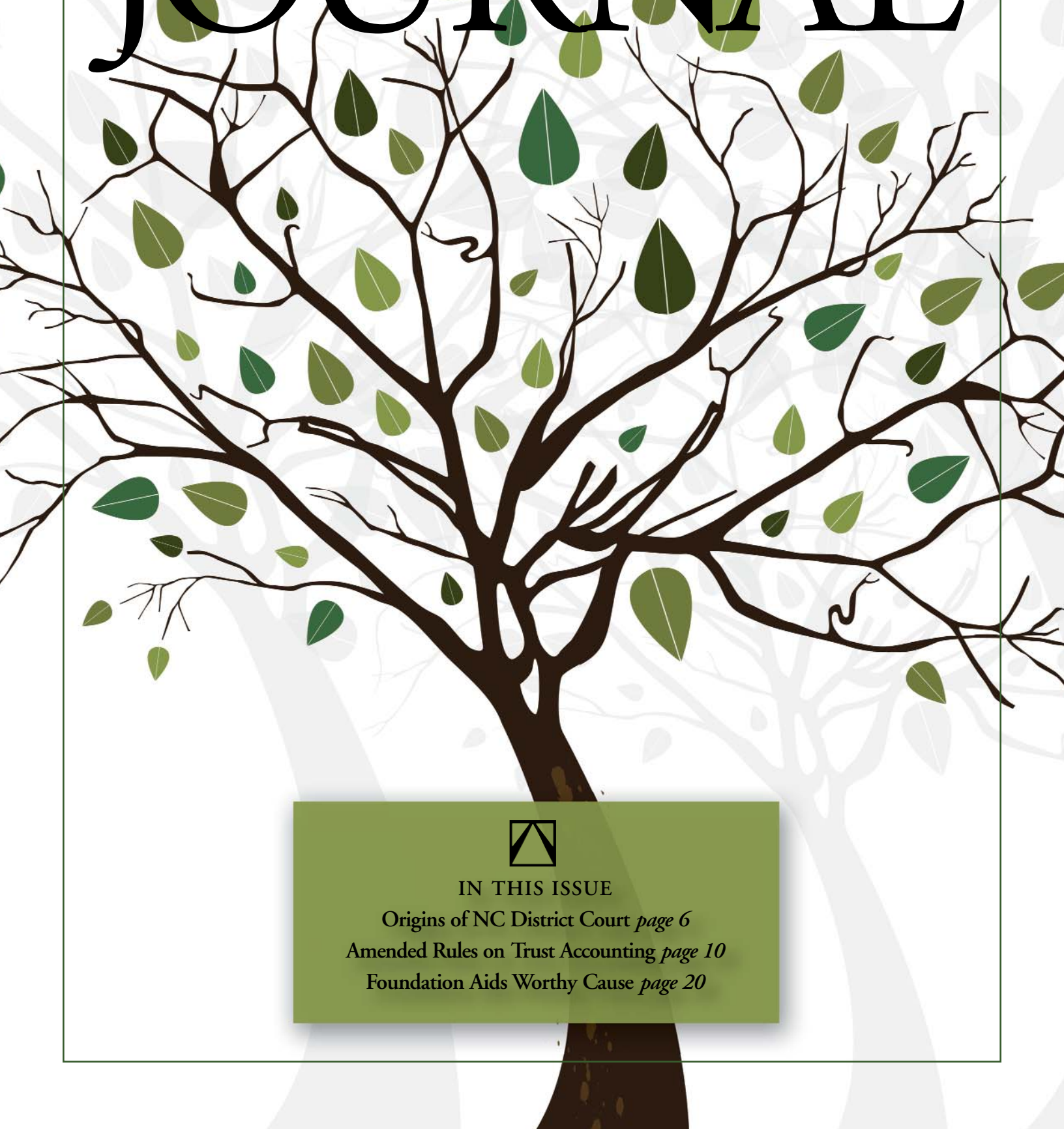


THE NORTH CAROLINA STATE BAR

# JOURNAL

SUMMER  
2016



## IN THIS ISSUE

Origins of NC District Court *page 6*

Amended Rules on Trust Accounting *page 10*

Foundation Aids Worthy Cause *page 20*



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# Contents

## FEATURES



### 6 The Origins of the North Carolina District Court

By Michael Crowell



### 10 Coming to Terms (and into Compliance) with the Pending Trust Accounting Rule Amendments

By Peter Bolac

### 18 What's All the Buzz About?

By Robynn Moraites



### 20 Reinvigorated Foundation Aids Worthy Cause

By Zeb E. Barnhardt

### 24 The Supreme Court is Taking a Roadtrip

By Justice Sam J. Ervin IV

## Clarification

The Spring 2016 edition of the *Journal* contained an entry indicating that the DHC dismissed the complaint in *North Carolina State Bar v. Gretchen C. Engel*, 15 DHC 9. The entry appeared on the third page of the article entitled "Lawyers Receive Professional Discipline." The State Bar wishes to correct any misimpression that may have resulted from the location of the entry and wishes to emphasize that the complaint was dismissed and that Ms. Engel did not receive professional discipline.

