisdiction;

(C) pre-charge representation in matters being investigated by federal law enforcement agencies; and

(D) representation as principal counsel of record in criminal appeals to any

federal appellate court.

(c) Continuing Legal Education

In the federal criminal law subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which must include the following:

(1) at least 34 hours in skills pertaining to federal criminal law, such as evidence, substantive criminal law, federal criminal procedure, criminal trial tactics, pre-trial or pre-charge advocacy, criminal appeals (including any annual update pertaining to the docket of a federal appellate or the U.S. Supreme Court); and

(2) at least 6 hours in the area of ethics.

(d) Peer Review

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

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

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

(5) A reference may not be related by blood or marriage to the applicant, may not be a partner or associate of the applicant, and may not work in the same government office as the applicant at the time of the application.

(e) Examination - The applicant must

pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms - The examination shall be in written form and shall be given at such times as the board deems appropriate. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge in the following topics in federal criminal law:

- (A) the Federal Rules of Evidence;
- (B) federal criminal procedure and federal laws/federal case law affecting criminal procedure;
- (C) federal constitutional law;
- (D) the United States Sentencing Guidelines, and the calculation and application thereof;
- (E) trial procedure and trial tactics;
- (F) pre-charge advocacy and tactics;
- (G) substantive federal criminal law; and
- (H) federal appellate procedure and tactics.

(3) Required Examination Components - An applicant for certification in the subspecialty of federal criminal law must pass the examination on general topics in criminal law and the examination on federal criminal law.

.2511, Standards for Continued Certification as a Federal Criminal Law Specialist [NEW RULE]

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2511(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the subspecialty as defined in Rule .2510(b).

(b) Continuing Legal Education - The specialist must have earned no less than 60 hours of accredited continuing legal education credits as described in .2510(c)(1), with not less than 6 credits earned in any one year.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the

applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. Each applicant also must provide the names and addresses of the following: (i) five lawyers and/or judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in four recent cases tried by the applicant to verdict or entry of order. All other requirements relative to peer review set forth in Rule .2510(d) of this subchapter apply to this standard.

(d) Time for Application - Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2510 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2510 of this subchapter. ■

Client Security Fund Reimburses Victims

At its July 15, 2021, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$12,540 to four applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$1,840 to a former client of Phillip K. Anderson II of Raleigh. The client retained Anderson to represent him on three criminal charges. The client made payments in installments towards the quoted fee. However, Anderson failed to appear for a court date and was unable to continue the representation due to an administrative suspension of his license. Anderson refunded a portion of the fee paid, but was unable to refund the remaining amount prior to his

death on May 3, 2021.

2. An award of \$1,500 to a former client of Alan T. Briones Jr. of Raleigh. The client retained Briones to address the DMV's revocation of his driver's license. Briones initiated an action to temporarily restrain the DMV from preventing the client from using his restricted driving privileges, but later voluntarily dismissed the matter without taking any further action on the client's behalf. Briones became unavailable to clients due to a health condition, and a trustee was appointed to help wind down his practice on January 20, 2020. Briones thereafter entered into a Consent Order on November 25, 2020, to practice law only upon compliance of certain conditions. The board previously reimbursed one other Briones client a total of \$2,000.

3. An award of \$7,500 to a former client of Bruce T. Cunningham Jr. of Southern Pines. The client retained Cunningham to prepare and file an MAR. The client's wife paid Cunningham's quoted fee in installments until paid in full in October 2017. Cunningham failed to begin any work on the client's MAR before passing away on July 5, 2019. The board previously reimbursed several other Cunningham clients a total of \$104,025.

4. An award of \$1,700 to a former client of Larry C. Economos of Cary. The client retained Economos to investigate the fraudulent sale of two of her company's vehicles. Economos failed to provide any meaningful legal services for the fee paid prior to his death on January 2, 2021. ■

Brown Nominated as Vice-President



Charlotte Attorney A. Todd Brown has been selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina State Bar.

The election will take place in October at the State Bar's annual meeting. At that time, Salisbury Attorney Darrin D. Jordan will assume

the office of president, and Smithfield Attorney Marcia H. Armstrong will also stand for election to president-elect.

Brown earned his bachelor's degree from the University of South Carolina, and his JD from the University of South Carolina School of Law.

Brown has been a member of the North Carolina State Bar Council since 2013, during which time he has served as chair of the Administrative Committee, and has been vice-chair and chair of the Grievance Committee.

A partner of Hunton Andrews Kurth LLP,

Brown is the managing partner of the firm's Charlotte office; co-head of the firm's commercial litigation practice group; co-chairs its Diversity and Inclusion Committee and its Talent Development Committee; serves on the firm's Associates Committee and Screening Committee; and formerly served on the firm's Executive Committee.

