

THE NORTH CAROLINA STATE BAR

# JOURNAL

WINTER  
2021



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“This Message Will Self-Destruct in Five Seconds” *page 8*

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# TIMESHARE FRAUD

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*Publication of an article in the Journal is not an endorsement by the North Carolina State Bar of the views expressed therein.*

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# An Interview with Our New President—Darrin D. Jordan

*Salisbury Attorney Darrin D. Jordan was sworn in as the 87th president of the North Carolina State Bar by Chief Justice Paul Newby at the State Bar's Annual Dinner on Thursday, October 7, 2021.*

**Q: Tell us about your upbringing.**

I was born in Newport News, Virginia, and we moved to Salisbury when I was nine years old. My dad was a full-time national guardsman and ran the national guard unit in Newport News; my mom was a bookkeeper at the local Ford dealership. My dad was forced to retire from the military because he went blind (from being shot in the head in Korea), later was forced to retire from Metropolitan Life Insurance because of lung cancer, and finished his career as a law clerk for a local attorney in Salisbury, where I had worked while in college. My mom worked as a bookkeeper, first for the church we attended, and then retired as the first position secretary at Salisbury High School, my alma mater. I had one brother who was almost eight years older than me, and while we were close, it sometimes seemed like I was an only child.

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

One day while at Catawba College's library, I was talking with a friend who was considering going to law school. I made the comment that it sounded like something I'd like to do, but "my folks don't have the money to send me to law school." He told me that there was always a way to make things happen, and so I decided that I'd find a way. I went to law school and he became a real estate appraiser. What was probably an insignificant moment for him was a game-changer for me.

**Q: Can you tell us how your career as a lawyer has evolved?**

I graduated from Campbell University



*With his wife, Dana, looking on, Darrin D. Jordan is sworn in as president of the North Carolina State Bar.*

School of Law in 1990 and found a job in Wilmington with a small firm, Peters & Register. They didn't hire me because they had work that needed to be done; they allowed me to build my law practice from scratch with their support. It was really a perfect scenario for a Campbell graduate, where we were given direction on how to start our own law firm. After three years with Peters & Register, I got homesick and was hired by the district attorney for both Cabarrus and Rowan Counties (Judicial District 19A), Bill Kenerly. I was assigned to Cabarrus County and stayed in Cabarrus after the district was split into 19A and 19C, and I worked for the new Cabarrus County District Attorney, Mark Speas. In 1997, Mr. Kenerly had an opening in Rowan County (where I lived), and I transferred to Rowan where I remained

until 2000. I was a superior court prosecutor the entire time I was with the District Attorney's Office. In 2000 I left the Rowan County District Attorney's Office, opened my own firm for a couple of years, and then joined my current partner, Cecil Whitley, where I have remained for 20 years. I've handled almost exclusively state criminal law my entire career, but had a period where I handled child custody cases, and within the last five years I've branched out to federal court.

**Q: You are a North Carolina State Bar state criminal law specialist. What attracted you to this area of practice and why did you seek specialty certification?**

Sometimes the area of law picks you and you really don't make a conscious decision. Practicing criminal law was really what I was most comfortable doing after serving as an

assistant district attorney for six years. In 2004 I decided to seek a specialty certification after encouragement from James Davis and (now judge) Marshall Bickett. They both had been certified a few years before they began talking to me about it, and they helped me prepare for the exam. Certification has been important to me because it encouraged me to go over and above the minimum requirements for CLE, and it has also allowed me the opportunity to meet attorneys around the state who I probably would have never met. It is professionally and personally rewarding to be a state criminal law specialist, and I am really glad to see that the Specialization Board has now made federal criminal law its own specialty. I look forward to seeking certification in that standalone specialty.

**Q: What is your proudest achievement as a lawyer?**

Professionally, being able to serve our profession as the State Bar councilor for Rowan County for nine years, as a commissioner on the North Carolina Indigent Defense Services Commission, and as a commissioner on Chief Justice Mark Martin's Commission on the Administration of Law and Justice. Personally, being able to practice law with my law partner, Cecil Whitley.

**Q: If you had not chosen to become a lawyer, what do you think you would have done for a living?**

In high school, I wanted to be an engineer. When I went to college, I was a computer science major before changing to political science, pre-law, and then deciding to double major in accounting. I never really saw myself as a computer programmer or an accountant, so since deciding to go to law school, I've never considered doing anything but practicing law.

**Q: What was your first leadership position?**

I'm not sure, but I think it was in the second grade when I was chosen to represent our class in the elementary school's version of student government. Or it could have been in the first grade when my teacher made everyone get behind me and follow me to the lunch room. Neither time had a significant impact on my leadership style.

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

In late 2009, our State Bar councilor, David Bingham, was not eligible to run for another term. During a lunch with my law partner, Cecil Whitley, we were joined by

Judge Charlie Brown and District Attorney Bill Kenerly. We began talking about the upcoming vacancy, and because I never considered myself to be councilor "material," I began naming potential candidates. After a few names, I noticed that the others were not participating in providing candidates. I was interrupted and told that I was the one that they wanted to run for Bar councilor. My reluctance, in part, was thinking I wasn't worthy of the position, as I had no clue what a Bar councilor did.

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

I never thought about the work that went into being a councilor, and I never anticipated that I would meet so many great friends and great lawyers in one place. And the surprises don't end there. I was amazed at the procedures of the State Bar and the importance of assuring due process to any attorney or idea that comes before the council.

**Q: Tell us about your family.**

My wife, Dana, is one of the most talented teachers in North Carolina. She has been a high school science teacher for 28 years. She is as dedicated and committed to her profession as any lawyer, doctor, or any other professional, and I am confident, just as ministers are called by God to minister, she is called by God to teach. We met 34 years ago in Buies Creek and we just celebrated 30 years of marriage. She truly brings adventure to my life and to the lives of our children. We have two amazing young adult children, Martin and Anna Dupree. Martin earned a degree at our local community college and is in the process of deciding what to do next, and Anna Dupree is a junior at Western Carolina University pursuing a career as a forensic chemist.

**Q: What do you most enjoy doing when you're not representing clients or serving as a councilor or officer of the State Bar?**

We live in an incredible state, and while I like to explore the entire state, my favorite place is in Jackson County where Dana and I own a home and 11 ½ acres. I enjoy gardening, raising honeybees and chickens, or just riding my tractor, the very best place to work out the troubles of the world. But my passion is fly fishing for North Carolina mountain trout. Fly fishing is a way that I can get out of cell service for a couple of hours while taking a hike in the middle of a stream or river and periodically catching one

of God's greatest creatures. It has provided me beautiful scenery and great friendships that have stood the test of time. Every attorney should find a passion, mine happens to be fly fishing.

**Q: It appears that the COVID-19 pandemic is going to continue to impact our society for some time to come. As a trial lawyer and a State Bar officer, how have you been affected by the pandemic and what do you think will be its lasting impact on the legal profession?**

While the pandemic has affected every citizen who has come into contact with the judicial system since March of 2020, the criminal justice system has been uniquely affected. The rights of those accused of crime and the rights of those who are victims of crime have at times become subordinate to the concern for public safety, and our leaders within the judicial system have had to make hard and sometimes unpopular decisions.

The lasting effect is seen in the tremendous backlogs of pending criminal cases across the state, which will take time to whittle down to pre-pandemic numbers. Couple that with the fact that individuals who are charged with crimes are sometimes incarcerated under conditions of release that, even in the best of times, neither they nor their family can satisfy, and it becomes a constitutional crisis.

Finally, during the period of time when our courts were operating in compliance with pandemic protocols, crimes were still occurring and lawyers who handle indigent defense in North Carolina were getting more and more cases assigned without the ability to dispose of cases to maintain a manageable case load. A criminal justice system, which was already facing a crisis in the loss of qualified attorneys willing to accept appointments on indigent cases because of inadequate compensation, was further compromised by ever-increasing caseloads for already overworked and underpaid attorneys who were carrying these indigent defense caseloads.

**Q: You have served as a commissioner for the Indigent Defense Services Commission for many years and are the current chair. Why have you chosen to continue to serve on the commission despite your very busy schedule as a trial lawyer and a State Bar officer?**

Both the State Bar and the IDS

Commission seem to have similar goals and missions. The State Bar's mission is to protect the public by making sure that attorneys are competently and ethically representing clients, and the IDS Commission's goals include assuring that indigent defendants receive competent, effective, and qualified attorneys. It has been easy to transition from wearing one hat to another hat, and there have been points in time when the two hats have merged.

**Q: You are known in the Salisbury Bar for annually planning and organizing a day-long CLE program for local lawyers at a reduced fee. Why do you like to spend your "spare time" doing this?**

I have always been passionate about helping other attorneys become better lawyers. I have great examples of lawyers who have provided me with such guidance. First and foremost, my law partner Cecil Whitley has been an example as I watched him spend hours talking with young lawyers (and some experienced lawyers) about how to handle an issue that came up in court or that the attorney was grappling with at the moment. Gordon Widenhouse has been instrumental and a big part of these CLE programs for over 12 consecutive years. And there are many other great attorneys who have helped in this endeavor: Bill Powers, James Davis, David Freedman, David Teddy...and the list could go on for pages. I appreciate every one of the attorneys who has taken time out of their schedules to prepare and present at these seminars. They are the real heroes; I merely gave them access to the stage.

**Q: You served on the Ethics Committee of the State Bar Council for many years, ultimately becoming its chair. What was the most important ethics question the committee addressed during your service? Did the committee get the answer "right" in your opinion?**

A couple of FEOs come to mind when I think about the important work of the Ethics Committee. 2009 FEO 7 dealt with interviewing an unrepresented child prosecuting witness in a criminal case alleging physical or sexual abuse of the child. This FEO did exactly what the State Bar is tasked with doing for attorneys—it gives clear guidance in an area that is at the intersection of what a lawyer can do in a sex offense case to make sure that they are competently and zealously representing a client, and when a

lawyer is crossing the line of influencing a minor who may already be traumatized. Did we get it right? I'm not sure, but I'm not aware of this issue coming up in any of our proceedings since this FEO was adopted, and I have personally relied on it to provide me the boundaries.

The other one was 2013 FEO 2, which gave guidance on when an attorney had to provide an incarcerated defendant with an opportunity to review discovery materials, and it answered the question of whether it is mandatory that an attorney provide copies of discovery materials to an incarcerated defendant. The debate on this FEO was professionally rewarding as it was truly a dilemma where both sides of the issue provided compelling reasons to support their view.

**Q: What do you hope to accomplish while president of the North Carolina State Bar?**

I think that currently we have some unfinished business from past years, not because progress isn't being made, but because of the weight of the work that has been asked of our committees and subcommittees.

I hope that at this moment in time next year we will have answers to questions about whether liberalization of the unauthorized practice of law statutes, allowing alternative business structures, and allowing fee sharing with nonlawyers might increase access to justice for individuals who can't afford legal representation. I hope that at this moment in time next year we will be able to understand "regulatory sandboxes" and determine if we should expend time, energy, and money in promoting this idea in the name of increasing access to justice. We should approach these issues specifically asking how will they increase access to justice, and if they don't, we must decide whether implementation of these ideas will put the public at risk, thereby violating our main mission.

I hope that at this moment in time next year the council will have concluded the work on proposed changes to the Preamble and changes to the Rules of Professional Conduct.

While each of these endeavors has a place of importance in the work of the State Bar Council, we should be careful not to deviate too far from our mandate of protecting the public.

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

Ralph Waldo Emerson is credited with saying, "To leave the world a bit better, whether by a healthy child, a garden patch, or a redeemed social condition; to know that even one life has breathed easier because you have lived—that is to have succeeded."

I hope that when I leave office, lawyers will find the State Bar was a better organization and that we had advanced our mission by making improvements where needed and leaving things alone that are working.

**Q: You are from Salisbury, the home of Cheerwine. Do you imbibe and, if so, what makes Cheerwine unique?**

Cheerwine is uniquely Salisbury and I am fortunate to attend Rotary with the CEO, Cliff Ritchie. It definitely has a unique taste (my wife says it taste like cough syrup, but even she likes it in small quantities). It is best consumed out of a glass bottle, which you will sometimes see filled to varying degrees (no bottle seems to be filled to the same height), which makes it unlike the bigger soft drink companies. That fact gives it a local quality. My favorite form of Cheerwine has become Cheerwine fudge, which can only be found in one location, specifically the Candy Shoppe in China Grove, in Rowan County. It is the closest thing to an illicit drug (because of its addictive qualities) that I care to try. ■

*Darrin D. Jordan is a partner with the law firm of Whitley, Jordan, Inge & Rary, PA. He maintains a criminal practice in both state and federal court and is a board certified specialist in state criminal law. While he practices in his hometown of Salisbury, he lives in Kannapolis.*

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# “This Message Will Self-Destruct in Five Seconds.” *Ephemeral Messaging and the NC Rules of Professional Conduct*

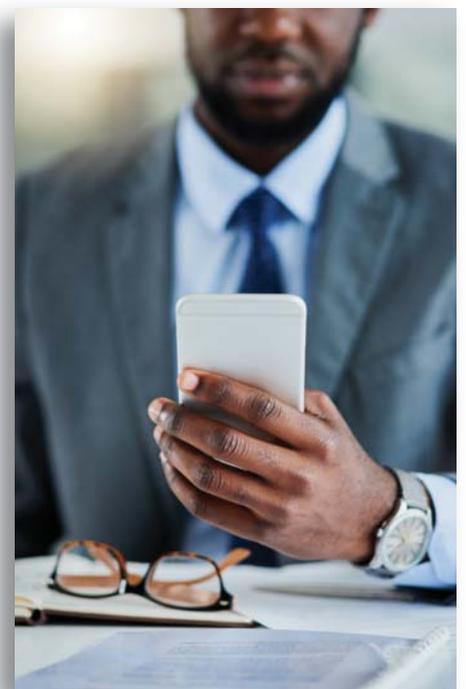
BY JOSHUA T. WALTHALL

What are ephemeral messaging apps? An ephemeral messaging app is a communication platform that allows one user to send to another user an electronic message, not unlike an email or text message, that will automatically disappear directly after the recipient views it. Ephemeral messaging apps “are now widely available on a host of platforms, including enterprise software such as Slack or DingTalk...

...Although each application is slightly different, they all incorporate some type of trigger that automatically deletes messages shortly after viewing and prevents users from editing, copying, forwarding, or printing the messages.”<sup>1</sup> Such apps are lauded by “privacy advocates”<sup>2</sup> and are becoming increasingly available, especially in the context of litigants and those subject to discovery: “Time limited messaging, after all, can stifle the best laid e-discovery plans or the most thoroughly conducted investigation. And they’re not going away anytime soon. Once only the focus of a handful of messaging apps, ephemeral mes-

sages are now being offered by widely used services like Gmail and Facebook.”<sup>3</sup>

Typically, messages sent through ephemeral messaging apps are not even captured or saved on a server, though they resemble text messages and emails in other respects. Messages sent and received via an ephemeral messaging app “create the digital facsimile of an in-person meeting or a telephone call by deleting or otherwise destroying a message shortly after it has been read or opened by its recipient(s).”<sup>4</sup> The apps themselves “are often peer to peer, which eliminates servers in between the sender and recipient



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that could potentially be used to capture the communication. These layers of security make retrieval or reproduction of such messages nearly impossible.”<sup>5</sup>

A server is essentially a central storage system through which a company’s emails travel before being sent to the recipient: “Generally, in a business organization, email systems use a central computer (sometimes the server) to store messages and data and to send them to the appropriate destination. All that is needed

to send messages is a PC, modem, and email connection.”<sup>6</sup> Emails sent through a regular channel are often captured on a server and, even when deleted from the email recipient’s inbox, can be retrieved by someone searching or accessing the server: “Deleted emails are, in most cases, not irretrievably lost. Deleted emails may remain on a computer hard drive, servers, or retained on back up tapes.”<sup>7</sup>

Think of it this way: if an email is a hard-copy letter, the email recipient’s inbox is her hands, and the server is the waste bin in which she tosses the note after she has read it. Even if she throws the note away, into the bin, the note still exists and can be accessed and read later. To completely eradicate the note, the recipient would need to remove it from the bin and burn it. In much the same way, the recipient of an email cannot eradicate it simply by deleting the email from his inbox; it will still exist on a server and can be searched for, found, and produced in discovery later. Messages sent via ephemeral messaging apps, however, are not kept on a server, so when they disappear, they cannot be accessed again, even by the sender or the recipient.<sup>8</sup> That, essentially, is what ephemeral messaging apps are: text messages or emails that vanish—from all possible sources—shortly after they are read by the recipient.

### **Boundaries and Signposts: The North Carolina Rules of Professional Conduct**

What, if anything, do the North Carolina Rules of Professional Conduct have to say about ephemeral messaging apps? In truth, not much, at least specifically. This is not surprising: as mentioned, this technology is relatively new. Nonetheless, various aspects of the rules clearly intersect with ephemeral messaging apps and their use in litigation in North Carolina.

Rule 3.4 of the North Carolina Rules of Professional Conduct indicates that, out of “fairness to opposing party and counsel,” a “lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”<sup>9</sup> Rule 3.4 goes on to note that a lawyer shall not “knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation.”<sup>10</sup> Finally, the Rule

notes that, “in pretrial procedure,” a lawyer is prohibited from “fail[ing] to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or fail[ing] to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions.”<sup>11</sup>

The second official comment to this Rule of Professional Conduct elaborates on the discovery implications of this requirement:

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.<sup>12</sup>

The fifth comment to the Rule highlights “that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw.”<sup>13</sup> The comment then goes on to note that “reasonably” generally means acting as “a reasonably prudent and competent lawyer” and that, “when responding to a discovery request or disclosure requirement, a lawyer must act in good faith.”<sup>14</sup>

The fifth comment concludes by noting that a “lawyer should impress upon the client the importance of making a thorough search of the client’s records and responding honestly. If the lawyer has reason to believe that a client

has not been forthcoming, the lawyer may not rely solely upon the client’s assertion that the response is truthful or complete.”<sup>15</sup>

Thus, in summation, the following principles drawn from Rule 3.4 of the Rules of Professional Conduct may implicate the use of ephemeral messaging apps in litigation in North Carolina:

1. Lawyers cannot obstruct an opposing party’s access to documents by obfuscating the evidence directly or advising a client to do so.
2. The Rules of Professional Conduct require lawyers to make diligent efforts to obtain and preserve discoverable information and evidence and to comply with discovery directives issued by the courts.
3. It is wrongful for a lawyer to destroy evidence or documents for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.
4. Lawyers have a duty to impress upon clients the importance of being honest, thorough, and forthcoming in producing and preserving records in discovery.

The Ethics Committee of the North Carolina State Bar issued 2014 Formal Ethics Opinion 5 in 2015, and it, too, may provide some possible points of application to the present analysis.<sup>16</sup> The opinion’s second hypothetical raises a relevant situation: A “client’s legal matter will probably be litigated, although a lawsuit has not been filed. May the lawyer instruct the client to remove postings on social media?”<sup>17</sup> While ephemeral messaging apps are not necessarily “social media,” the answer to the inquiry is nonetheless instructive:

A lawyer may not counsel a client or assist a client to engage in conduct the lawyer knows is criminal or fraudulent. Rule 1.2(d). In addition, a lawyer may not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. Rule 3.4(a). The lawyer, therefore, should examine the law on preservation of information, spoliation of evidence, and obstruction of justice to determine whether removing existing postings would be a violation of the law.<sup>18</sup>

The opinion notes that, provided various criteria are satisfied, advising a client to remove or delete postings is not necessarily a violation of the North Carolina Rules of

Professional Conduct: “If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media.”<sup>19</sup> It is also permissible for the lawyer to “take possession of printed or digital images of the client’s postings made for purposes of preservation.”<sup>20</sup>

The third hypothetical provides further points of interest to the present discussion: “May the lawyer instruct the client to change the security and privacy settings on social media pages to the highest level of restricted access? Yes, if doing so is not a violation of law or court order.”<sup>21</sup>

Thus, we may conclude the following

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principles from 2014 Formal Ethics Opinion 5:

1. A lawyer may be guilty of violating Rule 3.4 of the North Carolina Rules of Professional Conduct if she advises a client to remove or destroy social media posts or other communications that might have evidentiary value in pending or expected litigation.
2. A lawyer may not be guilty of violating Rule 3.4 of the North Carolina Rules of Professional Conduct if she advises a client to restrict access to or increase security features governing certain posts or other communications, provided it is not in violation of law or court order.

**Application: A Hypothetical**

Let’s consider how these principles drawn from the Rules of Professional Conduct and the formal ethics opinion may be applied through a hypothetical: Mr. Deets and Newt entered into a business venture together to sell beef cattle to a Montana ranch. Newt took what Mr. Deets believed was more than his fair share of the profits of a recent sale. Mr. Deets hired a locally renowned cattle attorney, Mr. Wilbarger, to represent him in a lawsuit against Newt. Mr. Deets informed Mr. Wilbarger that he was regularly texting with a member of the Montana ranch regarding the sale and the pending lawsuit. Mr. Wilbarger suggested that Mr. Deets stop texting through normal channels and begin texting only through an ephemeral messaging app so that none of the communications could be discovered later. Mr. Wilbarger also instructed Mr. Deets to delete a public social media post wherein Mr. Deets bragged about the money he made from the sale in question. Finally, Mr. Wilbarger suggested that, for all other communications regarding cattle sales, Mr. Deets use a double-encrypted email service to protect the emails from hacking. Eventually, Mr. Wilbarger’s actions drew the ire of the court, which issued an order to show cause, requiring Mr. Wilbarger to show the court why he should not be disciplined for violating the North Carolina Rules of Professional Conduct.

How might a North Carolina court rule regarding an attorney suggesting that Mr. Deets use an ephemeral messaging app and delete relevant social media posts? As mentioned, Rule 3.4 clearly prohibits lawyers from obstructing an opposing party’s access to documents by directly obfuscating the evidence

or advising a client to do so.<sup>22</sup> The Rule also requires that lawyers make diligent efforts to obtain and, significantly, to preserve discoverable information and evidence. Accordingly, by advising his client to use an ephemeral messaging app and thus cause the messages to be automatically deleted, a court may find that Mr. Wilbarger did not make appropriate efforts to protect discoverable evidence and, in fact, took deliberate steps to obstruct Newt’s access to those communications in violation of Rule 3.4.<sup>23</sup> Moreover, by advising Mr. Deets to remove or destroy social media posts that had evidentiary value in the pending litigation with Newt, Mr. Wilbarger may have further violated Rule 3.4.<sup>24</sup> However, Mr. Wilbarger’s final recommendation to use a double-encrypted email service in order to increase email security is likely not a violation of Rule 3.4 since a lawyer is permitted to advise a client to increase security features governing certain communications, provided it is not in violation of law or court order.<sup>25</sup>

**Conclusion**

The societal and cultural concerns of privacy and secrecy—the very concerns ephemeral messaging apps are designed to serve—are legitimate and worth protecting, and ephemeral messaging apps are a brilliant new tool to accomplish as much. But litigants and lawyers in North Carolina must use them appropriately and in accordance with the North Carolina Rules of Professional Conduct, particularly since, as of the date of this article, this is uncharted territory in North Carolina’s courts.<sup>26</sup> ■

*Joshua Walthall is an attorney at Nelson Mullins where he focuses his practice on representing lawyers, physicians, CPAs, realtors, and other professionals before licensing boards. Prior to joining Nelson Mullins, Josh spent eight years as a prosecutor at the State Bar.*

**Endnotes**

1. William Semins, Daniel Miller, and Hugh McKeegan, *The Compliance Risks Facing Companies That Use Chat Apps*, LAW 360 (June 16, 2020, 4:38 PM), perma.cc/4QW2-T376.
2. Rhys Dipshan, *This Article Will Self-Destruct: Behind Ephemeral Messaging’s In-House Rise*, The Recorder (June 13, 2019), perma.cc/RFZ4-4FD9.
3. Dipshan, *supra*.
4. Semins, *supra*.
5. *Id.*

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## IMPORTANT NOTICE REGARDING STATE BAR EMAILS

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# Afghanistan: In Defense of National Security Law

BY PERRY WADSWORTH

If the marketplace of ideas were a farm, terrorist ideology would be the fungus in the garden, the parasite on the livestock, and the virus in the workers. You get the point. The warped violence it pursues offers nothing in the way of pro-

ductive transformation, but leads more often to destruction of those it seeks to subjugate.

As the United States and its coalition of nations cease operations in Afghanistan, it is important to take inventory of our efforts. The approach for this article will be to highlight three areas: North Carolina and National Security Lawyers; the Afghanistan conundrum; and a tribute.

## North Carolina and National Security

North Carolina has played and will continue to play a major role in national security, including the fight against terrorism. North Carolina is home to a strong contingent of military forces: Active Duty includes bases for the army (Fort Bragg and Military Ocean Terminal Sunny Point), marines (Camp Lejeune, Cherry Point, New River), air force (Seymour Johnson), and coast guard (Elizabeth City), and also a wide array of reserve components—state national guard and US Reserves for the different services. Over 140,000 active and reserve service mem-

bers work in NC. They have over 150,000 spouses and children. Civilian employees and contractors employed at bases and throughout the state add tens of thousands more.

To drill down into one of the key elements of military operations, at least from my vantage point, every military unit has legal support. Not surprisingly, North Carolina has a bevy of national security lawyers to include military judge advocates, federal employees, technology and industry counsel, academic professionals/college professors, think-tanks, and so on. You might contribute to national security and not even know it.

National Security Law (NSL) is a burgeoning field. Looking at Department of Defense manuals from the 1990s and early 2000s, the specialty of “national security law” is not categorized in that way. It was most often covered in the realm of international and operational law fields, often honed in operational environments for war, peace-keeping, and humanitar-



*Perry Wadsworth at the Hamid Karzai International Airport in Kabul.*

ian operations. NSL can be seen as an umbrella for a wide range of practice areas and subspecialties: intelligence, space, cyber, nuclear, biological, maritime, aviation, Law of Armed Conflict, treaties/conventions/declarations/protocols, “occupation” requirements, information operations, artificial intelligence, drones, contracts/fiscal, banking (threat financing), prisons, detentions, criminal,

civil, human rights, immigration, border security, Status of Forces Agreements, application of host nation laws, rule of law, governance, and so on.