# Contents

## DEPARTMENTS

- 5 President's Message
- 28 Legal Ethics
- 29 Profile in Specialization
- 30 The Disciplinary Department

- 32 Lawyer Assistance Program
- 35 IOLTA Update
- 36 Proposed Ethics Opinions
- 40 Rule Amendments

## BAR UPDATES

- 53 Law School Briefs
- 54 In Memoriam
- 55 Distinguished Service Award
- 56 Client Security Fund
- 57 July Bar Exam Applicants

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# State Bar Programs

BY MARGARET M. HUNT

In 1933 the North Carolina General Assembly created the North Carolina State Bar and gave the State Bar the authority to regulate the professional conduct of licensed North Carolina lawyers, to take actions that are necessary to ensure the competence of lawyers, to adopt rules of professional ethics and conduct, and to investigate and prosecute matters of professional misconduct, all for the purpose of protecting the public.

Together with this responsibility to regulate the conduct of lawyers, the State Bar has a concurrent and implied responsibility to provide programs to assist lawyers in becoming more competent so that they may provide excellent and ethical legal services to the citizens of North Carolina. I encourage you to review the following State Bar programs designed to help lawyers in our State become better lawyers and to take advantage of any or all of them as appropriate.

## Ethics

a) **Formal Ethics Opinions**—FEOs are designed to give guidance to lawyers about the Rules of Professional Conduct. If you have an ethical question that would be of interest to the general Bar membership or is a matter of first impression, the question may be referred to the Ethics Committee for consideration and for the issuance of a Formal Ethics Opinion. FEOs are adopted by a majority vote of the State Bar Council after publication of the proposed opinion in the *Journal* and the consideration by the Ethics Committee of any comments received.

b) **The Ethics Hotline**—This is designed to provide a same day answer to a current ethical question that a lawyer may have about his or her prospective conduct. You may call the State Bar or send an email to [ethicsadvice@ncbar.gov](mailto:ethicsadvice@ncbar.gov) and one of the State Bar's three ethics



lawyers will respond to your question. Your communication with the ethics lawyer is confidential and you may rely on the advice you receive if you have provided a full, fair, and accurate summary of the pertinent facts. While the advice you receive from the ethics lawyer is an unofficial opinion of the State Bar, if a grievance is subsequently filed against you arising out of this conduct, the Grievance Committee will consider your seeking and relying on the advice of an ethics lawyer as evidence of your good faith effort to comply with the Rules of Professional Conduct. The hotline answers approximately 5,000 inquiries per year.

## Legal Specialization

The Board of Legal Specialization oversees the certification of North Carolina lawyers in a number of practice areas. Specialization is designed to assist in identifying for the public those lawyers who have demonstrated specific knowledge, skill, and proficiency in a particular area of the law so that members of the public can retain lawyers with expertise in the area of law of concern to them. After completing the requirements, such lawyers may use the designation of a Board Certified Specialist. Certification is currently available in real property law, bankruptcy law, estate planning and probate law, family law, criminal law, immigration law, workers' compensation law, social security disability law, elder law, appellate practice, and trademark law. At its January 2016 meeting, the State Bar Council voted to add a specialty in utilities law, subject to Supreme Court approval.

## Trust Account Compliance Officer

There is no reason to fear a random audit of your trust account! One of the most important obligations of lawyers is the safeguarding and proper accounting of a client's funds.

While Rule 1.15 sets out the specific procedures for trust accounting, it is not unusual for lawyers to have questions about proper trust accounting. One of the State Bar's lawyers is our trust account compliance officer who is available to answer questions about your trust account by telephone, email, or in person, and will work with you to be sure your procedures are in compliance with the rules. The compliance officer is also available to attend district bar meetings to speak on proper trust account procedures. Our trust account compliance officer welcomes your questions about your trust account.

## District Bar Meetings

In 1995 the State Bar instituted a series of four State Bar sponsored meetings per year on a rotating basis among all of the district bars. The State Bar officers and staff attend the meetings and present information on State Bar programs. The lawyers attending the programs have an opportunity to ask questions and discuss issues of concern to them with the State Bar officers and staff. Those who attend receive CLE credit.

## Lawyer Assistance Program

In 1979 a group of North Carolina lawyers who recognized the problems and the suffering that arise out of addiction and alcoholism, came together to help offer assistance to fellow lawyers. In 1994 this committee called Positive Action for Lawyers (PALS) was incorporated into the State Bar. In 1999 the FRIENDS Committee was formed to assist lawyers with mental health issues, and later the two programs were merged into today's Lawyer Assistance Program (LAP). LAP is a service of the State Bar that provides free, confidential assistance to lawyers, judges, and law students suffering from substance abuse and mental health issues that may impair or prevent them from practicing law effectively. One of LAP's greatest assets is the

CONTINUED ON PAGE 27

# The Origins of the North Carolina District Court

MICHAEL CROWELL

This year we celebrate the 50th anniversary of the district court in North Carolina. The first district courts, part of the new statewide unified General Court of Justice, opened in 1966 in six districts and 23 counties, replacing a scramble of county courts, recorders courts, justices of the peace, and the like. Over the next four years the district court spread to the rest of the state.

While we celebrate 1966 as the birthdate, the creation of district court really began over a decade earlier in 1955. And the process was not completed until the 1970s. The story is a reminder of the perseverance required for meaningful court reform.

## The Beginning

It all began in July 1955, when Governor Luther Hodges addressed a meeting of the Supreme Court and superior court judges. We are not sure what or who prompted the governor's interest, but he warned the judiciary that the public's respect for the courts had fallen and change was needed. Hodges asked that the North Carolina Bar Association recommend improvements to him, the General Assembly, and the public.