Brown is a former president of the North Carolina Association of Defense Attorneys. He also served as president of the Mecklenburg County Bar, was a member of its board, and was co-chair of its Committee on Diversity. ■

Law School Briefs

Campbell University School of Law

Campbell Law School is once again among the Top 10 in the 2020-2021 American Bar Association (ABA) Competitions Championship, the ABA announced today. Stetson University College of Law is the 2021 ABA Competitions Champion, edging out Texas Tech University School of Law for the title of top law school in the ABA's four practical skills contests, which include Arbitration, Negotiation, Client Counseling, and the National Appellate Advocacy Competition (NAAC). This was the first year that the entirety of the ABA Law Student Division's practical skills competitions were held virtually. "This is an extraordinary accomplishment for our teams and for our coaches," Dean J. Rich Leonard said. Campbell Law was also ranked among the Top 10 ABA Competitions champions in 2019.

Campbell Law School has announced the launch of the Campbell Law Innovation Institute (CLII), which will focus on myriad issues raised by the use of advanced technologies in the delivery of legal services, including

artificial intelligence (AI), machine learning, and quantum computing. These new technologies are forcing innovation within law firms and law schools, which are responding by developing perspectives, programs, research, and theories to prepare students to address society's most pressing needs. The CLII will conduct research and promote models for the ethical applications of technology within the legal sector as well as business and government. The initial focus of the CLII will be on developing a continuing legal education (CLE) course to test the concept of online legal technology education in a new virtual marketplace. Relying on partners like the legal technology startup UniCourt, the CLII will use curated data sets and Application Programming Interfaces (APIs) as a guide in crafting online and seated classes, says CLII's founding director Professor Kevin Lee.

Elon University School of Law

National legal writing group honors Elon Law professor—Assistant Professor Tiffany Atkins was honored for her work over the past year in helping to organize professional devel-

opment programs for legal writing professors at law schools across the United States. The Association of Legal Writing Directors presented Atkins with its Outstanding Service Award in recognition of her work co-chairing the organization's Biennial Leadership Academy Subcommittee. Initially selected two years ago to co-chair the same subcommittee, Atkins agreed to stay in her role through 2021 after the first Biennial Leadership Academy she helped organize was canceled due to the COVID-19 pandemic.

Elon Law welcomes new legal writing faculty—Elon Law's Legal Method & Communication Program has welcomed Chrystal Clodomir and Srikanth Reddy as visiting professors for 2021-2022, joining a legal writing program ranked in the top 20% among law schools in the most recent edition of the *U.S. News & World Report's* annual Best Graduate Schools guidebook. Clodomir currently manages a solo practice in Greensboro where she serves parents and children in a variety of family and education matters. Reddy previously served as a staff attorney for both the US Courts of Appeals for the Fourth Circuit and for the Seventh Circuit, and as an

attorney-advisor with the US Department of Labor Benefits Review Board.

US Marine Corps honors Elon Law graduate—Major Nathan Campbell Thomas L'15—described by his commanding officer as a remarkable leader and extraordinarily talented litigator—was named Trial Counsel of the Year for 2020 by the Judge Advocate Division of the United States Marine Corps. Stationed at Camp Lejeune, Thomas was recognized for “professionalism, dedication, and litigation skills that resulted in successful outcomes at all levels of disposition, from complex felony contested trials to boards of inquiry and administrative hearings.”

University of North Carolina School of Law

UNC School of Law ranks highly in bar passage and employment. Carolina Law ranked 9th for bar exam passage and 15th for ten-month employment for the Class of 2020 out of 196 law schools, according to data collected by the American Bar Association.

NC State's Raj Narayan joined the UNC School of Law Institute for Innovation as the board of advisers chair. The board assists the institute's three clinics (Startup NC Law Clinic, Community Development Law Clinic, and Intellectual Property Clinic) with programming, networking, and building partnerships. Narayan is associate director of NC State's Kenan Institute for Engineering, Technology, and Science.

Prosecutors and Politics Project released a new report on analyzing prosecutor lobbying in the US. The report examines criminal-justice-related bills introduced between the years 2015 through 2018 in all 50 states.

Alumni have established the Sylvia X. Allen '62 diversity scholarship to honor first black female graduate. Students who enhance the diversity of the law school are eligible for the scholarship, which was launched by M. Scott Peeler '97 and Diana Florence '95.

Professor Ifeoma Ajunwa was selected for the Nigeria Fulbright Scholar Award. Ajunwa plans to spend the academic year in Lagos, Nigeria, researching and comparing how US and Nigerian laws affect startup technology companies.

Professor Leigh Osofsky was selected by the Administrative Conference of the United States to conduct study on use of automated legal guidance by federal agencies. Osofsky's scholarship focuses on tax law and the administrative and legislative process.