This is not meant to be an exhaustive list. Some niches overlap. It simply shows that many types of legal practice, under the right circumstances, could be relevant to national security interests. Cyber-surveillance activities by intelligence and law enforcement agencies to trace terrorist financing, for example, is as much an intensive NSL activity as advising on targeting decisions in a combat zone. To extrapolate further, the NC legal community provides legal assistance for hundreds of thousands of military personnel, their families, and veterans throughout the state. While all of this legal support might not be national security law per se, it helps to demonstrate the dynamics of how national security missions impact clients and the larger community.

### The Afghanistan Conundrum

Terrorist groups and their ideological justifications are not unique to Afghanistan. For purposes of this discussion, the attempt will be to mainly focus on Afghanistan: it is an exemplar for the past 20 years of the “War on Terror” as fought by the United States and its allies. Several points are worth synopsis to illustrate the complex background and the relevance to NC and our nation: (1) the conditions in Afghanistan; (2) incubation of violent extremism; and (3) the legal challenges in rule of law.

### Conditions

Afghanistan is a rugged, mountainous, arid, land-locked territory that is one of the most remote in Asia. It does have pockets of fertile ground, and much of that is largely used for growing poppies, making it the source of over 80% of opium in the world. Logistical challenges? Afghanistan has been called the “graveyard of empires” for its role—intentional or not—in thwarting major powers over millennia, e.g., notables like the Macedonian Empire (Alexander the Great), the Mongolian Empire (Genghis Khan), the Persian Empire, the British Empire, and the Union of Soviet Republics (USSR, a.k.a., Soviet Union). The recent 2021 withdrawal of the terror-fighting US-led coalition of the North Atlantic Treaty Organization (NATO) and some non-NATO partners like Australia, simply adds to the “graveyard” moniker.

Afghanistan is culturally rich with a long history. Much of the rural areas operate under tribal governance, often combining tribal custom and Islamic teaching. They may eschew constitutional frameworks established by a central government; this can be pragmatic in the sense that government enforcement of laws can be slow to non-existent. High levels of illiteracy and poverty persist. Afghanistan contains many ethnic groups, the largest being Pashtun, Tajik, Hazara, Uzbek, and Turkmen. Their allegiances can rapidly shift, which makes unified political leadership difficult.

Afghanistan is in a rough neighborhood, not just because of topography, but because of the countries surrounding it. Iran lies to the west; Turkmenistan, Uzbekistan, and Tajikistan to the north; China to the east; along with Pakistan to the south and east. It is not surprising that each of these countries has its own national interests, which mostly do not favor a thriving democratic Afghanistan with strong ties to the West—or, in the case of Pakistan, ties to India. Two of the countries are nuclear powers: Pakistan and China. (If you thought Iran, you are more than half-right; the Shiite theocracy certainly demonstrates nuclear ambitions.) Finally, Uzbekistan, Turkmenistan, and Tajikistan maintain ties with Russia, stemming from historical connections as former members of the USSR until 1991.

### Incubator of Terror

Afghanistan (and portions of Pakistan) appears to be a geographic magnet, if not incubator, for violent extremist groups (VEs). The reason the US invaded Afghanistan in 2001 and remained for 20 years was a very important national interest: counter-terrorism, self-defense, and retribution for attacks on the US mainland by the terrorist group al-Qaeda, led by Osama bin Laden. This was the legal mandate for Operation Enduring Freedom (OEF), i.e., the *jus ad bellum*. The Taliban controlled the Afghanistan government at the time of the attacks. And for the preceding five years of their governance (1996-2001) they allowed or facilitated safe haven, training, and support for al-Qaeda operations.

During the 20 years we operated in Afghanistan, the VEs included: al-Qaeda, Taliban, Haqqani (criminal) network, and ISIS-K.<sup>1</sup> Contrary to the idea that terrorist violence is lawless, the VEs in Afghanistan

and adjacent countries maintain they have legal justification within Islam—at least their interpretation.<sup>2</sup> Religious thought is not really distinguished from legal thought, per se. They are congruent.

Islam contains two main sects: Sunni and Shia. (Sufi may count as a third.) Most Sunni Islamic legal thought does not justify terrorist attacks such as those perpetrated by al-Qaeda in the US.<sup>3</sup> The four primary schools of Sunni legal thought are Malik, Shafi'i, Hanafi, and Hanbali.<sup>4</sup> The Hanbali school of jurisprudence, however, is one that has been associated with the intellectual underpinnings of more radical fundamentalist elements known as Salafi-Jihadists. The Taliban leadership have been ideologically aligned or at least sympathetic with jihadist thought even if they claim a different school (i.e., Hanafi), which is prevalent in the region. But the label is less relevant than their actions and the company they keep.

The Salafi-Jihadists include al-Qaeda and Islamic State of Iraq and Syria, a.k.a., Islamic State of Iraq and the Levant (ISIS or ISIL). However terroristic, criminal, and misguided the jihadists are, they preach a mandate to asserting their version of truth in Islamic governance. They would view Western presence in Islamic countries as an abomination. But their ire is not just with the West, it is with Islamic countries and belief systems different from their own. Their goal was and is to impose the purest, most fundamental form of an Islamic Caliphate. Hence, they seek to subjugate peaceful populations, whether Muslims, Hindus, Jews, Christians, etc. and regardless of any race, nationality, ethnicity, or gender. Their intentional, indiscriminate attacks on civilians reveals their disregard for any international norms. al-Qaeda's hijacking of civilian aircraft and subsequent use of them as projectiles showed their lack of scruples.

OEF diminished al-Qaeda, dismantled much of the organization, and ultimately killed its leader, Osama bin Laden, after he was discovered safely hiding in Pakistan. Even though the Islamic Republic of Afghanistan was approved by Loya Jirga and approved elected leaders, the Taliban remained ever-present and active. They essentially operated a shadow government in Afghanistan and utilized areas in Pakistan. The Quetta Shura, a group of Afghan Taliban leaders, was/is in Quetta, Pakistan.

Apart from the Taliban and al-Qaeda, ISIS developed in Iraq and Syria after US with-



*This is a photo of Kabul and the surrounding mountains. It appears grainy due to poor air quality in the region.*

drawals from Iraq in 2011. It technically was a split from al-Qaeda, a way of branding ISIS as a viable option for Salafi-jihadists. Cross-pollination within extremist groups is common, particularly amongst the rank and file. ISIS had the same ideological foundation as al-Qaeda, and sought to establish an Islamic Caliphate. ISIS not only sought a physical caliphate, but also to influence individuals around the world to act as lone wolves if necessary, conducting effective recruitment through social media platforms. The group's use of technology might seem a bit hypocritical considering their penchant for the earliest days of Islam's pre-Medieval era. They pursue modern twists to convert followers to their ideologically radical aims.

When the US and allies had to reenter Iraq, and then Syria, to defeat ISIS, there was a diaspora effect. ISIS elements eventually established a foothold in Afghanistan—an area they view as the “Khorasan” region of central Asia. Hence, they added a K, “ISIS-K.” ISIS-K despises Shiites as much as it despises any other group. They view Shia as apostates to Islam. They routinely carry out violent attacks on ethnic Afghan Hazaras, who mostly practice as Shia. Yet, ISIS-K's version of a legally ordained Caliphate is in direct competition with the Taliban and its affiliates, al-Qaeda and the Haqqani network. They might share similar ideologies, but the conflict is like a paraphrase of an American Western adage: “this town ain't big enough

for the two or three or four of us.”

#### **Rule of Law**

This takes us back to the Islamic Republic of Afghanistan: the legal governance structure supported by coalition forces for almost 20 years (2001-2021). NATO conducted Operation Resolute Support in conjunction with the US's Operation Freedom's Sentinel (the 2015 successor operation to OEF). A large portion of the NATO mission included US military elements and command structure to manage Train, Advise, and Assist (TAA) efforts with Afghan National Defense and Security Forces (ANDSF). Most of the TAA efforts were with the Ministry of Defense (MOD) and Ministry of Interior (MOI). The MOD controlled military elements of the ANDSF, while MOI controlled the civil law enforcement elements. MOI had a national police force, unlike the US, which has separate state systems.

The NATO mission included a “Rule of Law” organization for contributing to a legal line of effort—one that trained, advised, and assisted the ANDSF leadership, legal, and Inspector General departments. The Rule of Law (ROL) directorate was predominantly staffed with US personnel, including lawyers. The ROL mission attempted to foster the equal application of the law within all strata of government and society without bias or favor. In the context of military operations, advisors sought to encourage fair laws and applications

in the government ministries, particularly those impacting the judiciary, law enforcement, and prison systems.

The 2004 Constitution of the Islamic Republic of Afghanistan incorporated a democratic system in an Islamic legal framework. It was not extremist in the way the Taliban seek to impose their stricter version of Islamic governance, likely to change the name to something like the Islamic Emirate of Afghanistan and without many democratic elements. Rather, the former government we supported was more moderate, affording opportunities for women and equal treatment within the criminal justice system for all ethnicities. It was not as harsh as some might imagine under more fundamental regimes, e.g., a larcenist's hand getting chopped off or adulterers being stoned.

Corruption became an Achilles heel within the ANDSF and the government of Afghanistan as a whole. It is a wicked problem. Our NATO Rule of Law elements tried to get Afghan leadership to address corruption as quickly and effectively as possible. Some of the corruption was endemic in systems. For example, human resources, especially promotions to management levels, was rife with three problems: (1) nepotism, cronyism, patronage, (2) pay-to-play schemes, and (3) threats. The Afghan legal community and governance structure had a very difficult time getting a handle on this.

Aside from the evidentiary issues in corruption cases—e.g., “is there video?”—some leaders were complicit or incompetent. To use an analogy, the “rules” for advancement were unwritten, similar to the unwritten rules of baseball. How long can a batter stare at a homerun ball before he finds himself getting hit by a pitch on his next at bat? There is no rule, just a wink and a nod. That is the type of unwritten practice that could permeate logistics systems, employment opportunities, military promotions, and so on. As an example, for a police officer on a distant checkpoint to get promoted to a better job he often had to come up with money to pay a supervisor at a district level. How did he get the money? Graft—requiring payment or favors from travelers. How would a border patrol chief get promoted to regional chief or central government? He could divert fuel tankers coming over the border, turn a blind eye when the Taliban transported poppies or opium for sale; he might even sell a stash of weapons to VEs



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and later claim they were stolen.

Another Rule of Law mission was removing corrupt leaders and supporting the placement of good ones. Labor and employment law does not get easier overseas. Removal and/or prosecution could be accomplished sometimes through intelligence assets, informants, or assistance from Afghan partners. Unfortunately, some levels of corruption were not limited to theft of commodities or bribery for a job. Corrupt actors could have ties to Taliban or VEs. We labeled them as “insider threats.” An event involving an insider threat could disrupt TAA activities for days, weeks, or months as the extent of the threat was evaluated. For example, VE sympathizers would carry out acts of violence, such as shooting members of their Afghan unit or coalition military personnel. These incidents broke trust within the units and raised suspicions about force protection.

Now that the Taliban is the *de facto* government, rule of law will change. It will be grounded in the Taliban’s version of Sharia, likely influenced by the most extreme Salafi-Jihadists who make the region their home.

Regardless of how polished Taliban diplomacy and public relations efforts may be, they will implement harsh, fundamental measures, unfortunately resulting in death and oppression for much of the populace. There will be no freedom of speech; no free exercise of religion; no female freedom to live, travel, work, or marry as one chooses. Sadly, the dreams of opportunity that so many women, men, and children have had for the past 20 years may now turn into nightmares.

### Tribute

The scars from conflict are many. On September 11, 2001, the United States was attacked by terrorists: 2,996 people died. Close to a 1,000,000 soldiers, marines, airmen, and sailors have served in Afghanistan. At the height of US presence in 2011 there were about 110,000. By 2021 there were 2,500.<sup>5</sup> Of all the brave men and women who served, 2,461 died by the end of operations. Terrorists killed 13 of our finest in Kabul on August 26, 2021. Our troops bravely performed a mission in honor of their American oaths, serving to protect diplomat-

ic personnel, American citizens, Afghan partners and their families, and our allies.

Every life is worthy of tribute. Every Gold Star family deserves more than we can give. Salute.

The US Armed Forces stand strong and ready to serve wherever and whenever America requires.<sup>6</sup> To those in NC who help our military in any way, you also deserve special thanks. The military members, families, and veterans are connected to the community and choose to call North Carolina home.

Lastly, gratitude that is often unspoken goes to a community that seeks little acknowledgment, yet is so important to the rule of law in our great state, nation, and any country where our citizens may reside: the NC State Bar. The subset of national security lawyers has proven integral to supporting America in war, peace, and the gray zone in between.

We may have closed a chapter in the War on Terror in Afghanistan, but we did not close the book. There are still chapters that militant Jihadists want to write. Never forget. ■

CONTINUED ON PAGE 19

# Confederate Monuments

BY SCOTT HOLMES

I sat next to my African American client in the historic Alamance Courthouse waiting for the judge to call the jury pool into the courtroom. He was charged with using profanity on a public highway and reckless driving. He had cussed back at some officers who cussed at him as he drove through the scene of a traffic accident. The next morning, four white police officers showed up outside his trailer to serve warrants for these traffic offenses. They could have issued a citation or served a criminal summons, but they had a magistrate issue an arrest warrant to physically take him into custody. They had their tasers drawn when he came out of his door in his boxer shorts. They tasered him immediately, and when he fell to the ground and lay there motionless, they tasered him again in the back. As a result of their use of force, my client was seriously injured and charged with resisting arrest. The statistics on traffic stops, consent searches, and use of force for this department demonstrated a racial disparity and racial profiling.<sup>1</sup>

As jurors came into the historic courtroom in the center of Graham, North Carolina, I looked at the portraits of white judges on the wall. Then I looked out the window and saw the Confederate monument. A soldier, with a gun, who fought to defend the enslavement of my client's ancestors. I saw on the monument the words, "CONQUERED THEY CAN NEVER BE, WHOSE SPIRITS AND WHOSE SOULS ARE FREE," and words of "IMMORTAL GLORY..."

My client and I wondered if he could get a fair hearing in this historic courthouse, a museum to the history of white supremacy.

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I sat in the chambers of a visiting superior

court judge in Alamance County before court. I was explaining the religious reasons that I do not wear a tie in court, and the judge was curious and very understanding. Then, out of the blue, he shared this anecdote:

He received a letter from an African American citizen requesting to be excused from jury duty after receiving a summons. The letter explained that the citizen could not bear the pain of walking past the Confederate monument in front of the courthouse. The judge admitted that he had wondered about the impact of that monument on black residents. I shared that my Black colleagues and clients have expressed similar pain. The judge agreed and said he released the potential Black juror from service.

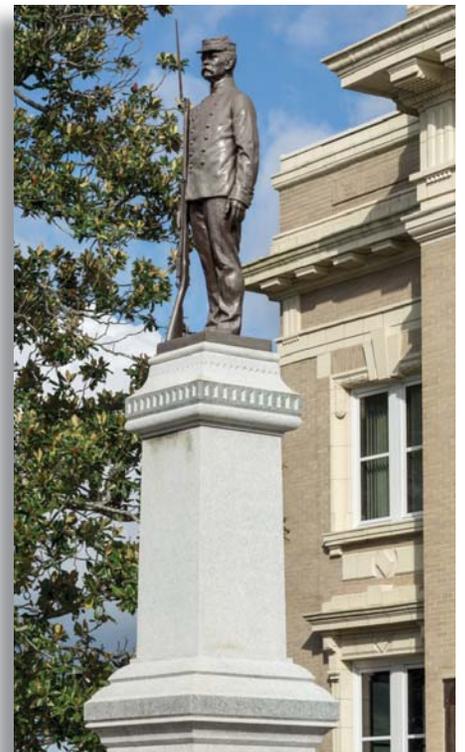
While it was merciful of the judge to release the juror from service, I wondered if this was yet another example of our legacy of discouraging Black people from serving on juries. The Confederate monuments standing before the courthouses around our state impact the administration of justice.

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The Confederate monument in front of the Alamance County Courthouse was erected in 1914.<sup>2</sup> Six years later in 1920, a white mob kidnapped a Black man near the courthouse on his way to court—within view of the Confederate monument—and lynched him.<sup>3</sup> No one who participated in the racial terror lynching was prosecuted.<sup>4</sup>

There are 42 Confederate monuments outside North Carolina courthouses, and they impact the administration of justice in this state. The North Carolina Commission on Racial & Ethnic Disparities in the Criminal Justice System have launched a campaign to remove these monuments.<sup>5</sup>

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*A statue of a Confederate soldier stands in front of the Anson County Courthouse in Wadesboro, North Carolina. The memorial was erected on January 19, 1906, by the United Daughters of the Confederacy.*

White supremacists erected Confederate monuments in front of courthouses around North Carolina to celebrate their victory, which ended the brief era of legal, political, and economic freedom African Americans achieved during the period of reconstruction.<sup>6</sup> North Carolina is home to some of the highest numbers of Confederate monuments in the South.<sup>7</sup> Placement of Confederate monuments outside courthouses conveyed to white and Black citizens the triumph of the white supremacist legacy over the "Equal Protection

of the Law” set forth in the Reconstruction Constitutional Amendments.<sup>8</sup>

In the aftermath of the Civil War, white southern elites faced the destruction of their wealth and a challenge to their political power. They suffered destruction of two-thirds of their wealth, two-fifths of their livestock, one-fourth of their white male relatives between the age of 20 and 40, half of their farm machinery, most of their railroads and industrial infrastructure, and an overall 60% decrease in their wealth.<sup>9</sup> The passage of the Reconstruction Acts, the Thirteenth, Fourteenth, and Fifteenth Amendments, and the North Carolina state constitution opened the doors of political power to African Americans and recently freed slaves.<sup>10</sup> A coalition between Black Republicans and white Populists—a “fusion” interracial coalition—took control of the North Carolina General Assembly, the governorship, and “countless local offices, threatening the power of both the remnants of the old planter class and the emerging industrial leaders of the New South.”<sup>11</sup> In response, white southern Democrats organized and conducted a statewide political and violent “white supremacy campaign” to retake power from the coalition of white and African American citizens.<sup>12</sup> Conventions were held throughout the South to reestablish rule based upon white supremacy.<sup>13</sup> “The ‘revolution’ in North Carolina came at the end of a series of white supremacy movements that swept the South and inaugurated a one-party system that ruled the region for two-thirds of the 20th century.”<sup>14</sup> The massive white supremacy campaign led to the cultural and legal separation of the races in politics, housing, employment, education, marriage, and society—enforced by law and by white terrorism, racial intimidation, and lynching.<sup>15</sup>

In the author’s opinion, there is overwhelming historical evidence for concluding that, more than any one group, lawyers were responsible for the success of the white supremacy campaign, the defeat of reconstruction era reforms, the codification of racial segregation, the enforcement of the laws separating races, and the refusal to prosecute members of white mobs engaged in extra-judicial racialized terror lynching. White lawyers led the way in making white supremacy the law of the land. They organized an all-white Bar and excluded Black lawyers from practice.<sup>16</sup> Three North Carolina white lawyers—Alfred Waddell,

Henry London, and Chief Justice Walter Clark—exemplify the connection between the political campaign for white supremacy, the legal codification of white supremacy, and the erection of Confederate monuments in front of North Carolina courthouses that celebrated that victory.

Alfred Moore Waddell was an attorney leader in the white supremacist campaign. He helped draft and promulgate the “White Declaration of Independence” in Wilmington, North Carolina, in 1898.<sup>17</sup> He helped lead the violent white supremacist insurrection against the governing Black middle class in Wilmington, which killed African American residents, drove others from their businesses and political positions, and seized their homes and business.<sup>18</sup> White supremacist leaders of the coup killed Black citizens and threw their bodies into the Cape Fear river.<sup>19</sup>

In a speech in Goldsboro before an election, Waddell said, “You are Anglo-Saxons. You are armed and prepared and you will do your duty...Go to the polls tomorrow, and if you find the negro out voting, tell him to leave the polls, and if he refuses, kill him, shoot him down in his tracks. We shall win tomorrow if we have to do it with guns.”<sup>20</sup>

Waddell spoke at several dedication and unveiling ceremonies of Confederate monuments.<sup>21</sup> At the dedication for the Confederate monument at the capitol grounds in Raleigh, Waddell said “[Slavery] was an institution, guaranteed and protected by the Constitution, as exclusively within the control of the state, and when the equality and reserved rights of the states were attacked by interference with it, there was just ground to believe that other preserved and guaranteed rights would be assailed, and the equality of the states destroyed.”<sup>22</sup> Alfred Waddell was a statewide speaker advancing white supremacy. There was a chapter of the United Daughters of the Confederacy named in his honor, and he was a charter member of the North Carolina Bar Association and its first vice-president.<sup>23</sup>

Henry London and his wife organized the erection of Confederate monuments and spoke at Confederate monument dedication ceremonies. Henry London was adjutant general and chief of staff for North Carolina’s United Confederate Veterans (UCV) and chaired or served on committees to erect memorials to North Carolina’s Confederate dead on battlefields in other states and the Confederate Women monument in Raleigh.<sup>24</sup> On his pub-

lic speaking tour promoting amendments to the North Carolina Constitution to restrict the right to vote for Black residents he told a Greensboro audience:

Now it is determined that white supremacy shall be made permanent by ridding the state of the ignorant negro vote...The whole situation is embraced in the single question: Can North Carolina be governed better with or without the ignorant negro voters? There should be no hesitation on the part of any man, with pure white blood in his veins, in answering that question...[Black voters] were as unfit to exercise the right of suffrage as their savage brother, who naked roamed the wilds of Africa.<sup>25</sup>

In his speech at the dedication of the Confederate monument at the Alamance County courthouse, London glorified the heroism of confederate soldiers against overwhelming resources of the Yankee invaders, saying “Why, we whipped the Yankees and got their own guns and whipped them with them, and many of you may have shot the Yankees with their own guns.”<sup>26</sup> He exclaimed, “Oh! It is a beautiful thing, eminently fit and proper to erect a monument in front of every courthouse throughout our Southland in memory of the Confederate soldiers, but, my friends, while this is something to be commended, and we thank the Daughters of the Confederacy of the county for having this monument placed here, yet let me tell them and all of you younger people not to forget the living while you honor the dead.”<sup>27</sup>

London was chair of the committee to revise the Constitution and bylaws of the North Carolina Bar Association on February 1899.<sup>28</sup> Even though the original constitutional and bylaws of 1885 made the bar association open to “any member of the legal profession in good standing,” London’s committee changed the bylaws to say “any white person shall be eligible...”<sup>29</sup> Like Waddell, London used his credentials as an attorney to codify white supremacy and celebrated the placement of Confederate monuments outside courthouses around the state.

Walter Clark was the chief justice of the North Carolina Supreme Court from 1903 to 1924.<sup>30</sup> He grew up on a plantation of several thousand acres in Halifax County along the Roanoke River, and his father owned over 100 slaves on one of the wealthiest plantations in North Carolina.<sup>31</sup> He fought as an

officer for the Confederacy in the civil war.<sup>32</sup> Clark was paternalistic in his views toward Black residents, and he clearly advanced white supremacy. He wrote during his 1902 campaign for chief justice that “the proper order of things...demands Anglo-Saxon supremacy.”<sup>33</sup> He supported giving the right to vote to white women, in part because it would negate the vote of Black residents, saying in a speech, “the admission of the women to the ballot box will be the only certain guarantee of white supremacy.”<sup>34</sup> His opinions as a Supreme Court justice affirmed racial segregation.<sup>35</sup> At a commencement speech to Black graduates at St. Augustine’s college in Raleigh, Justice Clark made it clear that he supported racially segregated schools, public accommodations, transportation, racial disenfranchisement, and whites-only juries in the courts.<sup>36</sup> He did not believe lynching was a racial problem, stating “this is not a matter of race but of the lawless passions of men who believe that prompt action is necessary because the processes of the courts, often uncertain, are often too long delayed.”<sup>37</sup>

North Carolina Supreme Court Justice Walter Clark also spoke at dedication ceremonies for Confederate monuments, and was introduced by Henry London at his speech commemorating the monument in Pittsboro on August 23, 1907.<sup>38</sup> Justice Clark was the keynote speaker at the Confederate monument dedication ceremony in Asheboro, September 7, 1911, celebrating the Confederate monument in front of the courthouse.<sup>39</sup> He said, “In the long centuries that are to come, legend and song in this fair Southland will keep bright the story of the Confederate soldier....You raised up the broken and discarded statues of law and order and replaced them with honor upon their pedestals. You cleared your fields of the brambles that had grown up and your government of the bad men who had climbed to power.”<sup>40</sup> After a long tale of heroic deeds by confederate soldiers against great odds, Justice Clark complained that “the monuments which the fair hands of our women have caused to be raised to the memory of the Confederate soldiers are not the only ones. The enemy, in sad sincerity, has erected far more costly ones.”<sup>41</sup> By “enemy” he meant the United States of America, and the Constitution he swore to protect when he became chief justice of the North Carolina Supreme Court.