The result was the Bar Association's Committee on Improving and Expediting the Administration of Justice in North Carolina, chaired by J. Spencer Bell of Charlotte, one of the state's most prominent lawyers and later a federal judge on the Fourth Circuit Court of Appeals. In tribute to his leadership the committee now almost always is referred to as the Bell Commission. The committee was a mix of talented and prominent lawyers and business leaders, many of whose names are still recognizable

today, including Shearon Harris, Henry Brandis, Pilston Godwin, James Poyner, William Womble, Fred Fletcher, Ashley Futrell, and Woodrow Price.

The Bell Commission employed the UNC Institute of Government as staff and set to work in November 1955. Subcommittees drafted and distributed reports, with questionnaires, to all members of the Bar Association as well as other lawyers and citizens. The final report was presented at the Bar Association's 1958 convention.

## The Courts of the 1950s

The court system the Bell Commission was examining, and attempting to improve, consisted of: a single appellate court, the Supreme Court; a single statewide trial court of general jurisdiction, the superior court; and a mixup of local courts with varying jurisdiction, procedure, financing, and methods of selection, plus justices of the peace (JPs). By the late 1950s, there were 256 local courts in the state with jurisdiction between that of a JP and the superior court—mayors' courts, municipal recorders' courts, county recorders' courts, general county courts, a civil county court, county criminal courts, domestic relations courts, and juvenile courts.

A local court might have jurisdiction only within a municipality, for a mile beyond the city limits, five miles, the entire township, or the entire county. In one instance, jurisdiction was defined by the watershed of the city reservoir. Some of the courts could hear only town ordinance violations, while others could hear all crimes below the superior court level. Civil jurisdiction might be capped at \$50, \$500, \$1,000, or some other amount, and might vary according to the



nature of the claim, or might be unlimited. Some of these courts could hear alimony and divorce, others could hear land disputes, some could issue injunctions, and others could not. Many local judges were elected, others were appointed by the city or county governing body or by the governor or the resident superior court judge, and terms of office ranged from one to four years or, in the case of mayors' courts, a term coterminous with the term as mayor. Most judges received a set salary, but a number depended on fees collected. The timing and numbers of sessions of court were all over the map.

## The Bell Commission's Vision

In looking to reform this patchwork of courts, the major principles that guided the Bell Commission, and the accompanying recommendations, to be embodied in a new Article IV of the State Constitution, were:

**Responsibility for the judicial system should be clearly fixed upon the courts—** The commission's view was that if the courts were failing to serve the people properly, criticism should be directed to the office of the

chief justice. For the chief to accept that responsibility, the system would need to be an actual single statewide court system and would need an administrative office of the courts with a director answerable to the Supreme Court. The Court should have control, too, over the rules of trial and appellate procedure.

**Justice should be uniform throughout the state**—The commission believed that people across the state should have basically the same court facilities, and that the courts should conduct their business in a uniform manner. Most significantly, that meant replacing the various local courts with a statewide system of courts utilizing uniform fees, jurisdiction, and procedure. The local courts would be replaced with a statewide district court system, and all courts would be administered and funded at the state level. Local governments would be responsible only for providing court facilities.

**The court system should be flexible**—Court needs will change over time and, therefore, the system should be sufficiently flexible to adapt. To that end, the proposed single unified General Court of Justice would have jurisdiction to hear all disputes, eliminating the rigid limited jurisdictions of all the local courts. The Supreme Court, the commission believed, should be able to change the jurisdiction of each division of the new system, though legislative approval would be needed to have district court try felonies or hear civil disputes of more than \$5,000.

The Bell Commission wanted to allow the court system itself to adapt to changing needs rather than having to keep returning to the legislature. Thus the commission recommended that a new intermediate court of appeals be established by the General Assembly, with its jurisdiction determined by the Supreme Court. The superior court's jurisdiction also could be modified by the Supreme Court. The legislature still would draw superior court districts, but the chief justice would assign judges to sessions of court, rather than being set by statute, and the chief could send superior court judges to temporary duty with either the district court or the new court of appeals. The Supreme Court would decide district lines for the new district court, and there would be a minor judicial official—the magistrate—to replace justices of the peace and, unlike JPs, be under the supervision of other court officials.

## The Problem of Judicial Selection

Judicial selection was a contentious issue for the Bell Commission and has remained so to this day. A Bell Commission subcommittee first proposed a Missouri Plan for selection of Supreme Court justices and superior court judges: A judicial council would nominate three candidates for each vacancy, the governor would appoint one, and that person would serve until the next general election, at which time there would be a yes/no referendum on retaining the judge in office for an eight-year term. District court judges and magistrates would be appointed by the chief justice from nominations by senior resident superior court judges.

After the subcommittee's proposals drew a strong unfavorable reaction, the commission dropped the Missouri Plan, staying with elections for appellate and superior court judges. The commission stuck with the appointment of district judges and magistrates by the chief justice.

## The 1959 General Assembly

The Bell Commission's first real test came in the 1959 General Assembly. It did not go well. Most importantly, the legislature was not willing to cede so much authority to the court officials. After the legislative committees had done their thing, the proposed constitutional amendments had the General Assembly, not the Supreme Court or chief justice, set district court lines, determine the jurisdiction of the trial courts, and determine the system of appeals. The legislative committee also removed the authority to assign superior court judges temporarily to district court, eliminated the chief justice's authority to appoint district judges, dropped the creation of a new court of appeals, and authorized the legislature to veto the Supreme Court's rules of practice and procedure for the trial courts.

The rewritten legislation cleared the Senate but was further amended in the House to diminish court authority even more. The House voted to have the legislature, not the Supreme Court, decide when sessions of superior court were to be held, and also allowed the General Assembly to amend any procedural rules adopted by the Supreme Court. With the constitutional revision now far from what the Bell Commission intended, the sponsors pulled the bill and gave up on any meaningful reform in the 1959 session. The General Assembly had made it clear that

it was not ready to loosen too greatly its oversight of the courts.