In Memoriam

Phillip Keith Anderson II
Raleigh, NC

Susan Strayhorn Barbour
Asheville, NC

Lloyd Clifford Brisson Jr.
Fayetteville, NC

Beth Bizousky Carter
Denver, NC

Joseph Brinson Cox Jr.
Pinehurst, NC

William Dial Delahoyde
Raleigh, NC

Larry Grant Ford
Salisbury, NC

William Edgar Graham Jr.
Raleigh, NC

Harold Franklin Greeson
Greensboro, NC

Russell Joseph Hollers Jr.
Candor, NC

Jeffrey Charles Howland
Winston-Salem, NC

Kristy Jean Jackson
Goldsboro, NC

Eric Andrew Jonas Sr.
Charlotte, NC

Howard L. Kushner
Charlotte, NC

Robert Wayne Long
Ash, NC

Richard Edwin Morton
Charlotte, NC

Clint Andrew Nichols
Glen Allen, VA

Otis Martin Oliver
Mount Airy, NC

Manley Clark Parker
Huntersville, NC

Ronald Stephen Patterson
Hollywood, FL

Billie Lynn Poole
Salem, NC

Robert Stanley Rankin Jr.
Durham, NC

Harvey W. Raynor III
Fayetteville, NC

James Lloyd Roberts
Mocksville, NC

Melanie Hyatt Rodenbough
Greensboro, NC

Theodore Satterwythe Royster Jr.
Lexington, NC

Stephen Robert Salisbury
Raleigh, NC

Edward D. Seltzer
Charlotte, NC

Frank Hornor Sheffield Jr.
New Bern, NC

Russell Graham Sherrill III
Raleigh, NC

Mittie R. Smith
High Point, NC

Charles Mark Stevenson
Brandon, FL

Rick Ian Suberman
Chapel Hill, NC

Gary Bunting Tash
Winston-Salem, NC

Andrew Peter Duncan Tennent
San Jose, CA

Joseph Felton Turner Jr.
Jackson, NC

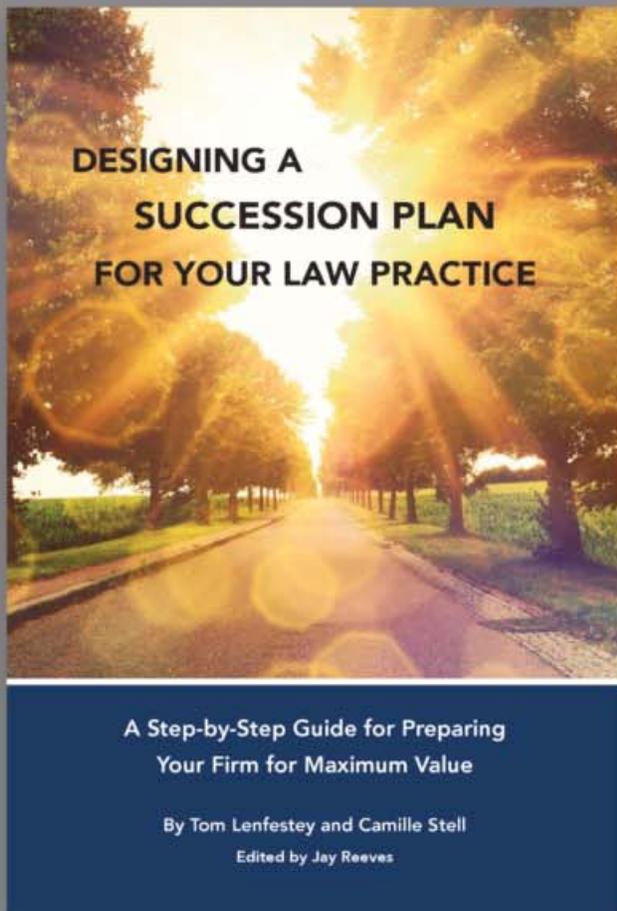
Rebecca Zoe Ulshen
Durham, NC

Melvin Lloyd Wall Jr.
Charlotte, NC

James Charles Windham Jr.
Gastonia, NC

Professor Theodore Shaw received the American Constitution Society's Lifetime Achievement Award. Shaw is the Julius L.

Chambers Distinguished Professor of Law and director of the UNC Center for Civil Rights. ■



The insider's guide to selling a law practice, transferring ownership, and designing a great Life After Law, written by two of the top authorities in succession planning.

“

Practical. Readable. Motivating. “Designing a Succession Plan” is an invaluable resource and planning guide. Solo and small firm partners will be especially interested in the sections on valuing and selling a law firm. All lawyers will appreciate the practical, expert advice outlining the options that await lawyers in this next phase.

— Joan H. Feldman, Editor/Publisher, Attorney at Work

Learn more and see additional resources at WWW.DESIGNINGASUCCESSIONPLAN.COM

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

Fall 2021

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