The Confederate monuments that were

erected in front of courthouses around the state were promoted and made possible by white lawyers supporting white supremacy. These lawyers passed the laws and decided the cases that made racial segregation and disenfranchisement the law of North Carolina, effectively ending the legal and political freedom won for Black residents as a result of the Civil War and reconstruction. The white lawyers and leaders picked courthouses for the placement of Confederate monuments to demonstrate to the entire community the victory of white supremacy and its codification in the law. No professional group did more to legislate and enforce racism than lawyers, and no group did more to fund and set up these monuments. It is our obligation to actively repair the racial harm our profession has caused, and the removal of these symbols of white supremacy from our courthouses would be a good next step. ■

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*Mr. Holmes has written a more in-depth piece on this same topic, and it will be published in an upcoming edition of the University of North Carolina School of Law’s Law Review (100 N.C. L. Rev. F. \_\_ (2022)).*

## Endnotes

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2. [docsouth.unc.edu/commland/monument/10](http://docsouth.unc.edu/commland/monument/10).
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5. [nccred.org/campaign](http://nccred.org/campaign).
6. Brian K. Fennessy, *Silent Sam and other Civil War monuments rose on race*, Raleigh News and Observer, Nov. 23, 2017. ([newsobserver.com/opinion/op-ed/article/186178233.html](http://newsobserver.com/opinion/op-ed/article/186178233.html)) “To answer this question, I searched for dedication speeches that were given at Confederate soldier monuments across North Carolina. Most orations were given by veterans and state officials. I successfully tracked down 30, and they support two conclusions: 1) white nationalism was a fixture of Confederate monumentation, and 2) Confederate soldier monuments honored veterans for their postwar success in eroding Black equality as much as for their failed wartime sacrifices. Racist language pervades the dedication speeches. If one assumes that the speaker is excluding Blacks from the term “southerners,” when its use clearly meant only white southerners, then white identity politics are present in every speech. But speakers were often more explicit. 14 speeches explicitly invoked “our Anglo-Saxon ancestors,” “love of race,” or “your own race and blood.” *Id.*

7. Erika Williams, *Confederate Statue Removed From NC Courthouse Grounds*, Courthouse News Service, (Mar. 12, 2019), [courthousenews.com/confederate-statue-removed-from-nc-courthouse-grounds](http://courthousenews.com/confederate-statue-removed-from-nc-courthouse-grounds).
8. Confederate monuments sit outside courthouses in: Albemarle (1925), Asheville (1896), Bakersville (2011), Burgaw (1914), Burnsville (2009), Clinton (1916), Columbia (1902), Concord (1892), Currituck (1918), Dallas (2003), Danbury (1990), Dobson (2000), Durham (1924), Elizabeth City (1911), Gastonia (1912), Graham (1914), Greenville (1914), Hendersonville (1905), Hertford (1912), Laurinburg (1912), Lincolnton (1911), Louisburg (1923), Lumberton (1907), Marion (unknown dedication), Morganton (1918), Newton (1907), Oxford (1909), Pittsboro (1907), Plymouth (1928), Roxboro (1931), Person County (1922), Rutherfordton (1910), Shelby (1907), Snow Hill (1929), Statesville (1906), Taylorsville (1958), Trenton (1960), Wadesboro (1906), Warrenton (1913), Waynesville (1940), Wilkesboro (1998), Wilson (1926), and Winton (1913). At schools in North Carolina: Asheville, Vance Elementary School; Charlotte, Zebulon B. Vance High School; Henderson, Kerr-Vance Academy, Northern Vance High School, Vance Charter School, Vance County Early College High School, Vance County Middle School, Vance County High School, and Zeb Vance Elementary School. See Carolina Civil War Monuments, North Carolina Department of Cultural Resources, North Carolina Civil War Monuments, [ncmonuments.ncdcr.gov](http://ncmonuments.ncdcr.gov).
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10. Laura F. Edwards, *Captives of Wilmington*, in *Democracy Betrayed*, eds. David S. Cecelski and Timothy Tyson, 117 (1998).
11. Timothy Tyson and David Cecelski, *Introduction to Democracy Betrayed*, in *Democracy Betrayed*, eds. David S. Cecelski and Timothy Tyson, 4 (1998).
12. H. Leon Prather Sr., *We Have Taken a City*, in *Democracy Betrayed*, eds. David S. Cecelski and Timothy Tyson, 20-21 (1998); Moore, 205 F. Supp. 3d at 840 (“Upon the readmission of the Confederate states to the Union, the South committed itself to two “new” causes—the continuation of a racial caste system and the endurance of Antebellum culture. During Reconstruction, organizations like the Ku Klux Klan, Knights of the White Camellias, and the White League sought to preserve white supremacy by using intimidation and violence to terrorize African-Americans.”)
13. *Moore v. Bryant*, 205 F. Supp. 3d 834, 844 (S.D. Miss. 2016), aff’d, 853 F.3d 245 (5th Cir. 2017) (“In 1890, Mississippians held a Constitutional Convention. Its purpose was clear. ‘Our chief duty when we meet in Convention, is to devise such measures, consistent with the Constitution of the United States, as will enable us to maintain a home government, under the control of the white people of the State,’ said State Senator Zachariah George. In other words, the convention was not intended to ensure the proper implementation of the post-Civil War Constitutional Amendments, but rather to permit ‘white people’ to take back their state from the multi-racial coalition which had governed Mississippi after the War.”)
14. Michael Honey, *Class, Race, and Power*, in *Democracy Betrayed*, eds. David S. Cecelski and Timothy Tyson, 178 (1998).
15. Raymond Gavins, *Fear, Hope, and Struggle*, in

- Democracy Betrayed*, eds. David S. Cecelski and Timothy Tyson, 188-189 (1998); Moore, 205 F. Supp. 3d at 840-41 ("Racial violence continued through the 1870s as local Klan groups lynched, beat, burned, and raped African-Americans. Despite the Klan's record of violence, 'Southerners romanticized it as a chivalrous extension of the Confederacy.'").
16. Richard Paschal, *Jim Crow in North Carolina 1865-1920* (2020).
17. *White Declaration of Independence*, November 9, 1898, (bit.ly/3mg1hmG) ("Believing that the Constitution of the United States contemplated a government to be carried on by an enlightened people; Believing that its framers did not anticipate the enfranchisement of an ignorant population of African origin, and believing that those men of the State of North Carolina, who joined in forming the Union, did not contemplate for their descendants subjection to an inferior race.—We, the undersigned citizens of the City of Wilmington and County of New Hanover, do hereby declare that we will no longer be ruled, and will never again be ruled by men of African origin. This condition we have in part endured because we felt that the consequences of the War of Secession were such as to deprive us of the fair consideration of many of our countrymen. We believe that, after more than thirty years, this is no longer the case."); *Wilmington Star News* (Nov. 17, 2006) (bit.ly/3kVPFFU).
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21. Alfred Moore Waddell gave the dedication speech at the Confederate monument erected at the courthouse in Forsyth County on October 3, 1905. (docsouth.unc.edu/commland/monument/15); Dedication Speech at Confederate Monument Smithfield, North Carolina Johnston County, May 10, 1887 (docsouth.unc.edu/commland/monument/507); Dedication Speech at the Guilford County Courthouse, July 4, 1906 (docsouth.unc.edu/commland/monument/133); Dedication Speech at Confederate monument, Raleigh Capitol Grounds, May 20, 1895 (docsouth.unc.edu/commland/monument/106).
22. Alfred Moore Waddell, Address at the Unveiling of the Confederate monument at Raleigh, NC, May 20, 1895 (bit.ly/2YGZ9WA).
23. Report from the executive director of the North Carolina Bar Association Board of Governors and the North Carolina Bar Foundation Board of Directors regarding the relationship between the NCBA and systemic racism in North Carolina, November 2020. (bit.ly/3kWrffv).
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26. Henry London Speech, *The Alamance Gleaner*, May 28, 1914.
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29. *Id.*
30. Willis P. Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C. L. Rev. 287 (1985).
31. *Id.* at 289.
32. Presentation of the Portrait of the Late Chief Justice of the Supreme Court Walter Clark, October 28th, 1924, 188 NC 839-840 (1924).
33. Willis P. Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C. L. Rev. 287, 303 (1985) (citing H. Page, Some Campaign Letters 58 (1902)).
34. *Id.* (citing W. Clark, Address to University of North Carolina Law Class, Chapel Hill, North Carolina 6 (Jan. 31, 1919) (unpublished address available in North Carolina Supreme Court Library, Raleigh, North Carolina)).
35. See e.g., *State v. Wolf*, 145 N.C. 440, 59 S.E. 40, 42 (1907)(upholding racial segregation in schools); *State v. Darnell*, 166 N.C. 300, 81 S.E. 338, 340 (1914) ("There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars and in similar matters."); *Johnson v. Bd. of Educ. of Wilson Cty.*, 166 N.C. 468, 82 S.E. 832 (1914)(concurring in an opinion holding "children are not entitled to attend the public schools for the white race, for the reason that they have negro blood in their veins" because the child had one sixteenth parentage).
36. Walter Clark Speech, "The Negro in North Carolina and the South," Commencement Address at St. Augustine's College, Raleigh, North Carolina, May 26, 1920. (docsouth.unc.edu/nc/staugust/clark.html)
37. *Id.*
38. Henry London introduced Justice Walter Clark as the main speaker at the dedication of the Confederate monument in Chatham County on August 23, 1907. (docsouth.unc.edu/commland/monument/11/)
39. The Address of Chief Justice Clark, *The Courier*, Asheville Sept. 7, 1911.
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## National Security Law (cont.)

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*Note: This article is an expression of the author's personal views. It is not a representation of official policy or position of the US Army, Department of Defense, or US government.*

### Endnotes

1. During 2001-2021, the US military conducted Operation Enduring Freedom, Operation Freedom's Sentinel, and NATO's Operation Resolute Support 2001-2021. The latter included over 40 countries helping with long-term stabilization efforts and attempting to transform Afghanistan into a place that would not be a harbor for VEs.
2. It is fair to say that Afghanistan was part of a proxy conflict during the Cold War between the US and USSR. The Afghan mujahedeen of the 1980s helped force the

Soviets to withdraw in 1989. The power vacuum left behind resulted in civil conflict with the Taliban gaining control in 1996. Ironically, even though the US and others had assisted the Mujahedeen in their bid against the Soviets, some members would later merge with al-Qaeda, Haqqani, and/or the Taliban, whose aims were attacking US interests.

3. Disclaimers: (a) Nothing in this article is intended to associate all of Islam with terrorism. In fact, the point is to draw a distinction between the vast majority of peaceful Muslims and the small, but determined, minority of violent Islamists. The former might even deny that the latter are Muslims at all. (b) The author is not a Sharia/Islamic law scholar. It is a complicated area of law, and even one's expertise in it might depend on the school of legal thought to which one ascribes. But some general precepts provide relevant background.
4. Shia Islam is a separate sect of Islam. It has its own school(s) of thought. The tendencies for violent imposition of its tenets has most often come in the form of state sponsorship from Iran, such as use of Hezbollah and militias.
5. The number of civilian employees and contractors, including diplomats and other government agency representatives, likely equals or exceeds that amount. Over 40 coalition countries sent thousands of their troops. Over 3,800 US contractors, 1,200 coalition partners, and 100,000 Afghans died.
6. The mottos. Army: "This we'll defend." Marines: "Always faithful." Air Force: "Aim high...fly-fight-win." Navy: "Not self, but country." Coast Guard: "Always ready." US Space Force: "Always above."

# Interview with Attorney and Author Geeta Kapur

BY MARK HENRIQUES

State Bar Councilor Mark Henriques sat down with attorney and author Geeta Kapur to discuss her new book *To Drink From the Well: The Struggle for Racial Equality at the Nation's Oldest Public University*. The following are edited excerpts from that discussion. You can listen to the

full interview on the State Bar Podcast *BarTalk* at [bit.ly/KapurInterview](http://bit.ly/KapurInterview)

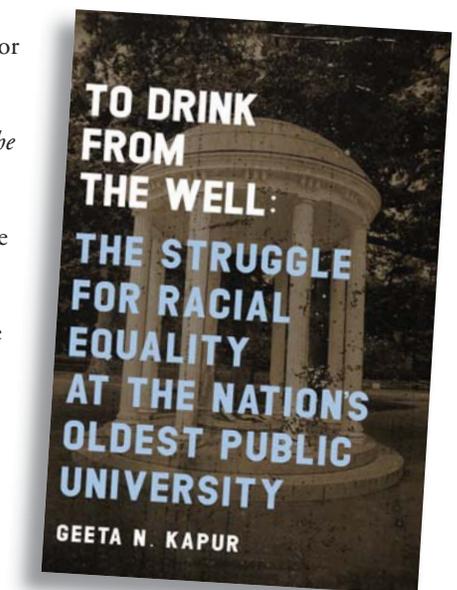
**Q: Tell us a little bit about yourself and your background.**

A: I started practicing law in 2003. I knew after clerking at two big law firms that that was not what I wanted to do. I really wanted to help poor people. So I started with a fellowship at the Center for Death Penalty Litigation. From there, I went to the Public Defender's Office in Orange County. I only stayed there for two years. I remember one of my professors in law school telling me that, "You know, if you do decide to do this work, check in with me at the second year, you're not going to be able to stay much longer than that." He was right. After having 30 cases, sometimes 40 cases a day, I was just exhausted. But I still was very committed to doing the work. I cared deeply for my clients. So I went into private practice and got on the court appointed list in Durham, and was able to manage my caseload much better. And

then I got on the appellate defender's list—I also do appellate work. I consider myself a civil rights attorney.

**Q: Tell us about how this book came to be. There's obviously a lot of research and writing—where did this idea come from?**

A: In 2010 I was preparing to teach as an adjunct professor at UNC in the undergraduate African American Studies Department. In the Wilson library I saw a poster about an exhibit that was called "We shall not be moved." It was an exhibit on African Americans in North Carolina. They had an extensive section on education and I saw two black and white photographs. One was of the first two African American students at the law school of UNC. The other showed three young men seated at the Old Well—they were the first three Black undergraduates at UNC. Both of the captions under the pictures indicated that there had been litigation



to get the students into Carolina. In fact, litigation that went all the way up to the US Supreme Court. I was stunned. And I felt betrayed because I had been at Carolina for seven years and never learned about these men or their lawsuits. So I went looking for their stories. I went looking for the cases first, because, you know, obviously, I'm a lawyer. I was fascinated by the fact that these cases went all the way up to the US Supreme Court. I found the cases, I read them, and then I just felt like I needed to go and find out who these men were. Where did they come from? What led them to do this? And, in finding their stories, I found a much larger story. It seemed that the more research I did, the more I had to do. I felt called to write a book about them. I thought I was writing a book about those two legal cases, but it ended up much larger than that.

**Q: I'm impressed by the amount of research that you've done. By my tally there are 893 footnotes. That's a pretty remarkable number, even for serious research texts. I'm curious about the decision to go the heavily annotated, scholastic approach.**

A: Well, I knew this book was going to be controversial. I knew I was going to be called upon to defend my work, so that's why I documented everything that I wrote. There are some parts of the book where it's clear, it's my voice, it's my opinion, I'm narrating a particular situation. But, where there are facts, I have documented those facts. It is my hope that students will go through the research themselves. I could imagine someone teaching a law school class on my book, and requiring them to go and find the transcript from the law school trial. Those are the two reasons why I documented it so heavily.

**Q: Tell us about the process, because you obviously have a day job. Many lawyers think it would be interesting to write a book. Give us a sense of the process and how long it took.**

A: It took several years to compile the research. I started out at the Wilson library digging through archives, including those of Frank Porter Graham, for example. I had a framework of the people who were involved in the desegregation of the university and I'd go through their papers. Then I went through the university's official papers. I also wanted to go through the governor's papers and the attorney general's papers, because the university was very closely tied and controlled by Raleigh and the politicians in Raleigh. So I went to the state archives in Raleigh and looked through the governor's papers and the attorney general's papers. Some places I went to. I called other archives and asked for particular materials. The research process was very, very arduous. It took me a long time to conduct all this research. I requested photocopies of everything, and I would come back after receiving them and throw them in a corner of my office because I was hoping that I just would never have to write this book.

The way that I managed it is I would take some time off here and there, maybe a week, maybe two weeks here and there. It was very difficult to do, because I didn't have a stipend, I didn't have a grant to write this book, I just had a calling to write it, and the calling wouldn't go away. It was very difficult to conduct the research and practice at the same time.

**Q. Right at the beginning in chapter one, we meet Wilson Swain. Who was he and how did you learn his story?**

A. The more research I did, the more I had this question: When did this all begin? I had taken African American history courses at UNC. I knew slavery had occurred, I knew Jim Crow had occurred. I just wondered, when did this all start? One day I was preparing to go dig through the archives again. I got off the elevator at the Wilson Library, and I walked through the glass doors at the front. They had a photograph of an African American man. It was a very grainy photograph perched on a stand. I could not take my eyes off of him. It was one of those moments when the world stopped around me. As I read the display, I learned that he was a slave of President Swain, who was, I believe the third president of the university. I just knew he was the beginning of the book.

I went to Wilson Swain's grave and was struck by the inscription on it. He's probably the only enslaved person who has such an inscription engraved on a sandstone pillar. The thing that caught me was that the last line was, "Let him rest here until he's ready for work again." I couldn't let that go. I couldn't let his image go, and I couldn't let that go. And I remember sitting on the ground there, in tears, thinking about what deferred dreams he had for his children. He had a large family. What dreams he and his wife had together. And so I made a promise to him before I left that he would be the beginning. So that's how I found Wilson Swain Caldwell.

Part of the issue with the archives is that they're devoid of any information on enslaved people. You can't go to the archives to find Wilson Caldwell's papers or anything that he's authored, for example. So, to find that kind of narrative, I had to employ a method that Toni Morrison used in her book, "*Beloved*." I tried to put myself in his position and take the reader into his world to understand what it was like to be an enslaved person at the university.

**Q. In the second chapter you talk about the Black Wall Street of America. Can you share a little bit about what you discovered?**

A. The five men in the two photographs that I described were all from Durham. The reader needed to know how this independent community got established. Initially the reader may think, "Well, okay, we just finished in Chapel Hill, why are we going to Durham?" But there was a very strong connection

between Durham and the University of North Carolina. Indeed, every case to desegregate, every battle to desegregate the university came from this independent Black community. Many people have written about the Black Durham, about the Black community in Durham called Hayti, and about the Black Wall Street of America. But, I don't think anybody has made the connection between it and the University of North Carolina.

**Q. You discuss a number of court decisions in the book. What one or two of the decisions was the most impactful or surprising to you?**

The first desegregation case in the nation was filed against the University of North Carolina in 1933. So *Brown v. Board* really began at UNC. What most people don't know is that *Brown* ended at UNC as well. The second opinion in *Brown* came out in 1955 and the court said, "you need to desegregate with all deliberate speed." Well, UNC took the position that *Brown* only applied to K-12 public schools, it did not apply to universities and colleges, and it denied admission to the three young African American men who had applied to the undergraduate college.

What really struck me was that UNC fought that case all the way up to the US Supreme Court. The plaintiffs were denied admission to UNC post-*Brown* and filed a lawsuit. The lawsuit was heard in federal court by a three-judge panel because the trustees were deemed to be state actors by the judges. The panel ruled that they had to be admitted to the university if they were qualified, because *Brown* did not apply just to schools that were lower public schools and secondary schools. In fact, they said that *Brown* applied with greater force to colleges and universities. Well, the trustees of UNC took the position that they were going to appeal that ruling. First, they were going to try to get a stay of the ruling to keep the three young Black men out, and then they were going to appeal it all the way to the US Supreme Court.

The state's brief to the Supreme Court really struck me. They didn't have case law to support their position. I wouldn't dare submit a brief without any case law. When I read it, I thought, I have never read anything like this. They basically told the Supreme Court that they erred when they decided *Brown*, and this case is going to give them an opportunity to decide *Brown* the correct way,

because *Brown* does not apply to colleges and universities. I found some communications between the attorney general and the governor where the attorney general says we don't have a chance at winning, knowing the Supreme Court the way that it is, but we need to fight anyway. So it's really their brief that struck me and stays with me to this day. And so they petitioned for review, and the Supreme Court denied review.

**Q. It is hard to believe that people were taking that position less than 60 years ago. You document a number of very disturbing historical incidents of racism and discrimination throughout the history of UNC, but you also talk about some inspirational leaders that really moved the ball forward and tackled some of those challenges. Of the people you wrote about, who stands out?**

A. I would start with President Frank Porter Graham. He was the first president of the consolidated university, which at that time was UNC Chapel Hill, the University of North Carolina State College in Raleigh, and then the Women's College in Greensboro. He was a small man, five foot four. But in so many ways, he was a giant. And I say that because he came in during the Great Depression and he was a strong advocate of academic freedom. I want to read a quote from my book, it's from his inauguration speech. He says, "Along with culture and democracy must go freedom. Without freedom there can be neither true culture, nor real democracy. And without freedom, there can be no university." So I really respected the fact that he was a fierce defender of academic freedom.

A lot of people don't know that he's the one who took the University of North Carolina to national prominence during Jim Crow. He was appointed to a number of committees by President Franklin Delano Roosevelt and then subsequently by President Harry Truman. There were many good things about him. He would loan money to the students, he would let them live in the President's Home. In fact, the trustees got so angry at him they passed a ruling saying the president could not give students money. But the thing that stays with me is that he refused to argue. I mean, as a lawyer that's just difficult to imagine. But it really came to the forefront in the 1950 senate race in North Carolina.

In 1949, North Carolina Senator Melville Broughton died, and Governor Kerr Scott appointed Dr. Frank Porter Graham to finish

up the term. People were devastated that he was leaving the university. He never thought he would ever leave. In the 1950 election, a prominent lawyer, Willis Smith, ran against Graham. Willis Smith was probably the founder and one of the partners of today's law firm Smith Anderson, which is in Raleigh. They had a primary. And then they had to have a second primary. Well, the Willis Smith/Frank Porter Graham 1950 senate race was one of the most vicious and openly racist campaigns in the state's history, and even in the nation's history. Willis Smith came out attacking Graham. First, he said that Graham was a communist. When that didn't seem to go very far with people, he turned and played the race card. Frank Porter Graham believed that desegregation should happen. He was a moderate, thinking that people would come around through education and religion. Once Smith used the race card against him, Graham's campaign staff came to him and said, "You need to go out and you need to attack Willis Smith. You need to be on the offense about this." Well, he told them in definitive terms, I'm not saying anything against any human being. He refused to argue. He lost the primary. He got on the elevator at the Sir Walter Raleigh Hotel, which is where his campaign headquarters were and where Willis Smith's campaign headquarters were, and went downstairs, congratulated Smith, and then never again talked about the senate race. He never said anything negative about Willis Smith. Willis Smith died a year later, while in office. And, at his funeral, on the back row, sitting there quietly, was Dr. Frank Porter Graham.

The other leader who is just as remarkable as President Graham is Dr. James Shepard. I was stunned that, in 1910, he found this plot of land on Fayetteville Street in Durham. It was a trash heap. He had a vision of having a free standing college there for African American students. He built a college and refused to turn away any poor student from 1912 until 1931. He faced serious financial issues, to the point where creditors were going to auction his home and all of his personal belongings. But he remained steadfast. He did not give up. He found benefactors to get the school out of financial trouble. He would go to the legislature to lobby for funds for the school. He was a master diplomat of Jim Crow. And in fact, he and Dr. Frank Porter Graham would correspond often. It always brought me such joy to see a letter from one

to the other. I was struck by Dr. Shepard's determination to fight within the constraints of Jim Crow. However, he was against desegregation because he believed that desegregation would lead to less funding for his school and that his school would eventually be shut down. He also believed—he would say this all the time—that Negro students do their best work at Negro schools. I was struck by his determination in the face of odds that were against him and remained against him. He just continued to fight for those students. ■

*Copies of Ms. Kapur's book are available for sale on amazon.com.*

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## Ephemeral Messaging (cont.)

6. Michael R. Arkfeld, *Structure and Type of Electronic Information*, in Arkfeld on Electronic Discovery and Evidence, § 3.9 (2015).
7. *Id.*
8. Semins, *supra*.
9. N.C. Rules of Prof'l Conduct 3.4.
10. *Id.*
11. *Id.*
12. N.C. Rules of Prof'l Conduct 3.4, Cmt. 2.
13. N.C. Rules of Prof'l Conduct 3.4, Cmt. 5.
14. *Id.*
15. *Id.*
16. N.C. State Bar, 2014 Formal Ethics Op. 5 (2015) (advising a civil litigation client about social media).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. N.C. Rules of Prof'l Conduct 3.4.
23. *Id.*
24. N.C. State Bar, 2014 Formal Ethics Op. 5 (2015) (advising a civil litigation client about social media).
25. *Id.*
26. This article is an abbreviated version of one published by the author in the Campbell Law Review: *It Was Here a Second Ago: North Carolina Discovery and Ephemeral Messaging Apps*, 43 Campbell L. Rev. (2021).

# Creating Change in the Practice of Law

BY ALYSSA JOHNSON

Is it possible to reshape the practice of law through heart-centered actions; deep self-awareness, and reflection, collaboration, and promotion of dignity in the practice of law?



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According to J. Kim Wright, the answer is yes. Kim, a lawyer since 1989, has made it her mission to know those lawyers in the US and abroad who are here to bring about a shift in consciousness in how law is practiced. A self-proclaimed “aggregator of people,” Kim firmly believes that the current way that law is practiced is unsustainable and that the way of the future is for a legal profession that is rooted in healing, peacemaking, and problem-solving. A legal model where all parties win rather than the unbalanced resolutions that are often seen in law today. A legal profession where everyone involved is treated with compassion and dignity. Legal experiences that are rooted in generosity, integrity, and authenticity. A profession where peoples’ well-being and happiness are recognized and honored. This model is called the Integrative Law Movement, and Kim is one of the lawyers sharing this model

with legal professionals.

As is often the case in life, Kim found her way into this work because of what she didn’t like. Out of family necessity, Kim went to law school, but she’d never had favorable impressions of lawyers. During law school she had some negative experiences with classmates that she later realized were rooted in competition. Seeing such behavior from some of her classmates reaffirmed to her that she didn’t want to be a “jerk” attorney.

After law school, Kim decided not to practice law. She ran a domestic violence center and worked in the nonprofit sector. In 1994 she was at a workshop in Atlanta where she heard a gentleman named Forrest Bayard stand up and say he was a “lawyer who believes in practicing with dignity. I’m a divorce lawyer and it’s my job to make sure the parents are still friends after the divorce so they can raise their children together.”

“It was,” Kim said, “one of those moments where everything went from black and white to color.”