## A New Committee, the 1961 General Assembly, and the 1962 Constitutional Amendment

With the lessons of 1959 in mind, the Bell Commission went back to work. Its revised proposals then were studied and modified by the Bar Association's Committee on Legislation, chaired by Howard W. Hubbard. Some other prominent committee members were Pat Taylor, Pete Avery, Jim Dorsett, Hubert Humphrey, John Jordan, Armistead Maupin, Beverly Moore, Rogert Morgan, Dickson Phillips, Richardson Preyer, Frank Snepp, W.W. Speight, Ralph Strayhorn, and Lacy Thornburg.

The Bar Association presented its report to the 1961 General Assembly, the main features being:

- The legislature would create a court of appeals on recommendation of the Supreme Court, and the Supreme Court would decide its jurisdiction.
- The Supreme Court, not the legislature, would set the sessions of superior court.
- The Supreme Court could subdivide superior court districts into district court districts and decide where the court would sit.
- The General Assembly would decide how district judges are chosen.
- Magistrates would be appointed by the chief justice on recommendation of the senior resident superior court judge.
- Solicitors would not be put under the supervision of the attorney general as discussed earlier.
- The chief justice could assign superior court judges temporarily to the Supreme Court or the new court of appeals.
- The Supreme Court would decide the rules of practice and procedure for all courts, subject to repeal by the legislature by 3/5 vote.

The House and Senate committees, naturally, put their own stamp on the legislation, more often than not restoring legislative control over the courts. The legislature eliminated the court of appeals, set its own authority to draw district court lines, provided for appointment of magistrates by the senior resident on nomination of the clerk of court, removed the authority of the chief justice to have superior court judges serve temporarily on the Supreme Court, and empowered the General Assembly to set procedural rules for the trial courts. The final bill included a new adminis-

trative office of the courts, but eliminated a proposed courts advisory commission, and also dropped the requirement that all fees and costs go to the state.

Finally, though, there was a new Article IV of the Constitution to go before the voters. The referendum on the constitutional amendment was on the ballot in November 1962 and was approved 357,067 to 232,774.

### The 1963 General Assembly

The overall structure of the new court system having been established, the Bell Commission started implementing legislation, blending its efforts with yet another new committee. This was a special committee established by Governor Terry Sanford to prepare proposals for the 1963 legislature, chaired by Judge George Fountain. Much of its work was done by a drafting subcommittee chaired by Dickson Phillips. Without time to iron out the details for establishing an entirely new district court system in 1963, the two committees chose instead to focus on establishing the administrative office of the courts and a courts commission.

The administrative office of the courts (AOC) did not make it through the 1963 General Assembly—some legislators resisted the whole idea of professional court administration, and others simply thought the AOC was not needed until more of the new system was in place. The creation of the Courts Commission did pass, but only after the General Assembly struck the idea of having the governor name all the members. The legislature provided instead for a majority of members to have legislative experience, with all members appointed jointly by the governor, the president of the Senate, the speaker, and the chairs of the General Assembly's judiciary committees. The Courts Commission's assignment was to draft the legislation necessary to fully implement the new court system by the beginning of 1971.

### The Courts Commission and Completion of the General Court of Justice

Over the next dozen years the Courts Commission first completed the broad contours of the new statewide court system and then filled in the details. It was chaired initially by Lindsay Warren Jr., and included, among others, David Britt, Alex McMahon, James McMillan, Dickson Phillips, Eugene Snyder, and Pat Taylor.

The Courts Commission drafted the 1965 legislation to establish the district court system, defining the offices of district judge and magistrate and setting their jurisdiction, then scheduled the new courts to open in different parts of the state in three phases. Twenty-three counties welcomed the new district court in December 1966, followed by 60 additional counties two years later, and the final 17 in December 1970. The lines for all district court districts were set in 1967 and were the same as for superior court. Solicitors became district attorneys in the new system in 1967, and in 1969 their districts were given the same lines as for the trial courts. The result was 30 districts with coterminous lines for district court, superior court, and prosecution.

The Courts Commission's efforts led to the creation of the court of appeals in 1967 with six judges. In 1969 the juvenile code was revised and those cases assigned to the district court, and in the same year the first two public defender offices were established in the 12th (then Cumberland and Hoke counties) and 18th (Guilford) districts, out of the seven recommended by the commission.

The original Courts Commission expired in 1969, but was reauthorized that year by the General Assembly. Over the next several years it put in place the final pieces of the uniform General Court of Justice, including the 1972 constitutional amendment leading to the creation of the Judicial Standards Commission and a method of judicial discipline other than impeachment, the mandatory retirement age for judges, and the judicial retirement system.

Like the Bell Commission and many others since, the Courts Commission banged its head against the wall of judicial selection a number of times without any success. At almost every session in its early years the commission proposed to the General Assembly a constitutional amendment for the Missouri Plan, i.e., the governor would appoint judges from names submitted by a bipartisan nominating commission, with the judge standing for a yes/no retention vote at the next election and after each term. Despite bipartisan sponsorship—and usually the backing of the governor—none of the bills could ever gain the 3/5 majority needed in both houses of the General Assembly to put the amendment on the ballot.

The Courts Commission went dormant in 1975, was revived in 1981, brought forward various more modest proposals for court improvement, and went dark again in 1989.

### The Futures Commission

The next and last big picture review of the court system came in 1994 through 1996 when Chief Justice Jim Exum established the Commission for the Future of Justice and the Courts in North Carolina, typically referred to as the Futures Commission or the Medlin Commission in honor of its chair, John Medlin, the retired CEO and chairman of Wachovia Bank. Vice chairs were former Chief Justice Rhoda Billings and former Superior Court Judge Bob Collier. Chief Justice Exum intentionally left off the 27-member commission any sitting court official, wanting to avoid members inclined to preserving the current system. Nevertheless several judges, a clerk, DA, and public defender were later included on advisory committees. The lawyer members of the commission included Phil Baddour, George Bason, Alan Briggs, Charles Burgin, Dan Clodfelter, Roy Cooper, Parks Helms, Ham Horton, Johnathan Rhyne, Russell Robinson, Tim Valentine, Jim Van Camp, David Ward, Fred Williams, and Merinda Woody.

The story of the Futures Commission is not as long as the Bell Commission because its work is more recent and more familiar, and because its efforts were not as successful. The commission's report, *Without Favor, Denial or Delay: A Court System for the 21st Century*, is available online and continues to be the source of discussion even though few of its specific recommendations have been implemented.

The Futures Commission began by reviewing the work of the Bell Commission and deciding whether its major principles still applied. The commission decided they did and organized its recommendations around the same themes. Like the Bell Commission, the Futures Commission believed that the chief justice and other officials needed to be held responsible for the system's performance, but for that to happen they had to have true authority over court operations. Thus the commission proposed that: the Supreme Court control all rules of procedure; the legislature appropriate funds to the courts in a lump sum, and the chief justice and AOC, working with a new Judicial Council, decide where to allocate positions and what salaries to pay; the Judicial Council be able to redraw district lines; and that each district, to be reorganized as a "circuit," have a chief judge and professional administrator responsible for assigning



cases, with individual judges accountable for managing their dockets.

Concerned about the growing disparity among districts because of significant demographic changes—the explosion of the urban areas of the state and stagnation of more rural parts—and also because of the splitting of districts into increasingly smaller units and the introduction of local supplemental funding of operations, the commission wanted a recommitment to uniformity. Its choice was to replace trial court districts with a smaller number of “circuits,” each with the critical mass of population and caseload necessary to support professional court administrators and specialized activities, such as family courts. For uniformity and for flexibility, echoing the words of the Bell Commission, the Futures Commission proposed the merger of district and superior court into a single trial court—the new circuit court—with assignment of cases to judges based on the circuit’s needs and the individual judges’ experience and interest. The idea was to eliminate the inefficiency of some district and superior courts being crowded while others had finished their business. The commission also wanted to reduce the barrier to case management inherent with superior court rotation, instead having judges stay within their circuits and be held accountable for their dockets. Management would be further enhanced by having a professional administrator assist the chief judge of each circuit and by having clerks appointed rather than continuing as independently elected officials.

Like all its predecessors, the Futures Commission thought election a poor method of selecting judges, and once again recommended a Missouri Plan for judicial selection. The state judicial council would nominate candidates for appellate judgeships, local judicial councils would recommend trial judges, and all judges would be subject to systematic evaluations based on established performance standards.

There were many more commission recommendations, a number of which dealt with more limited procedural matters rather than major structural changes. Several concerned upgrades in technology. The proposal that received the most attention and most success was the idea of a family court: the integration of resources so that all issues involving a single family—divorce, alimony, child custody, child support, etc.—would be

heard by the same judge who would be assisted by a team of court personnel who could more carefully monitor and manage the case. This recommendation was the basis for the family courts now operating in a number of districts around the state.

The Futures Commission’s recommendations were reported to the 1997 General Assembly, bills were drafted and introduced for various parts of its reports, special legislative and Bar Association committees were created, and over the next several years some pieces got attention, but most fell by the wayside. A new Judicial Council was created, but it was more an advisory body than the robust board of directors kind of entity envisioned by the Futures Commission. Family courts were created, but only in some districts and without the full range of resources the commission wanted. Technology improved, but not at the rate and as extensively as proposed. The structural changes called for by the commission fell flat. Clerks did not want to be appointed rather than elected; superior court judges abhorred the idea of merger with district court; no one wanted their districts redrawn; and as always legislators did not want to loosen their control over the courts.

### Conclusion

As the long story of the Bell Commission shows, and the short story of the Futures Commission reinforces, significant structural reform in the courts requires general public recognition that the existing system is failing; unity within the bar and courts on the need for change; a strong commitment by leaders in the legal and business communities; and years of discussion and much compromise with legislators.

Let us not forget, though, that the district court of 1966 and today is a huge improvement over its predecessors. Although the product of compromise and dilution of the principles of the study commissions who wanted more authority transferred from the legislature to the courts, the General Court of Justice was and still is the envy of many states that continue to struggle with the kinds of local courts North Carolina replaced a half century ago. By the 1970s the result of the work the Bell Commission began was a statewide district court with state funding for every judge, the same jurisdiction everywhere, coterminous districts for all purposes, a unified system where no one could be thrown out of court for filing in the wrong

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place, set salaries rather than fee-based compensation, and the accountability of a chief district judge appointed by and serving at the pleasure of the chief justice. There may be much still to be done, but the changes implemented 50 years ago were monumental. ■

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**Note on sources:** Much of the information in this article is taken from the UNC Institute of Government’s (now School of Government), March 1958 special edition of its magazine *Popular Government*, entitled “The Courts of Yesterday, Today, and Tomorrow in North Carolina”; the “Report of the Committee on Improving and Expediting the Administration of Justice in North Carolina,” published by the North Carolina Bar Association in December 1958; “A Report on The Unified Court Bill,” published by the Committee on Legislation, North Carolina Bar Association, January 1961; “A Summary of Court Improvement Efforts, 1955-1963,” prepared by Clyde L. Ball of the Institute of Government for the North Carolina Courts Commission, October 1963; the reports of the Courts Commission; and from the files and memory of James C. Drennan, retired professor of public law and government at the School of Government, and former director of the Administrative Office of the Courts.