Seeing the possibility offered by Forrest inspired Kim to practice law. She opened up her own practice in 1995 in a small North Carolina town. She found, as many lawyers have experienced, that she had to interact with other lawyers who were jerks. For example, another lawyer would do things like schedule hearings when he knew she would be on vacation. But Forrest’s words kept reverberating in her mind, and knowing it was possible, she believed that she could practice law in a new way.

So she did. She held firm to the belief that if she could have a holistic law practice in her small North Carolina town, she could do it anywhere. Her first steps towards holistic lawyering were to start using mediation in her practice, which was brand new in

North Carolina at that time. She also put practicing with dignity at the forefront of her behavior. She treated people with respect, and developed such a reputation that at the end of trials judges would say that she practiced with esteem and granted dignity to everyone.

She also started using a model of asking her clients what their best possible outcome for the case was, and used that to work towards a goal in the resolution of cases. One day, a truck driver came to her office and said that his wife had left and taken their kids to Tennessee. He was heartbroken because he wanted his kids back. Prior to their departure to Tennessee, they had all been living in a home owned by the truck driver's mother. The truck driver's ex-wife had no legal right to the home and had left North Carolina because a lawyer told her to do so. Kim worked with the parties to create a settlement agreement in which the truck driver's mother deeded her house to the truck driver's ex-wife. He then lived with his mother down the street. The ex-wife came back with the kids and he was able to remain in their lives. Kim, along with the other parties involved, created a solution outside of what the typical legal system could bring in that situation. The model of law at that time was to "go to court, fight a lot, and destroy the family." Kim chose a different way of practicing. A way in which she acted with integrity, humanized the people involved in the settlement proceedings, and worked towards the happiness and well-being of her client, his ex-wife, and their children.

As her practice evolved, Kim hired a paralegal, a receptionist, a social work intern, another lawyer, and two part-time counselors in her law practice, which she named The Divorce and Family Law Center, and created it as a holistic law center. She believes she was the first lawyer in the country to have a social worker on staff.

Her appetite for learning never ceased. She hired a coach and aligned herself with being a peacemaker. She learned multiple models of law practice including collaborative practice, restorative justice, and therapeutic jurisprudence, and used those models to better serve her clients.

Kim became adept at making connections and ensuring that changemaking lawyers knew each other so that collaborations and innovative discussions could be explored by people who wanted to change

how law is practiced. As the adage says, "a rising tide lifts all boats." A colleague of Kim's, Jacqueline Horani, founding changemaker and attorney at Horani Law, PLLC (LegallyUnconventional.com), agrees and notes that, "Kim is very genuine. She's very much about raising people up; lifting everybody together; highlighting what people's skills, values, and strengths are; and then supporting them to showcase that."

In 1999, Kim attended a meeting of the International Alliance of Holistic Lawyers (IAHL). She arrived thinking that she was really at the cutting edge of law, but found out that a number of attorneys were steps ahead of her in how they practiced. Some of the attorneys at the meeting channeled, did yoga with their clients, and practiced meditation. It was quite a shock to her small town North Carolina sensibilities, so she decided not to join the group.

A few weeks after returning to North Carolina, she received an email from the IAHL welcoming her as a new board member—something she didn't volunteer for. There was a huge snowstorm hitting North Carolina and she had been snowed in for days. Without anything else to do, she attended the virtual board meeting. At the meeting, members were assigned tasks, and one of them was website creation. Having built her own website, she volunteered. She also liked the idea of crafting the messaging of the IAHL and making it more palatable for herself and others. The organizers partnered Kim with a woman who was a channeler—something outside of Kim's comfort zone. But Kim figured that if they could create a website that felt good to both of them, then it would be the right website.

Over time, Kim and the founder of the IAHL, Bill van Zyverden, disagreed about the direction of the organization. Bill wanted to keep the IAHL open to fringe attorneys who weren't likely to become mainstream. Kim wanted to make holistic lawyering mainstream.

In 1999, Kim's husband was transferred across the country. She closed her law practice and created a website about all of the new developments in models of legal practices that she had been studying. The first year she had 100,000 views of her website and lots of people reaching out to her. Kim notes that the stories of many people who reached out to her were similar—they felt relief at learning that they weren't alone in

desiring a more conscious, compassionate profession. Kim and others founded the Renaissance Lawyer Society. The organization had 100 founding members, and 30 people flew to Portland, Oregon, to attend the first meeting in person.

As the organization grew, more and more lawyers from all over the world reached out to Kim to become a part of this type of lawyering. Kelly McGrath, a peacebuilding mediator and lawyer, says it's, "a good thing" that lawyers from all over the world are connected and using more conscious tools in the practice of law to help their clients. Kelly notes that Kim connects people and recognizes the different capabilities that each person has.

Shortly before the IAHL conference, Steven Keeva's book, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*, was published. It talked about different ways of practicing law, and it became a popular handbook for those involved in holistic lawyering, including Kim and her fellow pioneers. Those who were a part of the holistic law movement would leave copies of the book at places such as courtrooms, and use the book as a way to identify kindred spirits. The book gave people permission to talk about things that were emerging in the legal practice. And from this book and people finding each other, people became more authentic with their work and who they were.

In 2007, Kim was practicing law in North Carolina with her firm Healers of Conflicts. At the same time, she was actively involved in helping holistic lawyering grow within the US. That year she attended 15 conferences and helped plan eight on topics related to holistic lawyering. As she participated in these conferences, she heard stories of how lawyers were changing the legal profession, and at the 2007 Restorative Justice conference she realized that the stories needed to be captured. So she went to Walmart, bought the only available video camera, and started interviewing people. For example, she interviewed an older judge from Alabama who talked about compassion and healing. As she conducted more interviews, she realized she needed a professional videographer to film and edit the interviews.

At that same time, many changes were happening in Kim's life that opened up space for her to hit the road to interview attorneys. So she put her legal practice on hold and teamed up with a videographer to

travel around the US. They thought they'd be traveling for three months, but for Kim, it turned into 12 years. They created a YouTube channel called cuttingedgelaw, and at one time they had about 300 interviews on their channel. Through this work, Kim was named a 2009 Legal Rebel, which was defined at the time as attorneys who were "finding new ways to practice law, represent their clients, adjudicate cases, and train the next generation of lawyers." The ABA also approached Kim to write a book about these new ways of lawyering.

That book, which was published by the ABA in 2010, was *Lawyers as Peacemakers: Practicing Holistic, Problem-Solving Law*. An ABA bestseller, the book shared tools for providing humanistic, solution-based approaches to legal conflicts as a way to preserve dignity and respect for the parties involved. Kim notes that there was a shift in how people viewed her after she was named a Legal Rebel and her book came out. Rather than being perceived as a weirdo in the practice of law, she started being viewed as a pioneer.

The book also opened up Kim's work internationally. Marguerite Picard, an attorney in Australia, founded the book and asked Kim to autograph it for a group Marguerite was involved with in Australia. A friendship was forged and Kim traveled to Australia to share her work with interested attorneys. A trip to South Africa closely followed, and a country or region was added every year. She's built communities and dear friends all over the world, so she continually goes back to places she's been to in order to maintain those friendships and connections.

Interestingly, Kim never used the term "Integrative Law Movement" in her book as that title wasn't born until 2011 when 30 lawyers in the movement got together and came up with the name. The word "integrative" mirrors the integrative piece of integrative medicine and integrative psychology. The idea being that different branches of legal study, legal models, and healing modalities are united in the Integrative Law Movement. It's not the traditional adversarial model of law or a model where one party takes all, but one where all parties have their needs heard and met to the best of everyone's abilities. The driving values of the Integrative Law Movement are generosity, integrity, and authenticity.

Kim continued building out her work by

co-creating the Conscious Contracts® course with Linda Alvarez. Far from your typical fill-in-the-blank downloadable contract or boilerplate language contract you can find on the internet, Conscious Contracts® is really about self-reflection and partnership examination. Thoughtful questions such as, "who are you and what is important to you?" and, "why do you want to create this partnership?" are examined, creating a foundation of relationship and understanding. Then discussion occurs around how to address change and engage disagreements that will inevitably arise in any relationship, and given that information, capture that in a contract. This is what the Conscious Contracts® model is about.

The course also teaches lawyers how to write contracts in relational and plain language such as "Father" and "Daughter" rather than something more formal like "The Party of the First Part." Again, it's making law more conscious, more humanistic, and capturing the intention and hearts of the people involved in the contract. This idea is spreading amongst transactional attorneys who are drafting contracts for their clients, including attorneys who aren't familiar with Kim's work. She notes that a real shift in consciousness is occurring within the legal profession—both to preserve the well-being of clients, as well as the well-being of lawyers themselves.

Kim's second book, *Lawyers as Changemakers: The Global Integrative Law Movement*, was published by the ABA in 2016. It was a best seller on the day of its release. This book showcased the way that law is being transformed and gives global examples as to how it's being done. Integrative Law practitioners draw upon a number of disciplines in their legal work, including philosophy, science, psychology, and spirituality.

As we discuss the future of law, our conversation turns to those attorneys, practice areas, and legal employers who most easily adopt Integrative Law principles. From Kim's experiences, family law has been an area where experimentation and adoption of Integrative Law principles are prevalent because it's so clear that people are hurting. Collaborative law and mediation were born from family law because there was a clear need to address the hurt that parties were facing. The problem-solving court movement, which started in 1989 in South

Florida, is now worldwide. These courts are more focused on healing the problem and approaching people as human beings who are experiencing something that's in the way of them having a fulfilled life. These courts aim to address the obstacle rather than toss people into prison. Integrative Law principles tend to be adopted by family law lawyers and courts as a way to reduce pain and increase compassion and empathy for those involved in cases.

Kim is also noticing a shift in junior attorneys versus more senior attorneys. Today's junior attorneys have more options to choose from and, if they desire, they can easily find resources related to the Integrative Law Movement if they search for them online. Kim also notes that she sees that younger attorneys have less of an inclination to give everything up for the sake of a legal career, as opposed to what more senior attorneys may have felt inclined to do for their practices.

Finally, Kim believes that female attorneys have been really helpful to shift consciousness in the practice of law because many women aren't willing to buy into the "male in a skirt" model upon which the traditional practice of law is built. She has noticed that women aren't willing to sacrifice everything for law.

In terms of her current projects, Kim is working on two books: one is about legal design and the other is a book on trauma-informed lawyering. The trauma-informed lawyering book is a collaboration between Kim, Marjorie Florestal, Helgi Maki, and Myrna McCallum. According to Kim, her research reveals that trauma explains why the legal profession is rampant with drug and alcohol issues, depression, anxiety, and stress.

Lawyers experience secondary trauma and vicarious trauma because of what's going on with their clients. Secondary trauma, which may occur suddenly and without warning, is indirect exposure to trauma through the first-hand account of trauma from others. It can include PTSD-like symptoms even though the lawyer hasn't had direct exposure to the traumatizing event. Lawyers can experience vicarious trauma if they have multiple exposures to other people's trauma. It builds up over time and leaves a negative impact on an individual's

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# A Forgotten Libel Suit Filled with Unforgettable Characters

BY HUGH STEVENS

*Sometimes the account of a lawsuit reads more like the script for a morality play than a simple piece of legal lore. This is such an account.*

**The TIME** is 1983-85.

**The PLACE** is the Superior Court of New Hanover County, North Carolina.

**THE PLAINTIFF** is Dr. John Dees, a physician and Democratic Party operative from Burgaw, North Carolina.

**THE PLAINTIFF'S LAWYER** is John J. Burney Jr., a bombastic, Bible-thumping Wilmington trial lawyer, decorated World War II veteran, and democratic state senator.

**THE DEFENDANTS** are *The Wilmington Morning Star*, a daily newspaper owned by *The New York Times*, and two of its reporters.

**THE DEFENSE COUNSEL** are Raleigh lawyer Wade Hargrove, his law partner Wade Smith, and their young associate, John Edwards.

**THE JUDGE** is Charlie Winberry, a large man with a big personality and two passions: Wake Forest University and Democratic Party politics.

**THE KEY WITNESS** is Douglas McCullough, an assistant US attorney.

**OUR STORY** begins with the *Morning Star's* coverage of the sentencing hearing for Ron Taylor, a state representative convicted on federal racketeering charges in 1982. The paper's report, written by reporters Ray Belew and Judith Tillman, focused on a videotape played in federal court in which Taylor suggested that Dr. Dees, whom he

described as "the head politico in Pender County," needed money and might take a bribe or engage in other illegal activity to get it. In writing the story, which was headlined "Dr. Dees Denies Implications by Taylor," the reporters contacted Dees and quoted his suggestion that Taylor was merely "name-dropping" to impress the federal agents. Despite the fact that the newspaper had given him the opportunity to respond to Taylor's accusations, Dees sued the *Morning Star* for libel.

David Thurm, *The New York Times's* in-house counsel, retained Raleigh lawyer Wade Hargrove to defend the suit. Hargrove, who was general counsel to the North Carolina Association of Broadcasters, had established his reputation as a skilled media lawyer. He had never defended a libel suit in a jury trial, but he knew defamation law well and advised his clients about it. He knew that jurors were notoriously hostile to news organizations, so the favored defense strategy was to look for an opportunity to "kill the case on motions" and avoid a trial. Adopting that strategy, Hargrove moved to dismiss Dr. Dees' complaint on the grounds that the *Morning Star's* story was privileged as a fair and accurate report about a public judicial proceeding. To his dismay, Superior Court Judge James "Lew" Lewellyn summarily denied the motion, requiring the case to pro-

ceed to discovery and trial.

When the case was calendared for trial in the fall of 1985, the parties filed a flurry of pretrial motions, including Hargrove's motion to have Dr. Dees declared to be a public official or public figure in light of *New York Times v. Sullivan*. If successful, the motion would trigger the "actual malice" rule and greatly enhance Dees' burden of proof. The motion was grounded on Dees having held numerous public positions, including director of the Pender County Health Department, a trustee of Pender County Memorial Hospital and UNC-Wilmington, and chair of the Democratic Party for the Third Congressional District.

Hargrove and his young colleagues had researched and briefed the potentially critical motion, but he was worried because the judge assigned to preside over the trial was Charles Winberry. Like Dees and Burney, Winberry had long and deep ties to the North Carolina Democratic Party. As a registered republican, Hargrove felt surrounded, so he walked into the office next door to talk with its occupant, his law partner Wade Smith.

The two Wades had been close friends since meeting as law students at Chapel Hill. They not only practiced law together, they also made music as members of Bloomsbury, a local folk and bluegrass group. Smith, who hid a brilliant legal mind behind an Andy Griffith downhome demeanor, had become one of North Carolina's most respected and successful criminal defense lawyers by defending several high-profile murder cases, including the trial of US Army Captain Jeffrey MacDonald, a Green Beret physician charged with killing his wife and two daughters at Fort Bragg. By enlisting Smith's help,

Hargrove hoped to draw not only on his courtroom savvy, but also on two potentially critical facts: first, that Smith was wired into the inner circles of the North Carolina Democratic Party; and second, that Charlie Winberry, who was a member of the party's inner circle, owed him.

Wade Smith's Democratic Party credentials were grounded in his having served two terms as a state representative from Wake County in the mid-1970s, but his relationship with Winberry was personal as well as political. In 1971, Winberry, who was then president of North Carolina's Young Democratic Club, was involved in an automobile accident near Zebulon that resulted in the death of an NC State student. At the ensuing coroner's inquest, Smith defended Winberry, and he was exonerated.

Smith also had supported Winberry in 1980, when his nomination to a federal district judgeship was rejected by the United States Senate's Committee on the Judiciary—something the committee had not done in 42 years. The committee's vote was based on the testimony of the defendant in a federal cigarette smuggling case, who bragged to an informant that he had funneled payoffs to US District Judge John Larkins in return for light sentences. Winberry, he claimed, was the conduit for the payments. Winberry vehemently denied the allegations, labeling them "so ridiculous they don't even deserve comment." Senator Robert Morgan, who had recommended Winberry and whose 1974 campaign Winberry had managed, also disparaged the allegations, but after independent investigations by the American Bar Association and the judiciary committee turned up questions about Winberry's candor, the committee vote went against him, nine to six. Winberry was humiliated, but in 1982 Governor James B. Hunt redeemed his honor by appointing him to the state superior court bench, from which he would preside over the Dees trial.

Although Smith agreed to help Hargrove with the critical Dees motion, he was preoccupied with the defense of a murder case, so he and Hargrove weren't able to devote much time to preparing for the upcoming hearing. On the appointed day, Hargrove picked up Smith for the two and a half hour drive to Wilmington. In route, Smith relentlessly picked his brain about the issues and the applicable law, which Hargrove knew forward and backward. Finally Smith said,

"OK, I've got this."

When the hearing convened, Judge Winberry engaged in the customary pleasantries with the lawyers and said to Smith and Hargrove, "this is the defendants' motion, so I will hear from you." Wade Smith stood up.

"Good morning your honor," he began. "I'm pleased to be here today with my friend and law partner, Wade Hargrove."

"This hearing," he began, "reminds me of the story about a college professor who was awarded the Nobel Prize for developing a breakthrough theory about nuclear physics. In order to capitalize on his newfound fame, the professor arranged to give guest lectures at dozens of prestigious colleges and universities all over the United States. Now the professor didn't like to fly, and he wanted to see the country, so he hired a chauffeur to drive him from place to place. They developed a nice routine where the chauffeur would drive the professor to each lecture and sit in the back of the auditorium while the professor made his talk."

"One day, after the professor had given his lecture 20 or 30 times, the chauffeur said, 'You know, professor, I've heard your talk so many times I've pretty much memorized it. I'll bet I could give it as well as you.'

"Well,' the professor said, 'frankly, I'm pretty tired of giving it, so why don't we trade places tonight? You can wear my suit and give the lecture, and I'll put on your uniform and sit in the audience.'

"So they did."

"Well, your honor, everything went well at first. The chauffeur delivered the professor's lecture flawlessly, word for word, to great applause. But then the moderator said, 'Professor, by our university's long tradition, every visiting lecturer is expected to entertain a question or two from the audience, so I'm going to recognize Sam Jones, a graduate student in physics, to pose the first question.'

"Before the chauffeur could object, the student stood up and asked him an incredibly arcane and convoluted question about the professor's theory. When he had finished, the chauffeur said, 'Mister Jones, that is a very simple question. I am astonished that a graduate student in physics at this distinguished university would ask such a simple question. In fact, your question is so simple, I'm going let my chauffeur answer it.'"

Smith paused just long enough for Judge Winberry to absorb the story. Then he said,

"Your honor, Mr. Hargrove drove me down here this morning, and this motion is so simple, I'm going to let him argue it."

And he sat down.

After the laughter in the courtroom subsided, Hargrove presented the argument and prevailed. Winberry's ruling put Dees in the position of having to prove, by "clear and convincing evidence," that the article at issue was false, and that the newspaper had been reckless in publishing it.

When the case was called for trial in the fall of 1985, Smith was tied up in a murder case, so Hargrove put the trial tactics in the hands of 32-year-old John Edwards, whose charming, self-confident demeanor and intense preparation had already produced two multi-million dollar jury verdicts in personal injury cases. As the trial unfolded, the defense team found itself facing a thorny and unexpected development when Hargrove got a call from David Thurm, who had discovered that the *Times* had published an editorial in 1980 praising the Senate Judiciary Committee's rejection of Winberry's federal judgeship nomination. The newspaper's lawyers also were concerned that Burney and Winberry each had two degrees from Wake Forest University and were devoted "Demon Deacons."

Burney's first witness was Assistant US Attorney Douglas McCullough, who had prosecuted Ron Taylor. In the course of his testimony, McCullough, who would later serve for 15 years as a judge of the North Carolina Court of Appeals, described the videotape of Representative Taylor's interview with federal undercover agents. Edwards asked him whether Taylor had said or implied that Dees "would take a bribe." Since the videotape itself was not in evidence, McCullough paused, thinking that Burney might object that the answer called for hearsay. When no objection came, he said, "Yes." Burney then called, and cross-examined as adverse witness, the *Star* employees who had written and edited the story. Dr. Dees then testified that the newspaper's story had made him "depressed and irritable," that his medical practice had declined "considerably" in its wake, and that he got fewer Christmas cards and party invitations after it was published.

At the close of Dees' evidence, Edwards and Hargrove moved for a directed verdict in the defendants' favor. When Winberry denied their motion, they elected not to put

on additional evidence, a tactical decision that sent the case to the jury, and also gave them the right to argue to the jury before and after Burney argued on behalf of Dr. Dees.

In their closing arguments, Hargrove and Edwards urged the jurors to focus on the evidence, including McCullough's testimony that he agreed with the newspaper's characterization of Taylor's statements about Dees. If anyone libeled Dr. Dees, Edwards said, "it was Ron Taylor, not the *Star News*." Dees' attorney John Burney took a very different tact. In his customary flamboyant style, he made an impassioned and emotional presentation, telling the jurors he had "spilled my blood three times during World War II to protect this country's freedoms," including freedom of the press; describing the "appalling" experience of liberating a Nazi concentration camp; charging that the *Star* had set out to "gut" Dr. Dees; and declaring that defendant Tillman had "the face of a Madonna, but a soul of sawdust."

After hearing Winberry's instructions, the jurors retired to deliberate. Edwards told Hargrove that although he didn't know what the verdict would be, he was confident about the votes of two young women. "We con-

nected," he said, "and I'm sure they are with us." After discussing the case for several hours, the jury retired for the night without a verdict.

The next day, Winberry invited the lawyers into his chambers for a chat. He told them that although he couldn't hear through the wall exactly what was being said in the adjacent jury room, he could tell that voices were raised and the arguments were heated. Twice that day the jurors emerged and asked Winberry to review his instructions about the elements of libel and the definition of "clear and convincing evidence." Again, they went home for the night without having reached a verdict.

After deliberating for another day, the jurors reported that they were "hopelessly deadlocked" over the threshold issue, which was whether the newspaper's article was false. Ten jurors thought it wasn't, but two maintained that it was. (Post-trial interviews with the jurors, Hargrove said, revealed that the two holdouts were the two young women about whose votes Edwards had been so sure.)

Faced with the jury's impasse, Judge Winberry declared a mistrial and said he

would reconsider a defense motion for a directed verdict. After affording both sides the opportunity to present briefs and arguments, he allowed the motion in February 1986, dismissing the case. Dees and Burney elected not to appeal, thereby consigning the matter to history.

Charlie Winberry died four years later in 1989. He was just 47. Dr. John Dees died in 2003. John Burney passed away in 2010. Wade Hargrove continued practicing law until his retirement in 2017. John Edwards became North Carolina's best known trial lawyer, a US Senator, and a candidate for vice-president of the United States. After his political career imploded in the face of marital and sexual scandal, he returned to practicing law and is still winning big jury verdicts in personal injury cases.

Wade Smith is 83. He is still practicing law and telling stories. ■

*Hugh Stevens is of counsel to the Raleigh firm of Stevens Martin Vaughn & Tadych, PLLC. He has practiced law for more than 50 years and knows, or knew, Judge Charles Winberry and the lawyers who participated in the libel case that is the subject of this story.*

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## Creating Change (cont.)

character and belief system. Trauma can leave an imprint on the attorney well after she leaves the office. For example, without tools to recognize and work through trauma, a lawyer may go home and cross-examine her children and partner as a way to shut down her own feelings. She then returns to work and may be exposed to trauma again, creating a vicious cycle.

Kim also sees that many lawyers have their own traumatizing experiences from life, so they're stacking work trauma on top of their own trauma. Therefore, they may want to shut down because they don't know how to handle all of their feelings without a way to process them. As Kim is learning in her research, a big piece of trauma-informed lawyering is for lawyers to realize when they're shutting down and take steps to open themselves up and feel what's going on. It's also clear that the culture of law can be toxic, and that the systemic trauma of racism, sex-

ism, and other dominations can be harmful to lawyers and clients.

As we look towards the future of law, it's clear that the current model of law doesn't meet the needs of many attorneys. A profession rife with trauma, overworked and stressed-out lawyers, and unrealistic demands placed on people is unsustainable.

Kim created a vision for what she desires the legal profession to look like in 2045. It includes across the board changes in the legal profession—amongst lawmakers, lawyers, and law enforcement. For lawyers, she sees them moving towards a space where they, as people, are more integrated. For the legal profession, she believes that the old model is dying out and will be replaced by what she, and so many other pioneers, are working with in the Integrative Law Movement. As she notes, the old model has racism, sexism, and homophobia baked into it. It's not healthy for anybody. The new emerging models of law and the Integrative Law Movement are about harmony, peace,

dignity, and respect.

For the near future, Kim thinks the legal profession will continue moving towards a more holistic model of law practice. She also thinks there will continue to be heightened interest in social justice.

Kim's work has changed—and is continuing to change—the legal landscape. As some of her grandchildren have said, "grandma doesn't knit booties or babysit, but she's making the world a better place for all of us."

You can learn more about Kim at [jkimwright.com](http://jkimwright.com) or [integrativelaw.com](http://integrativelaw.com), or find her on LinkedIn as J. Kim Wright. ■

*Alyssa Johnson is a formerly practicing attorney who now consults and teaches on lawyer well-being issues. She works with individual lawyers and legal organizations on topics focused on emotional intelligence, trauma-informed lawyering, and productivity. You can learn more about her work at [AlyssaJohnson.love](http://AlyssaJohnson.love).*

# Gregory Peacock, Board Certified Specialist in Elder Law, Estate Planning and Probate Law

BY DENISE MULLEN, MANAGING DIRECTOR, BOARD OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Gregory Peacock, a board certified specialist practicing with Ward and Smith in New Bern, Greenville, and Raleigh. Greg received his undergraduate degree in business administration from the University of North Carolina at Chapel Hill and worked as a trust officer for three years before attending the Wake Forest University School of Law. Following his law school graduation, Greg joined Ward and Smith, focusing on estate planning, probate, and trust administration. Greg became a board certified specialist in estate planning and probate law in 2001 and earned board certification in elder law (with both the North Carolina State Bar and the National Elder Law Foundation) in 2010.

Greg was recently honored as a future leader in estate planning law through the Southeast Fellows Institute of the American College of Trust and Estate Counsel. Greg received this nomination based on demonstrating the highest level of integrity, commitment to the profession, competence, and experience. He is well regarded by his colleagues as being respectful, easy to work with, and always keeping his client's end goal in mind. His commitment to understanding both estate planning and elder law issues at the highest level is well noted by his colleagues and appreciated by his clients.

Following are some of his comments about his certifications and the impact they have had on his career.

**Q: What was your path to board certification in these two practice areas?**

When I was working as a trust officer at First Citizen's Bank, I dealt with financial issues, but also began learning about the legal

issues involved with trust administration. I realized that I enjoyed the legal issues more than the financial aspects of the position. That led me to law school, and even though I considered other types of legal work, my background was a great foundation for my work in estate planning law at Ward and Smith. Over time, we realized that there was a need in Eastern North Carolina for legal assistance in elder law as well. That seemed like a natural fit for my practice, so I began to handle those matters, adding the elder law certification when I was eligible.

**Q: How is certification important in your practice areas?**

Very few lawyers practice elder law and the need for qualified counsel can be critical. Frequently the clients have fear and insecurity about the future as they are facing important medical, financial, or housing issues. They can be gratified to hear that there are legal avenues that they can take as they make decisions that will protect their families and their assets. Practicing elder law can be very rewarding.

**Q: Who are your best referral sources?**

I get referrals from certified public accountants, financial advisors, and existing clients. I also have referrals from both local attorneys who do not handle trust and estate work as well as attorneys from other locations who are looking specifically for the certification. When I am asked to help someone find legal help, I know if the lawyer is certified that I have an added level of confidence in making that referral.

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

Yes, as we adjust to a new administration,

there are tax law changes that are impacting our clients and additional, pending changes that could have tremendous impact by the end of the year. We have been busy working with clients to educate them on options to use their estate and gift tax exemptions before they are lowered.

We have also seen the impact of the booming North Carolina economy on our clients over the past few years. We are now assisting clients who operate family businesses as they receive offers from large companies or out of state investors. This has brought significant wealth and liquid assets to our state and is changing the landscape around us.

**Q: How has your work in estate planning or elder law been rewarding over the years?**

One of the most enjoyable parts of my job has been working with multiple generations of my client families over time and truly getting to know them, their children, and their grandchildren.

**Q: What is one of your biggest success stories related to your estate planning or elder law practice?**

With estate planning, the "fruits of our labor" typically are not quantifiable until the death of a client. Though that is a sad time for families, it also is the time that families often recognize and appreciate the tax savings that have resulted from our estate planning techniques. I'm often surprised myself when I calculate what the tax would have been if we have not been proactive with planning during the client's lifetime.

**Q: How do you like to spend your free time?**

My most favorite days are days on the boat at Cape Lookout or any other island or sandbar with family and friends. I also run quite a bit and regularly exercise with a group



Peacock

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# Grievance Committee and DHC Actions

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

## Disbarments

**Daniel Flint**, formerly of Charlotte and currently of Michigan, was convicted in federal court in California of felony entering an airport area in violation of security requirements and was sentenced to 14 months in prison. The hearing panel found that Flint was convicted of a crime reflecting adversely on his fitness as a lawyer, presented false diplomatic credentials to Transportation Security Administration agents to avoid having his bag searched before boarding an airplane, and falsely asserted that he was a diplomat for the International Human Rights Commission. Flint was disbarred.

**Daniel R. Green** of Hickory surrendered his license and was disbarred by the Buncombe County Superior Court. Green was convicted of disseminating obscene materials to a minor under 16, taking indecent liberties with a minor, contributing to the delinquency of a minor, and giving alcoholic beverages to an underage person.

**Roydera D. Hackworth**, formerly of Greensboro and currently of Wilmington, was suspended by the DHC in 2012. After the effective date of the suspension, Hackworth engaged in the unauthorized practice of law, forged the name of an attorney to immigration petitions filed with the Department of Homeland Security, and held herself out as being eligible to practice law. Hackworth pleaded guilty in federal court to one count of filing a fraudulent naturalization application and notice of representation, a crime in violation of 18 U.S.C.A. § 1546(a). She surrendered her license and was disbarred by the State Bar Council.

## Suspensions & Stayed Suspensions

**Angela Beeker** of Hendersonville did

## 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*, on social media accounts, and in 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 65 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 two lawyers to the Disciplinary Hearing Commission and has issued four reprimands, 12 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.**

not promptly disburse entrusted funds, did not diligently complete disbursements and the related client representations, did not send annual accountings to clients, did not ensure funds were properly maintained in trust, and did not conduct required monthly and quarterly reconciliations of three trust accounts. Beeker was suspended for three years. The suspension is stayed upon her compliance with enumerated conditions.

**Lonnie P. Merritt** of Wilmington had a sexual relationship with a family law client. Merritt was suspended for one year.

## Petitions for Reinstatement

In July 2020, **Craig Blitzer** of Reidsville was suspended for four years, effective retroactively to August 3, 2017, when an interim suspension of his license was entered. As the elected district attorney for Rockingham County, Blitzer misused state resources, did not provide discovery in criminal cases, and was convicted of misdemeanor failure to discharge duties. After serving four years of active suspension, Blitzer filed a petition for reinstatement. The State Bar did not contest the petition because Blitzer had sub-

stantially satisfied the conditions of reinstatement. An order of reinstatement was entered on August 19.

### Censures

Mark Key of Lillington was censured by the Grievance Committee. Key did not timely file required accountings for an estate and did not respond to the fiduciary's attempts to communicate with him. In a separate matter, Key was retained for post-conviction relief. The client also sought his advice and assistance on a probation issue. Key assured the client he would handle the probation issue but did not advise the client or explain how he would address her concerns. The client was later arrested and charged with absconding probation.

The Grievance Committee censured Daniel Rufty of Charlotte for aiding an out-of-state law firm in falsely holding out to North Carolina residents that he was able to provide legal representation, debt relief assistance, loan modification representation, and/or bankruptcy services in this state, and for failing to supervise nonattorney assistants and their handling of entrusted funds.

Christie Bynum Smith of Greensboro did not verify wiring instructions in a real estate transaction, resulting in the seller's proceeds being wired to a fraudulent account, and made false representations to the Grievance Committee. The DHC censured her.

### Reprimands

Peter R. Henry of Arden was reprimanded by the Grievance Committee. Henry did not respond to discovery requests, contributing to entry of summary judgment against his client. Henry misled the committee by representing that he had mailed unsigned discovery responses to opposing counsel and by representing that he had served opposing counsel with notice of appeal. Henry represented to the committee that his client's motion to dismiss, which was heard by the court, was "ultimately not heard." In response to additional questions, Henry told the committee that he was "apparently mistaken" when he made that representation. The committee concluded that Henry failed to make full and fair disclosure of all facts and circumstances to the committee in violation of Rule 8.4(d).

The Grievance Committee reprimanded Larry Hoyle of Gastonia for engaging in a conflict of interest by representing a former



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client's wife in a substantially related matter.

### Transfers to Disability Inactive Status

David G. Belser of Saluda and Dean R. Davis of Wilmington were transferred to disability inactive status by the chair of the Grievance Committee.

### Notice of Intent to Seek Reinstatement

#### In the Matter of Mildred A. Akachukwu

Notice is hereby given that Mildred A.

Akachukwu of Durham intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Ms. Akachukwu was disbarred effective January 12, 2011, by the State Bar for misappropriating client funds.

Individuals who wish to note their concurrence with or opposition to this petition should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611-5908, before February 1, 2022. ■

## 2022 Meeting Schedule

Below are the 2022 dates of the quarterly State Bar Council meetings.

January 18-21	NC State Bar Headquarters, Raleigh
April 19-22	NC State Bar Headquarters, Raleigh
July 19-22	The Ballast Hotel, Wilmington
October 18-21	NC State Bar Headquarters, Raleigh <i>(Election of officers on October 20, 2022, at 11:45 am)</i>

# To the Bereaved

BY ROBYNN MORAITES

I am so sorry for your loss. If there is such thing as hell on earth, it is surely this. And yet, in the depth of your pain, your searing anguish is a holy testament to love.

You loved with your whole heart. Your whole soul. And they knew it. And they loved you, too.

I, too, know the searing anguish. So, I found some comfort in the words espoused by Mirabai Starr. Mirabai lost her 14-year-old daughter, Jenny, which she writes about with profound vulnerability and wisdom.

*When someone you love very much dies, the sky falls. And so you walk around under a fallen sky.*

*There is no map for the landscape of loss, no established itinerary, no cosmic checklist, where each item ticked off gets you closer to success. You cannot succeed in mourning your loved ones. You cannot fail. Nor is grief a malady, like the flu. You will not get over it. You will only come to integrate your loss.... The death of a beloved is an amputation. You find a new center of gravity, but the limb does not grow back.*

The depth of your pain is directly proportional to the depth of your love. Your heart, ripped apart, is consecrated ground. If only that could turn back time or bring them back. I am so, so sorry.

*(Excerpted and adapted from a letter written to a deeply bereaved friend.)*

Grief is a natural human response to loss. Grief is also a natural human response to change, as all change in life brings loss in some form, whether big or small. Most of us have recognized this fact when making a big life change—for example, moving away to go to college and having to say goodbye to childhood friends. And for most of life's events, we navigate the grief process relatively well and mostly unscathed. But sometimes life brings devastating loss. And with devastating loss comes devastating grief. Grief of this sort can be debilitating. It can be suffocating. It can paralyze us for weeks or months or years with depression. It can make us lose the will to live.

Grief of this sort throws us into chaos. We each respond differently, and it is important to recognize that fact. A veterinarian friend reported what she has observed when she euthanizes a beloved dog, which happens almost weekly in her busy practice. There might be five people in the room who are all from the same family. The moment the dog passes, one family member begins to sob in anguish. Another family member punches the

wall. A third family member walks out of the room. Yet another family member begins obsessively talking, getting organized with the final details, while the fifth family member stares blankly ahead, almost frozen.

In fact, it is not uncommon for a person who has suffered a major loss to respond differently years later at the occurrence of another major loss. We may feel we are coming unglued. Or we may feel the opposite: completely numb, shut off inside, unable to cry for a year or more about the loss. We may have the sudden urge to relocate, to sell or redecorate the house, to buy a new car. Our behavior may be perplexing to us (and to others). Part of the reason it is perplexing is that we as a society have moved the grief process underground. Because we no longer share openly about it, none of us has any idea what to expect or how to process it. We have no idea that what we are experiencing is normal.

In modern American culture, grief goes largely unnoticed. When it is acknowledged, it is often misunderstood or minimized. The world does not stop to allow us to grieve.



Grief is already an isolating experience, but this huge cultural blind spot leads the bereaved to feel even more alienated, prompting them to stuff and deny their feelings or go further underground with their pain. We have to somehow continue with our lives and grieve at the same time. We all try to get back to work, to “be strong” (i.e. act unaffected), and to “act normal” as quickly as possible.

But for those who are deeply bereaved, they quickly discover, this is literally an impossible task. We are operating under the uninformed assumption that somehow we will be better in a few weeks, when the reality is that with most truly significant losses it can take years to move past the searing pain and anguish, the bone crushing exhaustion, the inability to breathe, the inability to eat. We have lost our cultural framework for how to compassionately move through grief ourselves and how to honor or be emotionally present for those who are grieving.

In her memoir, *The Year of Magical Thinking* (documenting the aftermath that followed the unexpected death of her husband), Joan Didion makes some poignant observations about grief. She quotes excerpts from Emily Post's 1922 *Book of Etiquette*, specifically the chapter on Funerals. Ms. Didion observes:

[The] tone, one of unfailing specificity, never flags. The emphasis remains on the practical.... There was something arresting about the matter-of-fact wisdom here [about how to assist the bereaved].

[Ms. Post] wrote in a world in which mourning was still recognized, allowed, not hidden from view. [An author] notes that beginning about 1930 there had been... a revolution in accepted attitudes toward death. "Death," he wrote, "so omnipresent in the past that it was familiar, would be effaced, would disappear. It would become shameful and forbidden." [Another author] had described this rejection of public mourning as a result of the increasing pressure of a new "ethical duty to enjoy oneself," a novel "imperative to do nothing which might diminish the enjoyment of others."... [T]he contemporary trend was to "treat mourning as morbid self-indulgence, and to give social admiration to the bereaved who hid their grief so fully that no one would guess anything had happened."

One way in which grief gets hidden is that death now occurs largely offstage. In the earlier tradition from which Mrs. Post wrote, the act of dying had not yet been professionalized. It did not typically involve hospitals. Women died in childbirth. Children died of fevers. Cancer was untreatable. At the time she undertook her book of etiquette, there would have been few American households untouched by the influenza pandemic of 1918. Death was up close, at home. The average adult was expected to deal competently, and also sensitively, with its aftermath.

We have lost touch with this skill. Usually, it is only those who have been through deep grief that really understand what someone is going through when they suffer a devastating loss. It is also usually only those who have been through deep grief who are able to sit with someone who is deeply bereaved without rushing to "fix them" or "fix it," because they know it cannot be fixed. They understand as perhaps few others can that there is no way out but through: healing can only begin when we allow ourselves to feel. But as Ms. Starr so profoundly observes in the quoted material above, we do not get over it. We only come to integrate our loss. The death of a beloved is an amputation. We eventually, painstakingly, haltingly find a new center of gravity, but the

limb does not grow back.

In our culture, it is more acceptable for women to deal with feelings (whether their own or someone else's) than for men. Thus, men have a harder time processing their grief as well as responding to another person's grief. Often men best process grief through "doing." For example, a man's father died very suddenly and unexpectedly. His father loved woodworking and spent all his spare time working in his wood shop. He always had some project going on. As a kid, the son had spent a lot of time with his dad working on projects, but once he became a teen, he lost interest. The beginning of true healing for him occurred when he went out to his dad's shop with some of his dad's buddies and together, they finished the "latest project." It was his therapeutic way of grieving. This example is meant to be illustrative only; there are as many ways to process grief as there are cherished relationships to honor.

When we are deeply bereaved, we may also suffer what is known as a collateral loss. A collateral loss happens when a person we expected to understand what we are going through does not understand, or when a person we depended upon for emotional support effectively abandons us at the time we most need them, usually because of their own discomfort and inability to stay present with their own or another's discomfort. Unfortunately, collateral losses are usually a spouse/partner or very close friend. Sometimes these collateral relationships are lost in the aftermath of the primary loss. It can compound our loss and our grief, and it removes a primary area of support.

If you have suffered a devastating loss, just know that you are not alone even though you feel as if you are. You are the only person who had that specific relationship with your beloved. Your relationship was unique to you, so your loss is unique to you. But there are people around who want to help. Another anomaly to the grief process is that we find helpful souls everywhere. People we barely know step in and step up in thoughtful, generous, and unimaginable ways.

Years ago, I came across a description of grief, and our powerlessness over it, in the most unusual place. In the 1997 novel *Memoirs of a Geisha*, the main character, many years after suffering a loss, reflects, "Grief is a most peculiar thing; we're so helpless in the face of it. It is like a window that will open of its own accord. The room grows cold, and we

can do nothing but shiver. But it opens a little less each time, and a little less; and one day we wonder what has become of it."

As lawyers and judges, we are adept at compartmentalizing. We have to be good at this skill in order to do our jobs well. Deep grief bashes through those compartmental walls, turning them to ash in its wake. It is not a sign that we are broken or doing anything wrong. It is the nature of grief.

I will use an example from my own life. My father died unexpectedly while I was in law school. It was three weeks from diagnosis to death. I got the call that he had collapsed and flew home the same day. I was with him every day for those three weeks. When he died I was bereft. I was getting a joint degree at UNC: law and regional planning. That semester I only had one class at the law school. I was taking evidence with Ken Broun. I kept thinking I could pull it together and get back to class. I went to see him one day to explain what had happened and that I just needed another week and then I would be able to come back to class. I remember very little about that whole time, but I remember he scoffed at me, not unkindly, and told me that I should probably drop the class. He spoke from lived experience. I dropped the class.

I then spent the entire semester at the planning school where my classmates carried me academically. Unsolicited, they wrote the sections of papers I was responsible for in group projects. Professors gave me generous deadline extensions on papers for which I was solely responsible. I could not think. I could not eat. On one occasion, I parked at the park and ride lot, got on the bus, and started crying so hard that I got off the bus at the first stop, walked across the street, and got back on the bus that returned to the parking lot I had just left. I drove home.

The "grief window" opened sometimes seemingly of its own accord, like on the bus that day, but sometimes it was because of a surprise association, where my brain played a game of instantaneous connect the dots. For example, a professor's PowerPoint design... was the same design I used in an old print brochure for a program I developed at my old job... that featured a keynote speaker who was a psycho-oncologist... who was a professional friend... who I reached out to from the hospice unit in what I did not know would be

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# Pandemic Flux Syndrome: Is it Impacting Your Motivation to Continue Practicing Law?

BY LAURA MAHR

“I am reevaluating my career trajectory and thinking about moving away from traditional legal work,” her email read. “Law practice feels less and less like my passion and more and more like an overwhelming, unnecessary stressor,” she continued. “Can you help me to figure out what comes next?” This email from a prospective coaching client is representative of numerous inquiries I’ve recently received from attorneys exploring career transitions. Not only are attorneys asking for help with leaving the law, but firms are also seeking strategies to retain lawyers. “We are having a really difficult time recruiting and retaining associates during this phase of the pandemic,” a partner in a North Carolina firm recently shared. “We need strategies to help us compete with big city firms that are permitting associates to work remotely while paying them big law salaries. It’s challenging to attract and retain lawyers, specifically during the pandemic.”

After receiving numerous requests for assistance such as these, I was curious to research national attrition trends in the legal field, and find out which factors are impacting lawyers’ current career decisions. What I discovered is that the concerns of the attorneys and firms contacting me are echoing around the country. While many firms are asking, “Is there something we can do to compel lawyers to stay,” many lawyers are asking, “Is there something better-suited for my passion and purpose than the law?”

## Research on Lawyer Stress During the Pandemic Shows...

Two recent studies researching lawyers’ stress levels during the pandemic indicate that there is an uptick in both stress and attrition among lawyers since the beginning of the pandemic. A large-scale study released in May 2021 ([bit.ly/Winter2021Pathways](https://bit.ly/Winter2021Pathways)) examined gender-specific risk factors for mental



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health problems and attrition among licensed attorneys. The study, which included data collected from nearly 3,000 legal professionals, found that 24% of females and 17% of male attorneys considered leaving law due to mental health problems, burnout, or stress. These numbers are quite staggering if you pause and consider what it would mean if a quarter of the women and a fifth of the men practicing law were to leave our profession.

Another study released in April 2021 based on input collected during the fall of 2020 from over 4,200 American Bar Association (ABA) members found that participating lawyers “generally show much higher levels of stress in trying to manage work and home; higher levels of disengagement with the social aspects of work; and more frequent thoughts about whether full-time work is worth it.”

The study results, published by the Coordinating Group on Practice Management in an informative downloadable report titled “Practicing Law in the Pandemic and Moving Forward: Results and Best Practices from a Nationwide Survey of the Legal Profession” ([bit.ly/Winter2021](https://bit.ly/Winter2021)

Pathways2) also found distressing results about the effect of work-from-home stress on lawyers of color. The study found that “race and ethnicity showed an even greater impact. Compared to a year ago, lawyers of color have even higher levels of stress about work; are more likely to think the day never ends; have greater difficulty taking time off from work; feel overwhelmed with all the things they have to do; feel it is hard to keep work and home separate; and find work disrupted by family and household obligations.”

Like the first study, the ABA study also found gender differences between female and male lawyers, citing “significant gender differences in levels of stress and disengagement around work. Women experienced greater disruption in work than men. Thus, women were more likely to report increased frequency of work disrupted by family and household obligations, feel it is hard to keep work and home separate; feel overwhelmed with all the things they have to do (an effect especially true for women with younger children), experience stress about work, think their day never seems to end, and have trouble taking time off from work.”

If you are experiencing any of the challenges enumerated in the above research, it may be helpful to read that you are not alone. Although as lawyers we are accustomed to persevering despite significant stress, additional pandemic-related setbacks are pushing many of us beyond a level of tolerable stress. Lawyering beyond our resilience capacity may leave some of us wondering if the benefits of practicing law outweigh the burdens; and if not, what is next.

### “Pandemic Flux Syndrome”

An additional factor that may play a role in increasing numbers of lawyers considering career changes is “Pandemic Flux Syndrome.” I was introduced to this new term on one of my favorite podcasts, “Dare to Lead” with Brené Brown (from the episode “Brené with Amy Cuddy on Pandemic Flux Syndrome,” [bit.ly/Winter2021Pathways3](https://bit.ly/Winter2021Pathways3)). On the podcast, Professor Brené Brown—one of our country’s leading experts on the topics of courage, vulnerability, shame, and empathy—interviews social psychologist and expert on behavioral science Professor Amy Cuddy about “Pandemic Flux Syndrome,” a term which Dr. Cuddy first discussed in the article she co-authored in the *Washington Post* in August called “Why this stage of the pandemic makes us so anxious: Many of us are suffering from ‘pandemic flux syndrome.’” ([bit.ly/Winter2021Pathways4](https://bit.ly/Winter2021Pathways4)). In the article and podcast, Dr. Cuddy discusses the psychological impact that being in constant pandemic-related flux has had on our mental health, nervous system, and our decision-making. As the pandemic wears on, Dr. Cuddy observes, many people’s anxiety and/or depression are exacerbated, causing an increased desire to “escape from a threat that we feel we can’t control.” She suggests that we may be “changing something about our lives that gives us the feeling that we are ‘getting away from the threat.’” For example, if we are anxious, we may try to escape by making a drastic change—like switching professions, moving, or reinventing ourselves in some new way. Or, if we are depressed, we may do something that allows us to “turn off for a while” so that we can “wake up when it’s over”—like quit our jobs without a plan for finding a new one, or ending a relationship to avoid having to work through relational conflicts.

### What Are You Running Toward?

Pandemic Flux Syndrome aside, the story

of lawyers leaving the law does not begin and end with trying to escape or avoiding overwhelming stress. Through conversations with lawyers around the country during the pandemic, lawyers are sharing that they are not just running away from stress, they are running toward their passions to fulfill a greater purpose. This is a phenomenon that Anthony Klotz, an associate professor of management at Texas A&M University, refers to as “pandemic epiphanies.” In his research, Professor Klotz refers to the national surge of voluntary job departures as “The Great Resignation,” noting that in many industries there is an increase in voluntary departures ([bit.ly/Winter2021Pathways5](https://bit.ly/Winter2021Pathways5)). Professor Klotz attributes the increase in voluntary departures to four main causes: (*see* [bit.ly/Winter2021Pathways6](https://bit.ly/Winter2021Pathways6)):

1. a backlog of workers who wanted to resign before the pandemic but held on a bit longer;
2. heightened levels of burnout leading to heightened levels of resignations;
3. “pandemic epiphanies”—where people have had major shifts in their lives and identities that are leading them to pursue new careers and start their own businesses; and
4. an aversion to returning to offices after a year or more of working remotely.

The third main cause, “pandemic epiphanies,” lines up with the conversations I’m having with lawyers who are “running toward” greater alignment of their passion, purpose, and profession. These lawyers are asking questions, such as: “Do I feel good about what I accomplish as a lawyer on a daily basis?” “Does practicing law truly fulfill me...or is there something more I could do?” “Is what I’m doing in line with my personal goals?” Additionally, many lawyers who are committing to their well-being are curious if they might find a career in which they can have an authentic balance between work and home, self-care and client care.

### Should I Stay Or Should I Go?

Does this discussion mean that you’re missing the boat if you decide to stay put? Absolutely not! There are numerous lawyers who are satisfied with their jobs and may have found greater meaning and purpose in their work during the pandemic, and greater work-home balance as well. There are many reasons to stay the course; the reasons to stay or go are personal to you and your life circumstances.

If you are considering leaving your current job, however, either for a sabbatical or to pursue a new job or career, it may be helpful to work with a professional—such as a coach or therapist—who can help you to navigate your choices and make the best decision possible. If you’re new to working with a professional mental health care provider or coach, this article on help-seeking for attorneys may be useful: [bit.ly/Winter2021Pathways8](https://bit.ly/Winter2021Pathways8).

In my experience, it is likely that for some lawyers, it is time to actually do something different for work; for others, it may be more accurate that they need to do what they do differently. A business coach or therapist who specializes in resilience and burnout can help you get clear on whether you’re burned out on the practice of law or burned out in general. Professional help can also help you navigate the fears about change that may hold you back from making a much needed shift (including alterations that would allow you to keep your job but enjoy it more) or prevent you from fully enjoying the modifications you make.

Working with a coach or a therapist can also help you get clear on what “asks” may be the most crucial if you need modifications in order to stay at your current job. For example, would a hybrid schedule, working part-time temporarily, or taking a month-long “sabbatical” help? If you’re considering leaving your current job because of the return-to-office policy, make sure that you fully understand the policy, and ask for clarification if you have questions. You may consider trying out returning to the office before you resign; give it a try and see how it actually feels rather than make a decision based on how you think it may feel.

If you are a legal employer, consider thinking about new ways to retain lawyers and staff in the current context. Given the statistics above on attorney overwhelm, offering options where individual attorneys can choose ways to work that meet both the attorney’s individual needs and the firm’s collective needs is optimal. For example, is there a way that your firm can have more flexibility with return-to-office schedules, such as a gradual transition back to the office, more flexible flex-time, and a temporary leave policy for parents beyond maternity leave? Or, can you offer part-time work that has clear pathways for advancement, including options for “making partner?” In addition, offering wellness resources may be

key to both attracting and retaining legal talent. The above-referenced ABA study showed that, “A substantial number of lawyers (34%) report that guidance about enhancing mental health and well-being would help them in the practice of law going forward. Over one-third of respondents (37%) think that wellness resources are ‘very important’ or ‘extremely important.’” If you would like more ideas for firms returning to the office post-pandemic, please read my article “The Mental Health Factor: Accounting for the Emotional Toll of the Pandemic” ([bit.ly/Winter2021Pathways9](https://bit.ly/Winter2021Pathways9)) and the above-mentioned ABA publication ([bit.ly/Winter2021Pathways2](https://bit.ly/Winter2021Pathways2)).