# Coming to Terms (and into Compliance) with the Pending Trust Accounting Rule Amendments

BY PETER BOLAC

This past October, the State Bar Council adopted the amendments

on pages 14 to 17 to Rule 1.15 of the Rules of Professional Conduct.

These amendments are now pending before the North Carolina

Supreme Court. If and when the amendments are approved, lawyers must act to ensure their compliance with new requirements. To that end,

notice of any action taken by the Court will be emailed to the membership and posted immediately on the State Bar's website.

After a brief background of the procedural history of the amendment process, this article will explain each rule change, give guidance on how to come into compliance with the new rules, and provide links to sample forms and examples to help lawyers and firms comply with the new rules. Although the rules would become effective immediately upon the Supreme Court's approval, the State Bar understands that becoming 100% compliant with the new rules may take some time.

## Background

On October 23, 2015, the council adopted

the proposed amendments to Rule 1.15 of the Rules of Professional Conduct of the North Carolina State Bar. The amendments were the result of a rules review process that began in April 2014 at the behest of then State Bar Vice-President Margaret Hunt. Hunt, as chair of The North Carolina State Bar's Issues Committee, formed a subcommittee in early 2014 to study Rule 1.15 of the Rules of Professional Conduct and determine if any changes should be made to facilitate prevention and early detection of internal theft, and to add clarity to the existing requirements. In addition to examining the existing rules, the

Subcommittee on Trust Account Management was also tasked with developing a procedure whereby a firm with two or more lawyers might designate a firm partner to oversee the firm's general trust accounts. The subcommittee drafted the proposed amendments, the Issues and Executive Committees approved the amendments, and the full council approved the amendments for publication in the *Journal*. The first set of proposed rule amendments was published in the Spring 2015 edition of the State Bar *Journal*. In response to comments received after publication, the council published additional changes



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in the Summer 2015 *Journal*. Based on comments received after the second publication, additional changes were approved and the rules were published a third and final time in the Fall 2015 *Journal*. No adverse comment was received after that publication and the amendments were adopted by the council.

## Explanation of Amendments to Rule 1.15

(Items in bold marked with \*\*\* would require action in order to remain compliant)

### Rule 1.15-1 Definitions

Rule 1.15-1(a): Adds credit unions to the definition of “bank.” This change allows lawyers and law firms to maintain trust accounts at credit unions. Credit unions were removed from the definition in 2008 due to concerns about whether deposit insurance applied to individual clients in a trust account maintained at a credit union in the same way FDIC insurance applied to trust accounts maintained at banks. The deposit insurance concern was addressed, and credit unions are now eligible to offer IOLTA accounts to North Carolina lawyers.

Rule 1.15-1(k): Adds language excluding “professional fiduciary services” from the def-

inition of “legal services.” The converse of this exclusion already exists in Rule 1.15-1(l). Lawyers who provide “legal services” have different requirements than lawyers who only provide “professional fiduciary services,” so a clear distinction is important.

### Rule 1.15-2 General Rules

Rule 1.15-2(f): This rule change clarifies that lawyers may not hold funds for third parties in the trust account unless they were received in connection with legal services or professional fiduciary services.

Rule 1.15-2(g): This one-word change of “may” to “shall” clarifies that a lawyer must promptly remove funds to which the lawyer is or becomes entitled.

Rule 1.15-2(h): This amendment clarifies any confusion caused by the old language, but does not change the substance of the rule. Any item drawn on the trust account must identify (by name, file number, or other information) the client from whose balance the item is drawn. The identification must be made on the item itself, not on a stub or other document.

Rule 1.15-2(i): The amendment prohibits cash withdrawals by any means, not just debit cards.

Rule 1.15-2(j): The amendment moves the debit card prohibition from the end of Rule 1.15-2(i) to a standalone paragraph.

(All subsequent paragraphs in Rule 1.15-2 are relettered)

Rule 1.15-2(k): An amendment to the title of the rule clarifies that entrusted funds should not be used or pledged for the personal benefit of the lawyer or a third party.

Rule 1.15-2(p): This is a substantive amendment to the lawyer’s duty to report misappropriation or misapplication of entrusted property. While confirming that intentional theft or fraud must be reported immediately, this amendment removes the reporting requirement for unintentional and inadvertent misapplications of entrusted funds *if* the misapplication is discovered and rectified on or before the lawyer’s next quarterly reconciliation. The amendment also clarifies that to satisfy the lawyer’s duty to self-report, the lawyer may reveal confidential information otherwise protected by Rule 1.6. Comment [26] further explains the lawyer’s duty to report misappropriation or misapplication of entrusted funds, and a comment to **Rule 8.3, *Reporting Professional Misconduct***, clarifies that a

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lawyer has a duty to report misappropriation or misapplication of trust funds regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.