As we navigate the upcoming months, there are likely more pandemic-related changes and unknowns on the horizon. Finding ways to resource ourselves and strengthen our firm’s wellness culture so that we navigate life as resiliently and steadily as possible may help us cope with “Pandemic Flux Syndrome,” and help us to mindfully consider career options. Notwithstanding the stress of the pandemic, there is an opportunity available to us now as individuals and firms for reflection, growth, goal clarification, and improved strategies. Taking time to reflect and reorient is important, as the realizations that come from our reflections can lead to increased passion and meaning in all of our personal and professional lives. ■

*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 Laura’s CLE course offerings for your firm, or to find out more about one-on-one resilience coaching, please email Laura through [consciouslegal-minds.com](https://consciouslegal-minds.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): [consciouslegal-minds.com/register](https://consciouslegal-minds.com/register).*

## To the Bereaved (cont.)

the final hour of my father’s life. He passed away about 15 minutes after I had concluded my call with her and returned to his bedside.

If you were a fly on the wall of that classroom, what you would have seen was a professor turn on a PowerPoint, followed by me running out the lecture hall, leaving purse and books behind, gulping back sobs. For me, it was an involuntary response, an unexpected association out of left field. Throughout the years, in speaking with dozens of people who have been deeply bereaved, I have learned these types of situations are common. But, as earlier referenced, none of us has any way of knowing because, as a society, we never talk about it.

Good grief counseling really does help, both in the depths of our despair in the early stages as well as later, when we begin to move into our new center of gravity, which can feel like a betrayal of our deceased loved one. Grief counseling also helps us understand our process and the natural reactions we might have at various stages, like the backlash feeling of guilt the first time we laugh or

enjoy something again. Because we do not have a cultural understanding and acceptance of this process, grief counseling is all the more important to help us navigate these uncharted waters. Local hospice organizations almost always have grief counseling services available for a very reasonable fee. LAP can assist you in finding a grief counselor in your area.

Most importantly, go easy on yourself. Whatever you are feeling is normal—even if it feels extreme or the opposite, or if you are numb and cannot seem to feel anything at all. Whatever you are experiencing, it is not a place for judgment or “shoulds.” Honoring our beloved means honoring ourselves and our experience through this process. ■

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

## Upcoming Appointments to Commissions and Boards

Anyone interested in being appointed to serve on any of the State Bar’s boards, commissions, or committees should email [lheidbrink@ncbar.gov](mailto:lheidbrink@ncbar.gov) to express that interest (being sure to attach a current resume), by January 7, 2021. The council will make the following appointments at its meeting in January:

**Lawyer Assistance Program Board (LAP)** (three-year terms)—There are three appointments to be made. Reid Acree Jr. (volunteer) and Gerald Collins, Jr. (councilor) are not eligible for reappointment. Michael E. McGuire (clinician) is eligible for reappointment. The rules governing the Lawyer Assistance Program Board require the council to appoint the board’s chair and vice-chair annually.

The mission of the Lawyer Assistance Program is to protect the public from impaired lawyers and judges; assist lawyers, judges, and law students with issues that may be impairing; support the recovery process of lawyers and judges; and educate the legal community about issues of substance abuse. The LAP Board, which oversees the operation of the program, is a nine-member board comprised of three State Bar councilors, three LAP volunteers, and three clinicians who are experienced in working within the substance abuse and/or mental health field. The LAP Board examines policy issues and establishes policy relative to the LAP mission. The board meets during the regularly scheduled quarterly State Bar Council meetings.

# 2021-2025 Strategic Plan: Working toward a North Carolina where All Can Meet Their Legal Needs

In January 2021, NC IOLTA initiated a strategic planning process to create a clear roadmap to guide IOLTA's work in the coming years. Through the efforts of committed volunteers, staff, and stakeholders, NC IOLTA has matured since establishment in 1983. For example, rule changes made the program mandatory in 2008 and required comparability in 2010 (that is, required that IOLTA accounts only be held at eligible banks that agree to pay the highest available rate on IOLTA accounts meeting the same minimum balance or other requirements), with the goal of maximizing income for grantmaking. The objective of the strategic planning process was to identify a new phase of opportunities for NC IOLTA's growth, consistent with the program's founding principles and building upon achievements made since inception.

The Executive Committee of the board led the strategic planning process, with the participation of the full board and staff and the support of consultants Stephanie Choy and Lonnie Powers, leaders who have worked professionally to support, improve, and grow civil legal aid for decades. The process included 19 stakeholder interviews and a community forum for feedback on the draft plan. The IOLTA Board approved the strategic plan on June 23, 2021. This fall, IOLTA Board and staff are connecting with stakeholders, including grantees, leaders within the legal profession, and licensed North Carolina attorneys, to share the results of this process.

NC IOLTA's vision is a North Carolina where all people can effectively meet their legal needs. This is a description of the place where we would like to be in the future if all of the organization's goals and aspirations are met. As a profession, we have long recognized this ideal in North Carolina. The Preamble of the North Carolina Rules of Professional Conduct calls on all lawyers to devote profes-

sional time and resources to the improvement of the law, access to the legal system, and the administration of justice, saying "at their best, lawyers assure the availability of legal services to all, regardless of ability to pay." It is this professional obligation of all lawyers which was central to the creation of the program in 1983 by the North Carolina State Bar with the approval of the North Carolina Supreme Court. This principle remains central to the program today.

NC IOLTA's mission is to improve the lives of North Carolinians by strengthening the justice system as a leader, partner, and funder. This statement of purpose emphasizes the program's role and the opportunities that we have to make an impact. The core values that the IOLTA program strives to embody in pursuit of this mission and through daily operation include integrity, stewardship, equity, leadership, and partnership.

Five broad goals were identified, summarized in brief below, for NC IOLTA's work over the next several years:

**Goal 1. Be a responsive and responsible grantmaker that engages in effective stewardship of funds to advance its mission.** Since the first grants were made in 1985, IOLTA has approved more than \$100 million in grant awards. With this goal, IOLTA seeks to continue stable support to grantees while also evaluating grant priorities and considering ways that IOLTA can use grants to foster leadership, collaboration, and improvement, and strengthen partnerships within the civil justice community.

**Goal 2. Solidify, increase, and diversify NC IOLTA funding.** IOLTA relies heavily on interest earned on lawyers' trust accounts, a source subject to the ebbs and flows of the market. To work toward the mission and vision, IOLTA must be involved in efforts to increase funds for civil legal aid.

**Goal 3. Heighten communications about**

## IOLTA Update

- **New Staff.** In October, NC IOLTA welcomed two new staff to the department. Colleen Bishop, administrative assistant, will assist with recordkeeping for IOLTA attorney compliance and bank data, as well as provide administrative support to other department functions. Daniel Labarca, program manager, will oversee IOLTA's grantmaking including application, reporting, and monitoring processes.
- **IOLTA Revenue.** Revenue from participant income has remained steady in 2021, tracking 2019 income figures after seeing a decrease in income in 2020 as a result of the pandemic. Funds received through September exceed \$3.6 million.
- **2022 Grants.** Staff are currently reviewing 2022 grant applications received in October in anticipation of the IOLTA Board's grantmaking meeting which will take place on December 2. In total, NC IOLTA received 27 applications requesting more than \$5 million in grant funding for 2022.

**the benefits produced by IOLTA and the need for increased civil legal aid.** IOLTA heard continuously throughout the strategic planning process that increased communication about the program's impact and the need for civil legal aid is critical. Through this goal, IOLTA seeks to create a communication plan designed to reach all potential supporters of civil legal aid, utilizing data, stories, and connections to build awareness.

**Goal 4. Embrace IOLTA's leadership role in the justice community.** As a statewide

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# Myth Busters: What is Generally Known About the Lawyer's Duty of Confidentiality?

BY SUZANNE LEVER, ASSISTANT ETHICS COUNSEL

## Update on Proposed 2020 FEO 6 (Commenting Publicly on Client Information Contained in Public Records)

Proposed Opinion 2020 FEO 6 (Commenting Publicly on Client Information Contained in Public Records) was published for comment in October 2020. The proposed opinion concluded that a lawyer was prohibited from discussing his former client's high-profile case on a podcast, even if the lawyer limited his comments to information in the public record, because the former client did not give his consent. The opinion concluded that, pursuant to Rule 1.6, the lawyer needed his former client's consent to discuss any information relating to the former client's case. The proposed opinion specifically concluded that the lawyer needed his former client's consent, even to discuss information in public records, information presented at judicial proceedings, or information contained in the news.

The comments in opposition to the proposed opinion came fast and furious. The watercooler and listserv discussions of the proposed opinion were robust. We received comments that the proposed opinion would be a violation of a lawyer's first amendment rights. We also received comments that the proposed opinion is impractical and illogical. For example: it would be impractical to prevent lawyers from discussing their prior cases in CLEs and other educational forums, to prevent lawyers from discussing the holding and precedent in an appellate case they were involved in, to prevent lawyers from mentoring other lawyers utilizing stories of past experiences, and to prevent lawyers from sharing documents. We also heard that it would be illogical to allow everyone in a courtroom to discuss a case, except the lawyer who actually participated in the mat-

ter, or to prevent a lawyer from discussing information that is a matter of public record or headline news. Some comments suggested that the proposed opinion did not correctly interpret and apply the rules (although those comments subsequently failed to provide an alternative interpretation of the rules). Other lawyers expressed concern that the current prohibitions are overly broad and impractical and suggested that the rules should be revised to specifically state that information in the public record or information that is generally known should not be deemed protected information.

All comments were provided to the Ethics Committee for review. As a result of the comments, the proposed opinion was sent back to a subcommittee for further study, with a new instruction to consider whether to proceed with the opinion, propose an amendment to the Rules of Professional Conduct as was suggested, or both. Although overwhelmingly negative, ethics staff at the State Bar was pleased with the amount of feedback received on the opinion. This engagement is part of self-regulation, and both staff and the Ethics Committee are incredibly thankful for the amount of comments received.

When the proposed opinion was sent to subcommittee, the subcommittee meetings were attended by not only the subcommittee members, but a sampling of State Bar officers both past and present, law school professors, representatives of Legal Aid, representatives of the North Carolina Advocates for Justice, and other guests. The discussions that took place during these particular subcommittee meetings were some of the most interesting legal discussions of I have ever been a part. In addition to reviewing all submitted comments, the subcommittee members and guests dissected the

North Carolina Rules of Professional Conduct pertaining to a lawyer's duties of confidentiality, and, similarly, analyzed the confidentiality rules of the small minority of states that have exceptions in their rules for information in the public record and/or information that is generally known. The majority of attendees ultimately agreed that the proposed opinion was a correct interpretation of the current rules. However, as to whether or not Rule 1.6 and/or Rule 1.9 should be revised, a more divided opinion emerged. Some attendees expressed their opinion that the duty of confidentiality a lawyer owes to his client is sacrosanct and the duty as set out in the North Carolina Rules of Professional Conduct (as well as the overwhelming majority of other jurisdictions) should not be changed. These attendees pointed out that lawyers are free to talk about a client's case at public forum if they get the client's consent or if they use hypotheticals. They also opined that the lawyer is an agent of the client, and the lawyer owes his clients a duty of loyalty such that the lawyer may not discuss the client's case against the client's directive. Other attendees argued that, although contrary to what the text of the rules say, the profession has for years (if not decades) interpreted Rule 1.6 and/or Rule 1.9 in a manner that allows lawyers to speak about the public aspects of their former client's cases. As such, any change to Rule 1.6 and/or Rule 1.9 would not be a change in carrying out this sacrosanct duty of confidentiality; rather, the rule change would merely be to the text of the rule in a way that reflects how the profession has carried out the duty of confidentiality—without harming clients—for decades.

After several meetings, the subcommittee came to an impasse as to whether or not to revise the confidentiality rules. The chair pre-

sented the issue to the full Ethics Committee at the October 7, 2021, meeting for discussion. Again, there was a fascinating debate of the advisability/necessity to revise the rules. After an hour of thoughtful discussion, the full committee directed the subcommittee to continue their efforts to explore an amendment to the Rules of Professional Conduct in this regard in order to provide practical and logical guidance to the bar. What these changes may be is unclear. What is clear from the comments the State Bar received and the discussions we participated in, is that there are some misconceptions as to the content and coverage of the current versions of Rule 1.6 and Rule 1.9.

This article addresses four of the most common misconceptions—or “myths”—about a lawyer’s duty of confidentiality under Rules 1.6 and 1.9.

**Myth: Rule 1.6 only applies to “confidential information.”**

Fact: Rule 1.6 applies to any information acquired during the professional relationship with a client or relating to representation of a client.

Rule 1.6 sets out a lawyer’s duty of confidentiality to his clients. Section (a) provides that a lawyer “shall not reveal information acquired during the professional relationship with a client” unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted by paragraph (b). The title of Rule 1.6 is “Confidentiality of Information.” There is a misconception that the title of Rule 1.6 is “Confidential Information.” In actuality, there is no reference to “confidential information” anywhere in Rule 1.6 or the comments to the rule. Rule 1.6 applies to *any information* acquired during the professional relationship with a client or relating to representation of a client. The rule coverage is broad and applies not only to matters communicated in confidence by the client, but also to all information acquired during the representation, whatever its source.

**Myth: Rule 1.6 only applies to current clients.**

Fact: There is no distinction between current and former clients in Rule 1.6.

There is a misconception that Rule 1.6 creates a duty of confidentiality to current clients, and Rule 1.9 extends this duty to former clients. The duty of confidentiality set out in Rule 1.6 continues after the termination of the client-lawyer relationship.

Additional duties owed to former clients are discussed in Rule 1.9. Rule 1.9 does not supplant Rule 1.6. As stated in comment [1] to Rule 1.9: “After termination of a client-lawyer relationship, a lawyer has certain *continuing duties with respect to confidentiality* and conflicts of interest and thus may not represent another client except in conformity with this Rule.” (Emphasis added). Rule 1.9(c)(2).

Rule 1.9(a) generally provides that a lawyer may not represent a new client who is materially adverse to a former client when the subject of the representation is “substantially related” to the lawyer’s prior representation. A concern underlying Rule 1.9(a) is the possibility of the lawyer revealing or misusing information learned in a prior relationship. The primary purpose of the “substantial relationship” test is to protect the former client’s information to which the lawyer was privy.

**Myth: Lawyers may disclose a former client’s information if it is generally known.**

Fact: The “generally known” exception applies only to the use of information, not disclosure.

Rule 1.9(c) separately regulates the use and disclosure of client information regardless of whether matters are substantially related. As noted above, Rule 1.6 broadly prohibits lawyers from disclosing former-client information. This restriction is reiterated in Rule 1.9(c)(2). Rule 1.9(c)(2) deals with disclosure of a former client’s information and prohibits a lawyer from *revealing* information of either a current or a former client. Rule 1.9(c)(2) provides that a lawyer who has formerly represented a client in a matter shall not thereafter “reveal information relating to the representation except as these Rules would permit or require with respect to a client.” The prohibition on revealing information “except as these rules would permit or require” references the general duty of confidentiality found in Rule 1.6. Lawyers have the same duty not to reveal former client information under Rule 1.9(c)(2) as they have with regard to current clients under Rule 1.6(a).

Rule 1.9(c)(2) confirms that the duty to keep your client’s information confidential per Rule 1.6 extends to former clients. Notably, the rule is an outright prohibition on the lawyer “reveal[ing] information relating to the representation” of a former client. There are no exceptions, and particularly no exception such as that included in (c)(1) regarding a lawyer’s “use” of the former

client’s information.

Rule 1.9(c)(1) permits more liberal *use* of former-client information. Rule 1.9(c)(1) permits a lawyer to use client information if it does no harm to a former client or if the information has become generally known. The “generally known” exception applies only to the use of information, not disclosure.

The carve out in Rule 1.9(c)(1) is not a broad grant of permission for lawyers to use a former client’s information for whatever purpose the lawyer desires so long as the information is generally known.

The terms “reveal” or disclose on the one hand and “use” on the other describe different activities or types of conduct, even though they may occur at the same time. In discussing the use of information related to a current representation (Rule 1.8(b)), comment [5] to Rule 1.8 provides:

Use of information relating to the representation to the disadvantage of the client violates the lawyer’s duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency’s interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by the Rules of Professional Conduct.

In each of the examples above, the lawyer is using the current client’s information without actually revealing the information.

**Myth: Information that is in the public record is generally known.**

Fact: Information is accessible through the public record does not make it generally known.

Confusion exists as to when information is “generally known.” Some lawyers believe, incorrectly, that information is “generally known” when it is a matter of public record.

## In Memoriam

**Edgar Reel Bain**  
Lillington, NC

**Robert Joel Blum**  
Cary, NC

**Robert Brevard Blythe**  
Charlotte, NC

**Kathleen Kenney Brennan**  
Charlotte, NC

**Joe N. Cagle**  
Vale, NC

**James Robert Carpenter Jr.**  
Gastonia, NC

**Randolph Cartwright Dow**  
Ash, NC

**Milton Palmer Fields**  
Rocky Mount, NC

**James Robert Fox**  
Winston-Salem, NC

**Stephen Field Franks**  
Hendersonville, NC

**David Bruce Freedman**  
Winston-Salem, NC

**Joshua Garland Gropp**  
Raleigh, NC

**Vonno Lamar Gudger III**  
Asheville, NC

**Clarissa Kay Halks**  
Durham, NC

**William Frederick Hulse**  
Charlotte, NC

**Richard Erik Jenkins**  
Durham, NC

**Timothy Thomas Leach**  
Gastonia, NC

**John Gray Lewis Jr.**  
Statesville, NC

**Elvis Lewis**  
South Hill VA

**Thomas Ashe Lockhart**  
Charleston, SC

**Patricia Stanford Love**  
Chapel Hill, NC

**Benjamin S. Marks Jr.**  
Greensboro, NC

**Wayne Watkins Martin**  
Morganton, NC

**Perry David Mastrocola**  
Charlotte, NC

**Joe Pearson McCollum Jr.**  
Monroe, NC

**Edward Harrington McCormick**  
Lillington, NC

**Richard Terrell Meek**  
Charlotte, NC

**John Garland Mills III**  
Wake Forest, NC

**Christopher David Munz**  
Erwin, NC

**Stephen Holmes Novak**  
Kill Devil Hills, NC

**Robert Ward Porter**  
Winston-Salem, NC

**Robert Kirk Randleman**  
Yadkinville, NC

**Tyler Lee Randolph**  
Richmond Hill, GA

**Donald Dean Sayers**  
Salisbury, NC

**Timothy Wayne Smith**  
Pink Hill, NC

**James Eugene Snyder Jr.**  
Lexington, NC

**Oscar E. Starnes Jr.**  
Asheville, NC

**Janeice B. Tindal**  
Reidsville, NC

**Frederic Earl Toms**  
Cary, NC

**Wallace Clemson Tyser Jr.**  
Chapel Hill, NC

**Walker Yeatman Worth Jr.**  
Fayetteville, NC

Comment [8] to Rule 1.9 explains the exception for information that is “generally known” as follows:

Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is “generally known” depends in part upon how the information was obtained and in part upon the former client’s reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons

does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered “generally known.”

The mere fact that information is in the public record does not necessarily deprive the information of the protections provided by Rule 1.6 and Rule 1.9.

In summary, the Rules of Professional Conduct provide that a lawyer may never reveal any information acquired during the professional relationship with a client or relating to representation of a client, unless the client consents or an exception set out in Rule 1.6(b) applies. This prohibition remains in place even if the client becomes a

former client and even if the client’s information becomes “generally known.” And this prohibition is the basis for the conclusion reached in Proposed Opinion 2020 FEO 6. The duty of confidentiality set out in Rule 1.6 is incredibly broad, and its broad scope compelled the ethics committee to answer the question posed about a lawyer participating in a CLE over his client’s objection in a way that was perhaps dissatisfying and impractical but nonetheless accurate.

### What Now?

The subcommittee continues its work, with the hope that a proposed resolution will be before the committee in January. Be on the lookout for an update at that time, for which comments will again be welcome (even if they say we got it wrong). ■

# Council Publishes Revised Comment to Rule 1.1 on Implicit Bias; Committee Publishes Two New Opinions, Returns Opinion on Google Local Service Advertisements to Subcommittee

## Council Actions

The State Bar Council adopted no new ethics opinions this quarter. At its meeting on October 8, 2021, following favorable votes from both the Ethics Committee and the Executive Committee, the council approved for publication a revised version of the proposed comment to Rule 1.1 (Competency) addressing a lawyer's awareness of implicit bias and cultural differences. This aspirational comment states that a lawyer should be aware of implicit bias and cultural differences relative to a client that might impact the lawyer's representation of the client, and that such awareness enhances a lawyer's representation of his/her clients. The full text of the proposed comment is published in this edition of the *Journal* and on the State Bar's website.

## Ethics Committee Actions

At its meeting on October 7, 2021, the Ethics Committee received reports and recommendations from two additional subcommittees studying proposed amendments to the Rules of Professional Conduct: one studying the adoption of anti-discrimination language in the text of the Rules of Professional Conduct, and the other studying potential amendments to Rule 1.19 (Sexual Relations with Clients Prohibited). Both subcommittees will continue their work over the next quarter.

In addition to the proposed Rule amendments, the Ethics Committee considered a total of eight ethics inquiries. Six inquiries were sent or returned to subcommittee for further study, including inquiries addressing the confidentiality of information contained in the public record, the ethical considera-

tions surrounding a lawyer's participation in an online advertising platform such as Google's Local Service Ads, and a lawyer's professional responsibility in providing limited representation to an indigent client in a criminal matter. Lastly, the committee approved the publication of two new proposed opinions, the first of which (proposed 2021 FEO 3) is a revised version of a previously published opinion that was returned to subcommittee following an initial round of publication earlier this year. Both proposed opinions appear below.

## Proposed 2021 Formal Ethics Opinion 3 Charging Fees to Separately Represented Party in Residential Real Estate Closing October 7, 2021

*Proposed opinion rules that a closing lawyer representing the buyer in a residential real estate transaction may not charge a fee for services performed that primarily benefit the buyer to a separately represented seller unless the seller consents to the fee and the lawyer complies with Rules 1.5(a) and 1.8(f). The opinion also allows a closing lawyer to charge a seller for services performed that primarily benefit the seller if seller is notified in advance of the charge and has a reasonable opportunity to object to the charge.*

Buyer retained Lawyer A to represent Buyer in a residential real estate transaction. Seller declined to retain Lawyer A and instead retained separate counsel for the transaction, Lawyer B. Leading up to the closing, rather than using her standard documents for the transaction, Lawyer A received documents prepared by Lawyer B to be used

## Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment—including comments in support of or against the proposed opinion—or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at its next quarterly meeting. Any comment or request should be directed to the Ethics Committee at [ethicscomments@ncbar.gov](mailto:ethicscomments@ncbar.gov) no later than December 30, 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.

at closing, which differed substantially from

the documents Lawyer A planned to use at closing. As a result, Lawyer A was required to review Lawyer B's work and make changes to the proposed documents for the benefit of her client, Buyer. At closing, Lawyer A charged a \$100 fee to Seller for the work Lawyer A completed in reviewing and responding to Lawyer B's proposed documents. Lawyer B and Seller objected to the fee charged by Lawyer A to Seller.

**Inquiry #1:**

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

**Opinion #1:**

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

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

Lawyer A has been retained by Buyer to represent Buyer (and presumably Buyer's lender, if applicable)

in the acquisition of real property from Seller. Although representation of multiple parties to a real property transaction is possible without violating Rule 1.7's prohibition on engaging in a concurrent conflict of interest during a representation (*see, e.g.*, CPR 100, RPC 210, 2006 FEO 3, and 2013 FEO 4), Seller has elected to obtain separate counsel for the transaction. Accordingly, Lawyer A's representation is limited to Buyer, and all work completed in the transaction by Lawyer A is for the benefit of her client, Buyer. Under these circumstances, the only way Lawyer A could collect a fee for the legal services provided to Buyer from anyone other than Buyer would be through compliance with Rule 1.8(f). Specifically, Lawyer A must a) obtain Buyer's informed consent to Seller paying all or a portion of Lawyer A's fee for completing her representation of Buyer in the transaction, b) ensure that Seller's payment of Lawyer A's fee does not interfere with lawyer's independence of professional judgment or with the client-lawyer relationship; and c) ensure that all information deemed confidential pursuant to Rule 1.6 remains appropriately protected in accordance with that Rule. Furthermore, any fee collected by Lawyer A from Seller or a third party for the benefit of Buyer must not be illegal or excessive pursuant to Rule 1.5(a). *See* 2006 FEO 3 and 2013 FEO 4.

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

**Inquiry #2:**

May Lawyer A charge an additional fee

to Buyer for the work completed in reviewing and responding to Lawyer B's proposed documents?

**Opinion #2:**

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

**Inquiry #3:**

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

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

**Opinion #3:**

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

**Inquiry #4:**

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



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

**Opinion #4:**

Yes, provided that a) Seller is provided advance notice of the fee to be charged and a reasonable opportunity to object, b) Seller does not object to the fee charged, c) Buyer consents to Seller's payment of Lawyer A's fee, and d) the fee charged is not illegal or clearly excessive. Although Buyer receives a benefit from Lawyer A's work in cancelling Seller's lien, (namely, obtaining clean title to the property sought), Lawyer A's services primarily benefit Seller in that Lawyer A is relieving Seller of his statutory and/or contractual obligations to provide clean title to Buyer. As such, Lawyer A may charge Seller for services that fulfill Seller's sole obligations, but Lawyer A must provide Seller with notice of the intended charge and an opportunity to object to the service and charge. If Seller does not object to the charge, Lawyer A may complete the work and charge Seller as proposed.

Notably, Lawyer A's service and charge to Seller does not create an attorney-client relationship with Seller. Rather, Lawyer A continues to represent Buyer, and Lawyer B continues to represent Seller, but for purposes of efficiency the parties agree to Lawyer A completing the tasks required of Seller and Lawyer B.

Should Seller object to Lawyer A's offer and proposed fee, Lawyer A may not charge Seller for work completed in ensuring clean title; instead, Lawyer A may only charge her client, Buyer, for additional work in completing the transaction so long as any such charge complies with Rule 1.5. While outside of the scope of the Rules of Professional Conduct, Lawyer A should review and rely upon, if necessary, any available legal remedies to ensure Seller complies with all applicable statutory and/or contractual obligations associated with the transaction, including providing clean title.

**Inquiry #5:**

May Lawyer A charge Seller for expenses incurred during the closing that are associated with Seller's role in the transaction?

**Opinion #5:**

Yes, provided that a) Seller is provided advance notice of the charged expense and a

reasonable opportunity to object, b) Seller does not object to the charged expense, and c) the charged expense is an accurate and documented expense incurred by Lawyer A in facilitating Seller's role in the transaction. Such expenses include, but are not limited to, postage, copying expenses, overnight delivery charges, and/or wire transfer fees associated with carrying out the transaction.

**Proposed 2021 Formal Ethics**

**Opinion 6**

**Departing Lawyer's Email Account  
October 7, 2021**

*Proposed opinion addresses a law firm's ethical responsibilities as to a departing lawyer's email account.*

**Facts:**

Departing Lawyer is employed by Law Firm and utilizes an email address associated with the firm. Departing Lawyer has decided to terminate his employment with Law Firm and open his own law practice. Law Firm and Departing Lawyer sent a joint communication to Departing Lawyer's current clients advising them of the departure and informing them that they have the option to continue their representation with Departing Lawyer, request that another lawyer with Law Firm take over the representation, or engage a lawyer from another firm.

Law Firm seeks guidance as to the ethical requirements relating to Departing Lawyer's law firm email account after Departing Lawyer has left the firm.

**Inquiry #1:**

Does Law Firm have an obligation to place an outgoing auto-reply message on Departing Lawyer's email account announcing his departure, or may Law Firm simply deactivate Departing Lawyer's email account?

**Opinion #1:**

In order to comply with its professional responsibilities, Law Firm must keep Departing Lawyer's email account active and must place an outgoing auto-reply message on Departing Lawyer's email account. When a lawyer leaves a law firm, "both the departing lawyer and the responsible members of the firm who remain have ethical responsibilities to clients on whose active matters the lawyer currently is working to

assure, to the extent reasonably practicable, that their representation is not adversely affected by the lawyer's departure." ABA Formal Op. 99-414 (1999).

Lawyers are required to "act with reasonable diligence in representing a client." Rule 1.3. The requirement to diligently represent clients continues during periods of transition when lawyers must "take care that they continue to fulfill the lawful objectives of their clients." RPC 48. A component of diligent representation is "reasonable communication" between the lawyer and the client. See Rule 1.4, cmt. [1]. Rule 1.4(a)(3) provides that a lawyer must "keep the client reasonably informed about the status of [the client's] matter." The departure of a lawyer who plays a principal role in a client's representation "is information that may affect the status of a client's matter as contemplated by Rule 1.4." ABA Formal Op. 99-414 (1999). Accordingly, Departing Lawyer's clients must be promptly notified that Departing Lawyer is leaving Law Firm. As noted above, Law Firm and Departing Lawyer sent a joint communication to Departing Lawyer's current clients advising them of the departure. However, Law Firm's obligations do not end once notifications have been sent to Departing Lawyer's current clients.

Law Firm is required to take reasonable measures to protect the interests of every client, regardless of whether the client remains with Law Firm or leaves with Departing Lawyer. See Rules 1.3, 1.4, and 1.16(d). Email and other communications may continue to come to Law Firm after Departing Lawyer leaves the firm. It is possible that Departing Lawyer's current, former, or prospective clients may attempt to contact Departing Lawyer through his law firm email account. In addition, third parties involved in ongoing litigation with one of Departing Lawyer's current clients may attempt to contact Departing Lawyer through his law firm email account. For this reason, Law Firm may not simply deactivate the account. Reasonable measures necessary to protect clients' interests in this scenario include placing an outgoing auto-reply message on Departing Lawyer's email account announcing his departure. ABA Formal Op. 489 (2019); Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2013-4.

**Inquiry #2:**

If Law Firm has an obligation to place an

outgoing auto-reply message on Departing Lawyer's email account, may Law Firm choose the wording of the auto-reply message?

**Opinion #2:**

Yes, however, the automatic response must include notice of the lawyer's departure and, if appropriate, must provide new contact information for Departing Lawyer if the contact information is known or reasonably ascertainable by Law Firm. Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2013-4. The response may also include an alternative contact at Law Firm for inquiries.

In circumstances such as those set out in 2013 FEO 8 (Responding to Mental Impairment of Firm Lawyer), or where the departing lawyer is under investigation for serious ethics violations such as embezzlement, the law firm may have a professional responsibility to do more than provide the departing lawyer's contact information in an automatic response with no further information regarding the circumstances of the lawyer's departure. In such limited circumstances, the automatic response must include notice of the lawyer's departure and include a contact at Law Firm for inquiries. Responses to client inquiries regarding the lawyer's departure should include the lawyer's new contact information as well as information necessary for clients to make an informed decision about continued or renewed representation by the departed lawyer.

**Inquiry #3:**

In addition to placing an outgoing auto-reply message on Departing Lawyer's email account announcing his departure and giving the new contact information, does Law Firm have a duty to monitor and respond to the incoming emails?

**Opinion #3:**

Yes. While Departing Lawyer's email account remains active, Law Firm must monitor the email account to ensure clients are not adversely impacted by the lawyer's departure. Such monitoring is necessary to ensure continued representation of those clients that have elected to stay with Law Firm and ensure prompt transmission to Departing Lawyer of communications that relate to a client that has decided to stay with Departing Lawyer. ABA Formal Op. 489 (2019); Philadelphia Bar Ass'n Prof'l

Guidance Comm., Op. 2013-4. As noted by the Philadelphia Bar Association, "some degree of interaction with the substance of messages to [a departing lawyer's] old email address would, as a practical matter, be necessary in order for [a law firm] to sort out its responsibilities to current clients, former clients, those clients who have elected to follow [the departing lawyer], as well as to third parties." Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2013-4. However, individuals responsible for monitoring the account should limit their review of email communications to only enough information to determine where the email needs to be directed.

**Inquiry #4:**

How long must Law Firm keep Departing Lawyer's email account active after the lawyer's departure?

**Opinion #4:**

As noted above, Law Firm must take reasonable measures to protect the interests of every client. Law Firm must keep Departing Lawyer's email account active for a reasonable amount of time. After a reasonable amount of time, Law Firm must remove the auto-reply message and deactivate the email account such that anyone contacting the address will receive a generic "undeliverable" message. What constitutes a reasonable time

period will vary depending on factors such as the type of law practiced by Law Firm and the caseload Departing Lawyer maintained while at Law Firm. In general, Law Firm must keep Departing Lawyer's email account active for a three-month period unless there are circumstances that would make it reasonably necessary to shorten or extend the three-month period. In the absence of special circumstances, Law Firm must not keep Departing Lawyer's email account active after three months. Law Firm must deactivate Departing Lawyer's email account to avoid giving clients and other third parties the impression that Departing Lawyer remains associated with Law Firm and to prevent clients and other third parties from inadvertently disclosing information to unanticipated recipients.

**Inquiry #5:**

If a former client emails Departing Lawyer's email account in search of legal services, may someone at Law Firm reach out to the former client and offer services?

**Opinion #5:**

Yes. Former clients, and prospective clients, seeking legal representation must promptly be given Departing Lawyer's new contact information. However, Law Firm may also offer the firm's services as an alternative. RPC 200. ■

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

# Amendments Pending Supreme Court Approval

At its meetings on April 16, 2021, July 16, 2021, and October 8, 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: [ncbar.gov](http://ncbar.gov).)

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

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

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

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

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

The proposed amendments add “Diversity, Inclusion, and Elimination of Bias Training” to the definitions in Rule .1501 and, in Rule .1518, include such training in the 2022 CLE requirements for active members of the State Bar.

The proposed 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 State Bar 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 on April 16, 2021.

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 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 Amendments to the Plan 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 Standards for New Specialty Certification

27 N.C.A.C. 1D, Section .3400,

## Highlights

- Published this quarter for comment: a proposed amendment to Rule of Professional Conduct 1.1, Competence, adds a new comment [9] that states how awareness of implicit bias and cultural differences enhances a lawyer’s competency.
- Proposed amendments to the standards for certification in criminal law were published for comment last quarter. These proposed amendments recognize separate subspecialties in federal criminal, state criminal, and juvenile delinquency law. The proposed amendments were approved by the council after receiving no comment during publication and will be transmitted to the Supreme Court.

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

Amendments to Discipline and Disability Rule .0129, Reinstatement, update the bar exam requirements for reinstatement if a petition for reinstatement is filed seven or more years after the effective date of the petitioner’s suspension or disbarment. The amendments also set forth additional requirements for reinstatement from suspension, disbarment, and disability inactive status and specify that failure to comply with any requirement can result in dismissal of the petition.

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

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

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

of the bar examination; and (3) attain a passing score on the Multistate Professional Responsibility Examination.

### 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 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.

## Proposed Amendments

At its meeting on October 8, 2021, the council voted to publish for comment the following proposed rule amendment:

### Proposed Amendment to the Rules of Professional Conduct

27 N.C.A.C. 2, Rule 1.1, Competence

The proposed amendment to Rule 1.1 adds new comment [9] which states that awareness of implicit bias and cultural differences enhances a lawyer's competency.

#### Rule 1.1, Competence

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thor-

oughness, and preparation reasonably necessary for the representation.

Comment

...

[1] ...

...

Maintaining Competence

[8] ...

**[9] A lawyer should be aware of implicit bias and cultural differences relative to a client or anyone involved in a client's matter that might affect the lawyer's representation of the client. Such awareness enhances a lawyer's competency and works to ensure understanding of the client's needs, effective communication with the client and others, and adequate representation of the client.**

[Subsequent comments renumbered] ■

### 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.**

### IOLTA Update (cont.)

funder focused on civil legal aid, IOLTA is uniquely positioned to support the civil justice community by embracing a leadership role. IOLTA envisions building on existing partnerships with stakeholder organizations and investing in our ability to convene, evaluate, and lead.

Goal 5. Build organizational capacity to pursue identified priorities, support sustainability, and address new issues as they arise. IOLTA acknowledges that identified objectives require an investment of staffing and other resources. IOLTA will work to identify the capacity and resources needed to pursue these objectives and support organizational sustainability.

The full plan can be found at [nciolta.org](http://nciolta.org). For more information about NC IOLTA's strategic plan, contact Mary Irvine, Executive Director, NC IOLTA at [mirvine@ncbar.gov](mailto:mirvine@ncbar.gov) or 919-828-0477. ■

## Resolution of Appreciation for Barbara R. Christy

WHEREAS, Barbara R. Christy was elected by her fellow lawyers from Judicial District 18 (now 24) in 2010 to serve as their representative in this body; she was, thereafter, re-elected councilor for two successive three-year terms; and

WHEREAS, in October 2018, Ms. Christy was elected vice-president and, in October 2019, she was elected president-elect; and, on October 23, 2020, she was sworn-in as president of the North Carolina State Bar; and

WHEREAS, during her tenure with the North Carolina State Bar, Ms. Christy served on the following committees and boards: Appointments Advisory Committee, including as vice-chair and chair; Authorized Practice Committee, including as vice-chair; Communications Committee; Distinguished Service Award Committee; Ethics Committee, including as chair; Executive Committee, including as vice-chair and chair; Finance and Audit Committee, including as vice-chair and chair; Grievance Committee, including as vice-chair; Issues Committee, including as vice-chair and chair; Legislative Committee, including as vice-chair; Lawyer Assistance Program Board; Dental Board Litigation Advisory Committee; Disciplinary Review II Committee; Special Committee to Study Amendments to the ABA Model Rules on Advertising; Special Committee to Study Ethics 20/20; and Special Litigation Committee; and

WHEREAS, while serving as a State Bar councilor, Ms. Christy participated in numerous significant initiatives of the State Bar including two substantial revisions of the North Carolina Rules of Professional Conduct, construction of the new State Bar headquarters, the successful adjudication of a major lawsuit against the State Bar, and an extensive review of the disciplinary process, to name but a few; and

WHEREAS, Ms. Christy demonstrated tremendous grace, patience, and good humor in accepting the vicissitudes of her presidential year which began during a global pandemic that made face masks, social distancing, and size limitations on indoor gatherings public health priorities and necessitated the conversion of the October 2020 Annual Meeting from in-person to online. Regrettably, the traditional annual banquet, at which a new president is sworn-in with the pomp and circumstance attendant to that great honor, was replaced with a small, socially distanced, masked swearing-in ceremony at State Bar headquarters. Although only a few of President Christy's family members and friends could be present to see her take the oath of office, she did not complain, but rather took the occasion to express her gratitude for her faith, her family, her vocation, and her opportunity to lead her fellow lawyers; and

WHEREAS, President Christy provided calm, thoughtful, informed leadership by relying upon public health statistics and scientific evidence to guide the State Bar's response to the pandemic and to determine that the January and April 2021 Quarterly Meetings must also be converted to virtual events; and

WHEREAS, President Christy fulfilled one of the key responsibilities of her office by continuing and building upon the undertakings of her predecessor, including the facilitation and expansion of the following unprecedented initiatives: the study of regulatory changes that have the potential to improve access to justice for those who are financially unable to afford legal representation; the exploration of ways to improve diversity, inclusion, and equity in the profession and in the agency itself; studies of the intersection of lawyer competency with the courts' secured leave policy and with the caseload and compensation of court-appointed attorneys; and the revision of the Rules of Professional Conduct and mandatory CLE requirements to encourage, assist, and support lawyers in fulfilling their professional responsibility to seek equal justice for all; and

WHEREAS, to ensure that all State Bar leaders have a better understanding of the role and responsibilities of the State Bar, President Christy fostered an atmosphere of collaboration among the leaders of the council including officers and committee chairs; and

WHEREAS, during the unique circumstances of her presidential year, President Christy was unerringly kind and supportive of the members of the council and of the State Bar staff and was the epitome of leadership from a place of quiet strength and of persuasion by force of character and understated diplomacy.

NOW, THEREFORE, BE IT RESOLVED that the Council of the North Carolina State Bar does hereby, and with deep appreciation, express to Barbara R. Christy its debt for her personal service to the State Bar, to the people of North Carolina, and to the legal profession, and for her dedication to the principles of leadership, integrity, professionalism, and equality.

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

## State Bar Swears In New Officers



Jordan



Armstrong



Brown

### Jordan Installed as President

Salisbury Attorney Darrin D. Jordan was sworn in as the 87th president of the North Carolina State Bar by Chief Justice Paul Newby at the State Bar's Annual Dinner on Thursday, October 7, 2021.

Jordan earned his BA from Catawba College in political science and accounting in 1987, and his JD from Campbell University School of Law in 1990.

A partner of Whitley Jordan, Inge & Rary, PA, he has been a board certified specialist in criminal law since 2004. He maintains a state and federal criminal law practice in Salisbury and he is admitted to the federal district courts in both the middle and western districts where he also is a member of the Criminal Justice Act Panel.

Jordan was a member of the North Carolina State Bar Council representing Judicial District 19C from 2010–2018, during which time he served as chair of the Ethics and Communications Committees as well as the Lawyers Assistance Program Board.

Jordan recently completed his service as chair of the NC Indigent Defense Services Commission; he had served on the commission since 2014. In 2012 he was presented with the Professor John Rubin Award for Extraordinary Contributions to Defense Training Programs, which is awarded each year by the Indigent Defense Services Commission in honor of its namesake at the UNC School of Government. He has coordinated annual continuing legal education programs in Rowan County for the last 12 years in the areas of

criminal law and family law.

Jordan is a member of the North Carolina Advocates for Justice, where he currently serves on the Board of Governors. He was a commissioner of Chief Justice Mark

Martin's Commission on the Administration of Law and Justice where he served on the Criminal Adjudication and Investigation Committee.

In addition to his numerous professional activities, Jordan formerly served on the Board of Directors for Elizabeth Hanford Dole Red Cross and the Rowan Helping Ministries. For six years he was the cub master of Cub Pack 254 of Bethpage United Methodist Church in Kannapolis. In 2011 he received the District Award of Merit for service to the Kannapolis District, Central North Carolina District of the Boy Scouts of America.

Jordan resides in Kannapolis with his wife and two adult children and attends Harvest Community Church. He enjoys spending time in Cullowhee, North Carolina, fly fishing in the North Carolina mountains, and raising vegetables in his garden. He is also an amateur beekeeper.

### Armstrong Elected President-Elect

Smithfield Attorney Marcia H. Armstrong was sworn in as president-elect of the North Carolina State Bar by Chief Justice Paul Newby at the State Bar's Annual Dinner on Thursday, October 7, 2021.

Armstrong earned her bachelor's degree from Salem College and her JD from the Wake Forest University School of Law.

Armstrong was a member of the North Carolina State Bar Council from 2011–2019, during which time she served on many committees and was chair of the

Legislative Committee and the Opioid Summit Special Committee, and a vice-chair of the Grievance Committee.

A partner of The Armstrong Law Firm, PA, Armstrong has been a board certified specialist in family law since 1989. She is a past-president of the state chapter of the American Academy of Matrimonial Lawyers (AAML), which is recognized as one of the top family law associations in the country. She is a past-president of the Johnston County Bar Association and the 11th Judicial District Bar. In 2011, Armstrong received the Sara H. Davis Excellence Award from the North Carolina State Bar Board of Legal Specialization. She was recognized in 2010 as a Citizen Lawyer by the North Carolina Bar Association and has served in the past on the association's Board of Governors and as chair of the Family Law Section. In 1997, Armstrong was awarded the Distinguished Service Award from the North Carolina Bar Association for her service to the Family Law Section. Additionally, Armstrong received the Gwyneth B. Davis Award in 1995 from the North Carolina Association of Women Attorneys.

Armstrong practices law with her husband, Lamar; her son, Lamar III; her daughter, Eason Keeney; and her son-in-law, Daniel Keeney. Lamar's wife, Beth, is a second grade teacher. Armstrong's other son, Hinton, is a biochemical engineer, and his wife, Anna, is a pharmacist. Altogether, there are six grandchildren, ages 5 years to 3 months, with another on the way.

### Brown Elected Vice-President

Charlotte Attorney A. Todd Brown was sworn in as vice-president of the North Carolina State Bar by Chief Justice Paul Newby at the State Bar's Annual Dinner on Thursday, October 7, 2021.

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, is co-head of the firm's commercial litigation practice group, co-chairs its Diversity and Inclusion Committee and its Talent Development Committee, is a member of its Associates Committee and Screening Committee, and is a former mem-

ber of its Executive Committee.

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

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## Law School Briefs

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### Campbell University School of Law

Campbell Law School has unveiled its newest exhibit, “Judges of Campbell Law,” which honors alumni who have served on a variety of judicial benches. “I stand here today enormously proud of the huge influence this small and fairly young law school has had on our state and nation through our judges,” Dean J. Rich Leonard said. “Campbell Law currently has more alumni on the North Carolina bench than any other law school.” More than 50 judges made the trip to Raleigh from across the state and beyond to attend the formal reception held in the law school's Pope Foyer. Watch a video of the event at [youtube.com/watch?v=8UWTiyGaB-I](https://www.youtube.com/watch?v=8UWTiyGaB-I).

Campbell Law Dean J. Rich Leonard celebrated his eighth anniversary at the helm of Campbell Law School on July 15, 2021. Of the state's six law schools, Leonard holds the longest tenure of any dean. In fact, this anniversary lands him among the rare 10.78% of US law school deans who have served eight years or longer. What makes these numbers even more impressive is that the average law school dean's tenure is 3.35 years, according to an analysis by TaxProf Blog. Early in his career at Campbell Law the school was given the top spot in Bloomberg Business' Top 10 most underrated law schools in America list. Leonard has proven the “underrated” title to be more than a misnomer during his eight-year tenure, where the number of applications and students has grown not only in quantity, but quality. In addition, alumni engagement, donations to the law school, and the bar passage rate have also continued to climb under his watch. The secret to his success? “I think the key is an optimistic spirit and an eye

always on the future.”

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### Duke University School of Law

Duke Law welcomed Emilie Aguirre, Shitong Qiao, Sarah Bloom Raskin, and Alex Zhang to its faculty. Aguirre, a business law scholar who studies challenges facing companies with social and environmental goals in addition to profit, is associate professor of law. Qiao, an expert on property and urban law with focus on comparative law and China, is professor of law and the Ken Young-Gak Yun and Jinah Park Yun research scholar. Raskin, a former Federal Reserve governor and deputy secretary of the Treasury, is the Colin W. Brown Distinguished Professor of the Practice of Law and will take over as faculty director of the Global Financial Markets Center in January. Zhang, a veteran law librarian and scholar of legal information and access, is the Archibald C. and Frances Fulkruff research professor of law, associate dean of information services, and director of the J. Michael Goodson Law Library.

Working with NC Chief Justice Paul Newby's task force on ACEs-informed courts, Duke Law's Bolch Judicial Institute developed and administered a pilot version of a trauma education curriculum for North Carolina's judges. “We are so grateful for the judges and court administrators who helped develop this curriculum,” said institute director David F. Levi, who serves on the task force. “The goal is to help our courts become more effective and less frightening to children who are suffering from childhood trauma.”

Duke Law's Wilson Center for Science and Justice received a grant of nearly \$500,000 from the #StartSmall philanthropic initiative to support a new project aimed at rethinking policy on how forensic evidence is

used in criminal cases. In March, Wilson Center director and L. Neil Williams Jr. Professor of Law Brandon Garrett published the book *Autopsy of a Crime Lab*, which catalogues the sources of error and faulty science behind numerous forensic disciplines.

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### Elon University School of Law

*Class of 2023 sets records for Elon Law enrollment*—171 students joined the Elon University community in August when faculty and administrators welcomed to Greensboro the largest entering class in Elon Law history. Drawn from a pool of 920 applicants, the 16th entering class pushed the law school's total enrollment to a record 430 students. Details of the newest class:

- 23: Median Age
- 58% Female / 42% Male
- 26%: Students of Color
- 50%: From North Carolina

Also, 18 members have already earned master's degrees, the largest number ever represented in an incoming class. One holds a doctor of philosophy.

*Symposium explores legal underpinnings for reparations*—The *Elon Law Review* hosted a virtual symposium on September 24 with the theme of “Reparations: Restorative Justice for Racial Disparities.” Nkechi Taifa of The Taifa Group, LLC, delivered keynote remarks in which she emphasized that reparations aren't “handouts” or “welfare,” but rather “payment for a debt owed.” More than 250 people registered in advance, making it the largest *Elon Law Review* program in the publication's history.

*Elon Law celebrates 15 years*—Elon Law commemorated its crystal anniversary on September 14 with a celebration featuring remarks by Elon University President

Connie Ledoux Book, who praised the law school for its many accomplishments since welcoming the charter class in 2006. Achievements included:

- The adoption of a 2.5-year, highly experiential curriculum, with a residency-in-practice for every student, that has led to strong performances on the bar exam and corresponding career placement success.
- Significant improvements in recruiting a diverse student body and the law school's strategic focus on growing similar representation on its faculty.
- A reduction in average student loan debt at graduation, helping to make an Elon Law education more affordable for students.

### University of North Carolina School of Law

*UNC hires new student wellness counselor*—Licensed clinical social worker Tora Taylor-Glover is the first counselor embedded at UNC School of Law. Taylor-Glover

provides one-on-one counseling for law students and works with law school staff on wellness initiatives. She has a background in mental health, criminal justice, and higher education.

*209 enroll as Class of 2024*—This year's entering JD class includes 209 students from 26 states, Washington, DC, China, and the United Kingdom. More than half are North Carolina residents.

*Dean Martin Brinkley '92 named Kenan Distinguished Professor*—The award provides the largest stipend and research fund of any UNC distinguished professorship. There are 131 William Rand Kenan Jr. professorships at 56 American colleges and universities. The greatest number, 25, is at UNC.

*Professor Kevin Bennardo initiates amendment to NC holographic will statute*—North Carolina used to be the only state requiring handwritten wills to be stored in certain locations to be effective. Bennardo submitted a proposal to the North Carolina

Statutes Commission that resulted in the General Assembly amending the state's holographic wills statute in a way that makes it easier for North Carolinians to create holographic wills.

*Professor Kate Sablosky Elengold's report explores barriers to college completion for Latino students*—Together with UnidosUS and UNC Center for Community Capital, Elengold released the second report arising out of a grant from the Lumina Foundation to study the relationship between debt, achievement, and equity in higher education, with a focus on Latino students.

*Professor Carissa Byrne Hessick's book explains why plea bargaining is a bad deal*—In *Punishment Without Trial* (Abrams Press, October 2021), Hessick showcases how plea bargaining undermines justice at every turn and across socioeconomic and racial divides.

*Earn CLE credit*—Satisfy your annual CLE requirements with virtual programming through UNC. Visit [law.unc.edu/cle](http://law.unc.edu/cle). ■

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## John B. McMillan Distinguished Service Award

### Rebecca J. Britton

Rebecca J. Britton received her law degree from Campbell University School of Law in 1992 where she received the Order of Barristers. She was a member of Campbell's National Moot Court Team and National Trial Team. Ms. Britton has practiced law in Fayetteville for almost 30 years, and currently practices with Britton Law. She is well known for the respect and care she offers her clients and for her service to the Fayetteville community. Ms. Britton has shown commitment to the North Carolina State Bar's goal of furthering the public's understanding of the justice system, from high school students, to law students, to practicing lawyers.