\*\*\***Rule 1.15-2(s)** – This amendment requires that checks drawn on a trust account must be signed by a lawyer, or by an employee who is not responsible for reconciling the trust account and who is supervised by a lawyer. Further, any lawyer or employee who exercises signature authority must take a one-hour trust account management CLE course before exercising such authority. The rule also prohibits the use of signature stamps, preprinted signature lines, or electronic signatures on trust account checks. As Comment [24] explains, “[d]ividing the check signing and reconciliation

responsibilities makes it more difficult for one employee to hide fraudulent transactions. Similarly, signature stamps, preprinted signature lines on checks, and electronic signatures are prohibited to prevent their use for fraudulent purposes.” \*\*\*

*(Note: To ease the burden of the CLE requirement, the State Bar has partnered with the North Carolina Bar Association to produce an online trust accounting training CLE series that will be available for free to all North Carolina lawyers. More information on the CLE program will be provided as it becomes available.)*

#### Rule 1.15-3 Records and Accountings

Rule 1.15-3(b) and (c): Lawyers can now electronically maintain images of cancelled checks and other items instead of hard copies because new Rule 1.15-3(j) allows lawyers to maintain records electronically provided certain requirements are met. Rule 1.15-3(b) also amends language to mirror the clarification in Rule 1.15-2(h).

\*\*\***Rule 1.15-3(d)**: Explains how a quarterly reconciliation should be performed and adds the requirement that a lawyer must review, sign, and date a copy of all monthly and quarterly trust account reconciliations. \*\*\*

\*\*\***Rule 1.15-3(i)**: The new rule requires the lawyer to 1) review bank statements and cancelled checks for each trust account and fiduciary account on a monthly basis, 2) at least quarterly, review a random sample of a minimum of three transactions (statement of costs and receipts, client ledger, and cancelled checks) to ensure that disbursements were properly made, 3) resolve any discrepancies discovered during the reviews within ten days, and 4) sign, date, and retain a copy of a report documenting the monthly and quarterly review process, including a description of the review, the transactions sampled, and any remedial action taken. \*\*\*

The monthly review will disclose: a) forged signatures, b) improper payees or checks to cash, and c) unexplained gaps in check numbers indicating checks may have gone missing. The lawyer can verify that checks from the general trust account properly identify on the face of the check the client from whose balance the check is drawn. The lawyer can also examine the back of cleared checks to ensure proper endorsements were made.

Random review of ledgers and settlement statements helps to ensure that the ledgers

and statements accurately reflect the transaction. This type of review can uncover improper disbursements, incorrect deposits, and substituted or unissued checks. While the random review requirement may not uncover any improper activity, it will most definitely act as a deterrent to employee malfeasance.

Rule 1.15-3(j): The new rule provides for the retention of records in electronic format provided 1) records otherwise comply with Rule 1.15-3, including any signature requirements, 2) records can be printed on-demand, and 3) records are regularly backed up by an appropriate storage device.

#### Rule 1.15-4 Alternative Trust Account Management Procedure for Multi-Member Firm

This new rule permits, but does not require, a law firm to designate a trust account oversight officer (TAOO) to oversee the administration of the firm's general trust accounts. This is an optional rule; firms are **not required** to designate a TAOO. However, if the firm would like to designate a TAOO, it must follow the following guidelines.

Rule 1.15-4(a): permits a firm to designate a partner as the firm's TAOO. A partner is defined as a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law. The designation must be in writing, and signed by the TAOO and the managing lawyers of the firm. A law firm may designate more than one partner as a TAOO. Comment [27] explains the supervisory requirements for delegation under Rule 5.1, and states that “delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1.”

Rule 1.15-4(b): Lawyers remain individually responsible for the oversight of any dedicated trust account and fiduciary account associated with a legal matter for which the lawyer is primary legal counsel, and must continue to review disbursements, ledgers, and balances for any such account. Comments [28] and [29] further explain the limitations on delegation.

Rule 1.15-4(c): Explains the initial and annual training requirements of a TAOO. Comment [29] further explains this requirement.

Rule 1.15-4(d): Sets forth what must be included in the written agreement designating a lawyer as a TAOO.



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Rule 1.15-4(e): Requires any firm that designates a TAOO to have a written policy detailing the firm's trust account management procedures.

### Coming into Compliance

While most of the proposed amendments are stylistic and nonsubstantive, lawyers will need to become compliant with the procedural changes and additional review requirements. The following checklist and sample forms, which can be found online at [ncbar.gov/for-lawyers/forms](http://ncbar.gov/for-lawyers/forms), should ensure compliance with the new requirements if they are approved by the Supreme Court.

### Compliance Checklist

\_\_\_ 1. All trust account checks are signed by a lawyer, or by an employee who is not responsible for reconciling the trust account and who is supervised by a lawyer.

\_\_\_ 2. Any person with signatory authority on the trust account has taken a one-hour trust account management CLE (within the last three years).

**NOTE: Proof of completion of the CLE requirement will not need to be sent to the**

***State Bar, but should be retained and will be checked during a random audit.***

\_\_\_ 3. No trust account checks are signed using signature stamps, pre-printed signature lines, or electronic signatures.

\_\_\_ 4. All reconciliations are reviewed, signed, and dated by a lawyer.

\_\_\_ 5. A lawyer reviews the bank statements and cancelled checks for all trust and fiduciary accounts on a monthly basis and a report is created documenting the review.

\_\_\_ 6. At least quarterly, a lawyer reviews a random sample of at least three transactions (selected by the lawyer) to ensure that disbursements were properly made by reviewing the statement of costs and receipts, client ledgers, and cancelled checks for each transaction. Transactions should include multiple disbursements where available. A report is created documenting the lawyer's review.