Ms. Britton spearheaded the growth and development of the state's only high school mock trial program. From 1995 to 2000 she served as a mock trial attorney advisor/coach at Westover High School in Fayetteville. With her mentoring and guidance, the school placed fifth at a national-level competition in 1998. In 2001 she began her service as the regional coordinator for the Fayetteville High

School mock trial competition site, a role she still serves in 20 years later. In 2006 Ms. Britton served as president of the NC Advocates for Justice. During her tenure as president, she was a strong advocate for the mock trial program. In 2009, with the support of other attorneys passionate about educating the public about the law, she led the effort to set up the Carolina Center for Civic Education (now known as the NC Mock Trial Program) to run the state's high school mock trial program. She has served on the Executive Committee of that organization for 12 years. She currently serves as the president of the program and devotes many hours each month to the organization's management. Since 2010, her law firm has sponsored the Fayetteville Regional Competition site. She also served on the board of the National High School Mock Trial Championship and has been instrumental in hosting the national event twice in North Carolina. Ms. Britton also personally cosponsored a scholarship program for high school seniors who show inspirational leadership skills during their time

with the mock trial program. Additionally, she teaches trial advocacy classes at Campbell Law School, presents regularly at NCAJ seminars, teaches CLE courses around the state, and teaches with the National Institute of Trial Advocacy. In 2011 she received the NCAJ Charles L. Becton Teaching Award.

Ms. Britton has helped ensure generations of North Carolinians have confidence in—and an appreciation for—the legal system, and that those young leaders have the ability, life skills, and interest to reform and support the legal profession during their careers. The impact of her work to educate practicing lawyers through her numerous publications and presentations is also impressive.

### Nominations Sought

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

## Fifty-Year Lawyers Honored

Members of the North Carolina State Bar who, in 2020, celebrated their 50th anniversary of their admission to practice were honored during the 50-Year Lawyers Luncheon on November 5, 2021. One of the honorees, Retired Senior Superior Court Judge Donald W. Stephens, addressed the attendees, and each honoree received a certificate and a lapel pin in recognition of his or her service. After the ceremonies were concluded, the honorees in attendance sat for the photograph below. ■



*First row* (left to right): David Hough, Richard Stephens, Ronald Price, John Barlow, James Samuel Williams, Michael Lewis, L. Oliver Noble, Steven Hockfield, Stephen Thomas. *Second row* (left to right): Donald Davis, Gains Hopkins Jr., John Hackney, Mark Galloway, Craig Ellis, Bruce Huggins, Charles Worley, Herman Stephens. *Third row* (left to right) Jerry Clayton, Donald Stephens, Charles Steele IV, Kyle Hall, Robert Howard, Wade Barber Jr.

## Client Security Fund Reimburses Victims

At its October 7, 2021, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$16,345.91 to three applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$2,500 to a former client of Bruce T. Cunningham Jr. of Southern Pines. The client retained Cunningham to prepare and file an MAR and paid Cunningham's quoted fee in full. Cunningham spoke to the ADA who refused to give Cunningham access to the case file, so he needed to discuss other avenues of relief with the client. Cunningham was not able to speak with the client or provide any meaningful legal services prior to his death on July 5, 2019. The board previously reimbursed several other Cunningham clients a total of

\$111,525.

2. An award of \$11,780 to a former client of John O. Lafferty Jr. of Lincoln. The client retained Lafferty to negotiate a reduction of one or more credit card debts. Lafferty had the client bring him the funds to pay the negotiated settlement in full. Lafferty deposited the funds into his trust account but failed to disburse the funds to the creditors on his client's behalf. Lafferty was disbarred on May 5, 2019. The board previously reimbursed several other Lafferty clients a total of \$148,187.06.

3. An award of \$2,065.91 to a former client of Joseph VonKallist of Charlotte. VonKallist and co-counsel represented the client on capital murder charges in 2012 and 2013. VonKallist agreed to accept for safekeeping funds that were being held for the client by the Buncombe County Sheriff's

Office and to return those funds to the client once he was returned to prison in Florida. VonKallist received the funds from the Sheriff's Office in 2013 but failed to disburse all of the funds back to the client.

### Funds Recovered

It is standard practice to send a demand letter to each current or former attorney whose misconduct results in any payment from the fund, seeking full reimbursement or a Confession of Judgment and agreement to a reasonable payment schedule. If the attorney fails or refuses to do either, counsel to the fund files a lawsuit seeking double damages pursuant to N.C. Gen. Stat. §84-13 unless the investigative file clearly establishes that it would be useless to do so. Through these efforts, the fund was able to recover a total of \$1,416.30 this past quarter. ■

# Annual Reports of State Bar Boards

## Board of Continuing Legal Education

*Submitted by A. Elizabeth Keever, Vice-Chair*

Lawyers continue to meet and exceed their mandatory continuing legal education requirements. By mid-March, 2021, 27,153 annual report forms had been filed either electronically or by hard copy for the 2020 compliance year. I am pleased to report that 99% of the active members of the North Carolina State Bar complied with the mandatory CLE requirements for 2020. The report forms show that North Carolina lawyers took a total of 352,267 hours of CLE in 2020, or 13 CLE hours on average per active member of the State Bar. This is one hour above the mandated 12 CLE hours per year.

The CLE program operates on a sound financial footing and has done so almost from its inception over 30 years ago. Funds raised from attendee and non-compliance fees not only support the administration of the CLE program, but also support three programs that are fundamental to the administration of justice and the promotion of the professional conduct of lawyers in North Carolina. The program's total 2020 contribution to the operation of the Lawyers Assistance Program (LAP) was \$335,354.94. As of September 29, 2021, the board has also collected and distributed \$292,463.73 to support the work of the Equal Access to Justice Commission and \$292,475.34 to support the work of the Chief Justice's Commission on Professionalism. In addition, the CLE program generated \$73,093.02 to cover the State Bar's costs for administering the CLE-generated funds for the LAP and the two commissions.

This year the CLE Board has been studying its rules and procedures to determine if any changes can be made to improve the program. We are hopeful to have recommendations to submit to the council by the January 2022 meeting.

The State Bar began its project to devel-

op new regulatory management software, which includes a new CLE database and lawyer and sponsor portals. The CLE staff has been meeting with the software developers on a regular basis to discuss the project.

After council approval at their last meeting, a proposed rule amendment has been submitted to the NC Supreme Court to establish a new category of CLE entitled diversity, inclusion, and elimination of bias training.

Regrettably, the term of our chair, George L. Jenkins Jr. of Kinston, has come to an end. He will be greatly missed.

The board strives to ensure that the continuing legal education requirements meaningfully advance the competency of North Carolina lawyers. We welcome any recommendations or suggestions that councilors may have in this regard. On behalf of the other members of the board, I thank you for the opportunity to contribute to the protection of the public by overseeing the mandatory continuing legal education program of the State Bar.

## Board of Legal Specialization

*Submitted by Kim Coward, Chair*

North Carolina's Legal Specialization program exists for two reasons: First, to assist in the delivery of legal services to the public by identifying lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, so that the public can more closely match its needs with available services; and second, to improve the competency of the Bar. I am proud to report that, under the guidance of the Board of Legal Specialization, and with the tireless efforts of the specialty committees and staff, our program is stronger than ever and continually achieving the very purpose for which the State Bar Council created the program in 1985. On top of that, our program is entirely self-sufficient.

With the addition of 43 new specialists last November, there are nearly 1,100 certi-

fied legal specialists in North Carolina. The State Bar's specialization program certifies lawyers in 13 specialties. This spring we received 113 applications from lawyers seeking certification. Of these applicants, 109 met the substantial involvement, CLE, and peer review standards for certification and were approved to sit for their respective specialty exams. Last year, due to public health considerations stemming from the COVID-19 pandemic, we for the first time administered our specialty certification exams using remote proctoring through ExamSoft, the software program our board has employed in administering our exams for the past six years. Our experience with remote proctoring was a resounding success, both from the examinees' perspective and staff's perspective. In light of current and concerning trends regarding COVID-19, and considering our positive experience last year, we are again administering our exams using remote proctoring in 2021; we are also able to accommodate a small number of requests by applicants to take the exam in-person. It is our hope and expectation that we will continue to offer the option to take the certification exams remotely in the future, thereby increasing access to our program across the state by eliminating the barriers of time and travel that may have previously prevented lawyers from pursuing certification.

To assist lawyers interested in becoming certified specialists but who are not yet qualified, in 2018 we successfully created and implemented a new process allowing lawyers to fill out a Declaration of Intent form. We continue to utilize this form to track, communicate with, and assist interested lawyers regarding the lawyer's eligibility under the applicable certification standards. I am happy to report that this relatively new process remains both successful and appreciated by members of the profession.

The board remains active in evaluating its own administrative rules and its current

roster of specialty certifications to identify and pursue improvements in the program for the betterment of the public and the profession. To this end, the board approved a number of rule amendments this year to increase the program's operational efficiency. The board also approved important amendments to the administrative rules governing the criminal law specialty—these amendments clarify the criminal law specialty by creating a new sub-specialty focused on federal criminal law practice and ensure consistency among what will be three subspecialties within criminal law: state criminal law, federal criminal law, and juvenile delinquency law. Last, but certainly not least, I am proud to report that the board approved the creation of a new specialty in child welfare law. This area of law was identified to the board as a developing and increasingly important area of law in need of a resource for the public to identify lawyers who have objectively demonstrated their proficiency in the field. The board is grateful to the council for its support on all of these rule amendments throughout the year as we strive to improve what is already a nationally-respected specialty certification program.

The Board of Legal Specialization typically holds an annual luncheon in the spring to honor both long-time and newly certified specialists. Unfortunately, and like most others during the pandemic, we chose not to hold our event in 2021. That, however, did not prevent us from publicly recognizing our specialists' achievements. On May 21, 2021, we released a video tribute via the State Bar's YouTube page honoring those who obtained their initial specialty certifications in 2019 and 2020, as well as those who reached the important milestones of 25 and 30 years of specialty certification in 2020 and 2021. We were honored to have State Bar President Barbara Christy and State Bar President-Elect Darrin Jordan—both of whom are specialists in their own practices—participate in the video tribute. In 2022 (if the world permits), the board intends to host multiple, smaller recognition events across the state in lieu of an annual luncheon. These smaller events would permit those who cannot travel to Raleigh for the annual luncheon to attend, be recognized, and/or support their fellow lawyers in their specialization achievements. Our hope is to host events in

the western, central, and eastern parts of the state in 2021. We will also resume awarding the board's three Service and Excellence Awards named in honor of past chairs of the board: The Howard L. Gum Excellence in Committee Service Award; the James E. Cross Leadership Award; and the Sara H. Davis Excellence Award.

I am also happy to report that, despite the financial difficulties presented by the past two years, the Jeri L. Whitfield Legal Specialty Certification Scholarship Fund, established to provide scholarships for specialization application fees for prosecutors, public defenders, and nonprofit public interest lawyers who wish to become certified specialists, continued to experience success in 2021. The fund is administered by the North Carolina Legal Education Assistance Foundation (NC LEAF). We received several donations from specialists and board members during 2021, as well as a very generous grant of \$1,000 from the North Carolina Bar Association Foundation. The fund balance at the beginning of 2021 was \$540, and we received over \$1,500 in additional scholarship funds thus far in 2021 (including a \$600 grant from the Bar Foundation). All contributions are tax-deductible and can be made through NC LEAF. As a result of this scholarship fund, I am pleased to report that nine public interest applicants received scholarships this year, thereby offering these lawyers the opportunity to not only attain certified status, but also instill trust and confidence in the legal services received by the clients they serve.

Our exams continue to be a strong and objective measure of proficiency for the various specialties, and we are ever-striving to improve both the content of the exams and the testing experience. In 2019 we re-initiated our working relationship with Dr. Terry Ackerman with the University of Iowa. Dr. Ackerman previously provided psychometric analysis for the program's exams for several years, and Dr. Ackerman has resumed that role in providing valuable psychometric analysis for each of our specialty exams to ensure they remain valid and reliable. As noted before, we continue to utilize ExamSoft and its testing program, Examplify, for all of our testing needs. ExamSoft is a secure, cloud-based software that is used by many law schools and on most bar exams. The program's significant

capabilities help streamline all aspects of the testing process, from writing and storing exam questions to grading and analyzing exams. Also, as mentioned before, we are utilizing the remote proctoring features offered through ExamSoft to administer our certification exams in 2021. Without the ability to proctor the exams remotely, we may have had to cancel certification exams this year. We are hopeful that this new method of offering the exams will prove useful in reaching more lawyers in more parts of the state, thereby increasing lawyers' access to our program and the public's access to improved legal services via specialty certified lawyers.

Also in this year's specialization news, the State Bar *Journal* featured interviews with Tara Cho, a specialist in privacy and information security law from Raleigh; Neill Fuleihan, a workers' compensation specialist from Brevard; and current State Bar President Barbara Christy, a commercial real property specialist from Greensboro.

We continue to be thankful for the State Bar Council's support of our program, including its thoughtful consideration in re-appointing Patti Head to an additional three-year term and its appointment of Gina Cammarano, a workers' compensation specialist, and Barbara Morgenstern, a family law specialist, to their initial three-year terms on the board. We are grateful for the council's appointment of Jan E. Pritchett as vice-chair to the board, and I am humbled by your action in appointing me as chair of the board. The board looks forward to continued success in certifying lawyers in their specialty practice areas, thereby contributing to the State Bar's mission of protecting the public by improving the quality of legal services available to the people of this state.

### **Board of Paralegal Certification** *Submitted by Warren Hodges, Chair*

Despite the difficulties of the past two years, our program continues to do the good work of the North Carolina State Bar by serving the public and contributing to the improvement of legal services offered in this state. North Carolina's Paralegal Certification Program exists for two reasons: First, to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demon-

strated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer; and second, to improve the competency of those individuals. Sixteen years after the first application for paralegal certification was accepted by the board in 2005, there are today over 3,600 North Carolina State Bar certified paralegals. I am proud to report that, under the guidance of the Board of Paralegal Certification and with the tireless efforts of various volunteers and staff, our program is thriving and continually achieving the very purpose for which the State Bar Council created the program. Importantly, our program is entirely self-sufficient. Early in 2020 and in the midst of the pandemic, the board and staff prepared to administer the October 2020 certification exam via remote proctoring should the pandemic persist. Our efforts in pivoting our testing methods to remote proctoring paid off, as we successfully administered our October 2020 certification exam with virtually no issues; and our experience and confidence in this new testing approach made it an easy decision to administer both exams in 2021 via remote proctoring. On April 24, 2021, we administered our paralegal certification exam to 154 applicants via remote proctoring. Of those applicants, 85 achieved passing scores and were so certified by the board. On October 16, 2021, we will administer our paralegal certification exam via remote proctoring to approximately 214 applicants. We anticipate designating a total of over 200 new certified paralegals in 2021. Notably, the total number of applicants in 2021 was higher than in years prior, and we believe one factor contributing to this increase is the availability of the exam via remote proctoring. It was our hope in 2020 that offering a remote exam would enable more paralegals from across the state to pursue paralegal certification, particularly those who ordinarily could not afford the time or the travel expense of taking the exam at one of our traditional testing locations. I am delighted to report that our hope has become our experience, and I am proud that our program converted the difficulties of 2020 into opportunities to evolve our program for the betterment of legal services offered by paralegals in all parts of our state. Also, in 2021 the board will have considered over 3,600 recertification applications. To maintain certification, a certified paralegal must complete six hours of continuing paralegal education (CPE) credits annually, including one

hour of ethics. I am pleased to report that certified paralegals have continued to improve their competency by taking over 21,500 hours of CPE in the last 12 months.

In 2020 the Supreme Court of North Carolina approved the rule amendment presented to the State Bar Council at the end of 2019 that allows a paralegal to qualify to take the paralegal certification exam based upon the applicant's work experience. The new rule recognizes our state's valuable and experienced paralegals who did not obtain particular degrees prior to joining the paralegal profession by allowing paralegals with five years of paralegal work experience plus ethics training to qualify for the exam. The board feels this new rule works well with our ongoing educational requirements, allowing only those paralegals who have demonstrated specific educational achievements or substantial paralegal work experience to sit for the exam, thereby ensuring the high standards communicated by our certification process. We are thankful for the support of the State Bar Council and the Supreme Court of this rule amendment. I am happy to report that over the past two years, 23 paralegals qualified to sit for our certification exam by way of their work experience. In 2022 we again expect that number to grow.

Our exam continues to be a strong and objective measure of proficiency for paralegals, and we are ever striving to improve both the content of the exam and the testing experience. In 2019 we re-initiated our working relationship with Dr. Terry Ackerman with the University of Iowa. Dr. Ackerman previously provided psychometric analysis for our program's exam during the early years of our existence, and Dr. Ackerman has resumed that role in providing valuable psychometric analysis to ensure our exam remains valid and reliable. We also continue to utilize ExamSoft and its testing program, Examplify, for all our testing needs. ExamSoft is a secure, cloud-based software that is used by many law schools and on most bar exams. The program's significant capabilities help streamline all aspects of the testing process, from writing and storing exam questions to grading and analyzing exams. As mentioned before, we also utilized the remote proctoring features offered through ExamSoft to administer our certification exams in 2020 and 2021. Without the ability to proctor

the exams remotely, we likely would have cancelled both certification exams this year. We are excited that this new method of offering the exam has proven useful in reaching more paralegals in more parts of the state, thereby increasing paralegals' access to our program and the public's access to improved legal services via certified paralegals.

We continue to be thankful for the State Bar Council's support of our program, including its thoughtful consideration in re-appointing lawyer member and State Bar Councilor Matthew Smith and lawyer member Benita "Angel" Powell for additional three-year terms, as well as the anticipated appointment of paralegal member S.M. Kernodle-Hodges to her first three-year term.

The Board of Paralegal Certification looks forward to continued success certifying qualified paralegals to help with the delivery of legal services to the citizens of North Carolina. We welcome any recommendations or suggestions that councilors may have for ways in which the board might improve the paralegal certification program. On behalf of the other members of the board, thank you for the opportunity to contribute to the protection of the public by overseeing this important program of the North Carolina State Bar.

### **Lawyer Assistance Program**

*Submitted by Robynn Moraites, Director*

In last year's annual report, I explained how the Lawyer Assistance Program, both staff and volunteers, rose to the unique challenges of that unprecedented year. Groundhog Day references abound as 2021 has turned out to be an extended repeat of 2020. Despite attempts in late August/early September to return to in-person operations, with the rise of the Delta COVID-19 variant, NC LAP continues to operate virtually.

Despite our virtual status, LAP's caseload remains busy. We opened 165 new client files. We have been holding one-on-one counseling appointments and support groups via Zoom. We continue to give virtual CLE presentations and made 47 such presentations this year. We have even managed to participate in some law school orientations via Zoom. All operations remain fully functional and intact in this virtual

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# February 2022 Bar Exam Applicants

The February 2022 bar examination will be held in Raleigh on February 22 and 23, 2022. Published below are the names of the applicants whose applications were received on or before November 1, 2020. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Lee A. Vlahos, Executive Director, Board of Law Examiners, 5510 Six Forks Rd., Suite 300, Raleigh, NC 27609.

<b>Joseph Abeska</b> Charlotte, NC	<b>Asheville, NC</b>	<b>Rebecca Cathcart</b> Chapel Hill, NC	<b>Greensboro, NC</b>	<b>James Fetter</b> Lake Wylie, SC
<b>Aliyah Adams</b> Durham, NC	<b>Dorothy Bennett</b> Columbia, SC	<b>Julio Cazares</b> Charlotte, NC	<b>Jameson Davis</b> Hamden, CT	<b>Alexandra Fishman</b> Durham, NC
<b>Melissa Adorno</b> Mooreville, SC	<b>Dylan Bensinger</b> Charlotte, NC	<b>Brittany Chadwick</b> Charlotte, NC	<b>John Davis</b> Durham, NC	<b>William Flournoy</b> Jacksonville, FL
<b>Stephanie Ahlstrom</b> Imperial Beach, CA	<b>Holly Benton</b> Durham, NC	<b>Cassi Chambers</b> Lincolnton, NC	<b>James Davis</b> Davidson, NC	<b>Shawnda Francis</b> Riverview, FL
<b>Ghulam Akhuznada</b> High Point, NC	<b>Alisa Best</b> Forest, VA	<b>Donald Clack</b> Raleigh, NC	<b>Delicia Dawson</b> Clayton, NC	<b>Caroline Frey</b> Charleston, SC
<b>Dawnwin Allen</b> Charlotte, NC	<b>Kimberley Beyer</b> Glenville, NC	<b>Kimberly Clark</b> Statesville, NC	<b>Samuel Deese</b> Greensboro, NC	<b>Ashley Fromm</b> Fayetteville, NC
<b>Chloe Altieri</b> Raleigh, NC	<b>Mark Blevins</b> Summerville, SC	<b>Joy Clark</b> Raleigh, NC	<b>Kathryn Dever</b> Fort Mill, SC	<b>David Fronckowiak</b> Oakland, CA
<b>Angie Amador</b> Winston-Salem, NC	<b>Christopher Bobby</b> Wake Forest, NC	<b>Jeremiah Clarke</b> Morrisville, NC	<b>Jared Donaldson</b> Anderson, SC	<b>Donald Fryar</b> Washington, DC
<b>Hunter Amos</b> Greensboro, NC	<b>Dana Bonfiglio</b> Philadelphia, PA	<b>Benjamin Clayton</b> Advance, NC	<b>James Donnell</b> Greensboro, NC	<b>Shema'n Fullwood</b> Charlotte, NC
<b>Lauren Andrews</b> Greensboro, NC	<b>Joanna Booth</b> Chesapeake, VA	<b>Sarah Clemens</b> Rock Hill, SC	<b>Matthew Downer</b> Charlotte, NC	<b>Alexis Gadzinski</b> Greensboro, NC
<b>Shari Anhalt</b> Long Beach, CA	<b>Zachary Bowman</b> Raleigh, NC	<b>Christina Clemens</b> Whispering Pines, NC	<b>Jacob Drouillard</b> Coats, NC	<b>Megan Garcia-Davis</b> Durham, NC
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Avery Staley	Amber Thompson Jacksonville, NC	Dalen Ward	Robert Wilson Columbia, SC	

## Annual Reports (cont.)

format. Like everyone, we as a staff, and all our volunteers, are exhausted from all the digital interfacing.

But the discussion of COVID's impact does not end there. As more people contract COVID and die from it, we are seeing an uptick in grief and loss referrals. We are getting reports in from across the state of lawyers who contracted COVID and suddenly passed away, leaving law partners and colleagues stunned and family members in despair. There is tremendous sadness and collective trauma happening across the state; more so, collectively, than last year at this time, based upon the reports we are receiving. There are no easy answers. All we can do is support each other the best we can.

In June, the Texas Lawyer Assistance Program released a superb 28-minute video on depression and suicide prevention that is free for use and incorporation into longer programs. It can be viewed at [youtu.be/Q0O3198ip0I](https://youtu.be/Q0O3198ip0I). We used that video as a springboard, creating a 60-minute suicide awareness and prevention CLE video. It can be viewed from our video library page (along with other CLE talks)

here at [nclap.org/video-library](https://nclap.org/video-library).

Our volunteers remain stalwart in the face of all the present adversities. They continue to engage in volunteer activities virtually. I thank them for their service and their fortitude.

Because we report numbers quarterly and annually, there is a misperception that LAP only touches a small population of the Bar. Cumulatively, however, based on data beginning in the mid-1990s, we know that LAP has actively worked with +/- 15% of the NC Bar (including judges) with less than .05% involved in any discipline or regulatory process. Despite the recent national focus on wholistic 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 at every stage and all along the continuum, LAP is uniquely positioned 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. Thus, there is a real risk that the serious issues LAP deals with day-in

and day-out and the vital regulatory purpose it serves will be minimized or overlooked. The full annual report can be found at [nclap.org/wp-content/uploads/2021/09/2020-2021-Annual-Report.pdf](https://nclap.org/wp-content/uploads/2021/09/2020-2021-Annual-Report.pdf). ■

## Legal Specialization (cont.)

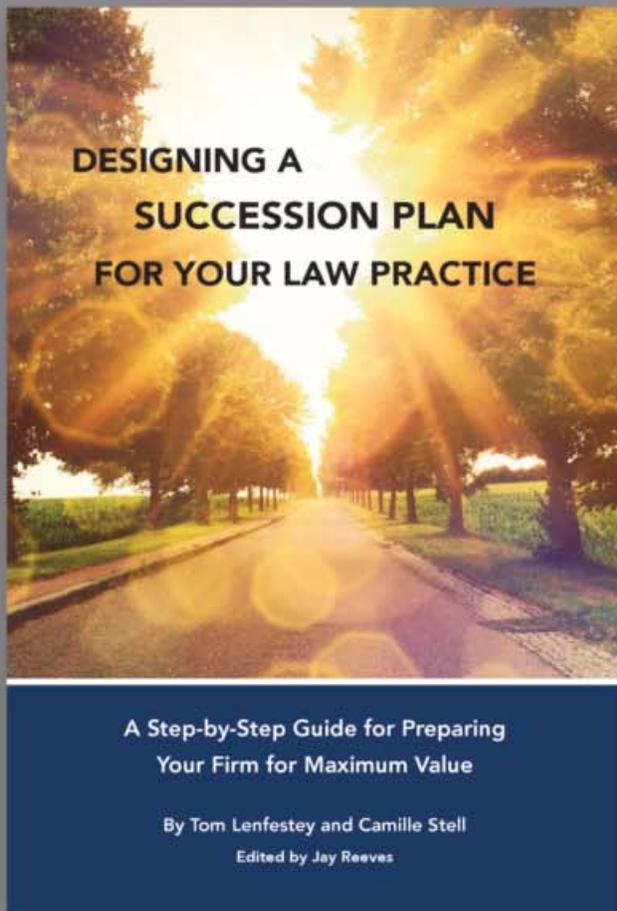
called F3, which stands for Fitness, Fellowship, and Faith.

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

If you want to be one of the lawyers at the top of your area of practice, it's a no-brainer. First, it is rewarding initially to pass the test and know that you are eminent in your field. Second, it definitely results in referrals. Third, the additional CLE, while sometimes frustrating, "forces" additional education, which truly is necessary to be a trusted specialist. ■

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





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

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