\_\_\_ 7. All reports are signed and dated by a lawyer.

\_\_\_ 8. Any discrepancy discovered during reconciliations or reviews is investigated and resolved within 10 days.

The State Bar has created forms for

lawyers and law firms to conduct the required monthly and quarterly trust account reviews and reconciliations. Although recommended, lawyers will not be required to use the State Bar forms if they have an alternate method of ensuring compliance. Proper completion of the State Bar's forms should ensure a lawyer's compliance with all of the monthly and quarterly reconciliation and review requirements.

### Conclusion

The proposed amendments to the trust account rules are the product of a two-year effort that involved public comment and multiple revisions. While the proposed review requirements may seem onerous, the minimal extra work involved should help deter and prevent costly mistakes and thefts that could jeopardize a lawyer's practice and pocketbook. For questions about the proposed amendments or any other trust account questions, please contact Peter Bolac at [PBolac@ncbar.gov](mailto:PBolac@ncbar.gov) or (919) 828-4620. ■

*Peter Bolac is the trust account compliance counsel for the North Carolina State Bar.*

## AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the council of the North Carolina State Bar at its quarterly meeting on October 23, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined except where noted):

### 27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

#### Rule 1.15 Safekeeping Property

This rule has ~~three~~ four subparts: Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; ~~and~~ Rule 1.15-3, Records and Accountings; ~~and Rule 1.15-4, Trust Account Management in Multiple-Lawyer Firm.~~ The subparts set forth the requirements for preserving client property, including the requirements for preserving client property in a lawyer's trust account. The comment for all ~~three~~ four subparts as well as the annotations appear after the text for Rule ~~1.15-3~~ 1.15-4.

#### Rule 1.15-1 Definitions

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank, ~~or~~ savings and loan association, or credit union chartered under North Carolina or federal law.

(b) ...

(k) "Legal services" denotes services (other than professional fiduciary services) rendered by a lawyer in a client-lawyer relationship.

#### Rule 1.15-2 General Rules

(a) Entrusted Property.

...

(f) Segregation of Lawyer's Funds. Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary services may not be deposited or maintained in a trust or fiduciary account. Additionally, ~~No~~ no funds belonging to a the

lawyer shall be deposited or maintained in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer ~~may~~ shall withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) Items Payable to Lawyer. Any item drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate on the item by client name, file number, or other identifying information the client from whose balance ~~on which~~ the item is drawn. Any item that does not include ~~capture~~ this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) No Bearer Items. No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by any means ~~of a debit card.~~

(j) Debit Cards Prohibited. Use of a debit card to withdraw funds from a general or dedicated trust account or a fiduciary account is prohibited.

(~~k~~) (k) No Personal Benefit to Lawyer or Third Party. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(~~l~~) (l) Bank Directive.

...

[Relettering intervening paragraphs.]

(~~p~~) (p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the

trust account compliance counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)(1). This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication.

(~~q~~) (q) Interest on Deposited Funds.

...

(~~r~~) (r) Abandoned Property. ....

(s) Signature on Trust Checks.

(1) Checks drawn on a trust account must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer. Prior to exercising signature authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature authority.

(2) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures.

#### Rule 1.15-3 Records and Accountings

(a) Check Format...

(b) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts, and fiduciary accounts maintained at a bank shall consist of the following:

(1) ...;

(2) all cancelled checks or other items drawn on the account, or ~~printed~~ digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client name, file number, or other identifying information of the client from whose ~~client~~ balance ~~against which~~ each item is drawn, provided, that:...

(c) Minimum Records for Accounts at

Other Financial Institutions.

(1)...;

(2) a copy of all checks or other items drawn on the account, or ~~printed~~ digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(d) Reconciliations of General Trust Accounts.

(1) Quarterly Reconciliations. ~~At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank statement balance for the trust account as a whole. For each general trust account, a reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:~~

(A) The balance that appears in the general ledger as of the reporting date;

(B) The total of all subsidiary ledger balances in the general trust account, determined by listing and totaling the positive balances in the individual client ledgers and the administrative ledger maintained for servicing the account, as of the reporting date; and

(C) The adjusted bank balance, determined by adding outstanding deposits and other credits to the ending balance in the monthly bank statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(2) Monthly Reconciliations.

...

(3) The lawyer shall review, sign, date, and retain a record copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

(e) Accountings for Trust Funds.

...

(i) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

(2) Each quarter, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the statement of costs and receipts, client

ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(4) A report of each monthly and quarterly review, including a description of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(g).

(j) Retention of Records in Electronic Format.

Records required by Rule 1.15-3 may be created, updated, and maintained electronically, provided

(1) the records otherwise comply with Rule 1.15-3, to wit: electronically created reconciliations and reviews that are not printed must be reviewed by the lawyer and electronically signed using a “digital signature” as defined in 21 CFR 11.3(b)(5);

(2) printed and electronic copies of the records in industry-standard formats can be made on demand; and

(3) the records are regularly backed up by an appropriate storage device.

Rule 1.15-4, Alternative Trust Account Management Procedure for Multi-Member Firm [NEW RULE: bold, underlined font is not used]

(a) Trust Account Oversight Officer (TAOO).

Lawyers in a law firm of two or more lawyers may designate a partner in the firm to serve as the trust account oversight officer (TAOO) for any general trust account into which more than one firm lawyer deposits trust funds. The TAOO and the partners of the firm, or those with comparable managerial

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authority (managing lawyers), shall agree in writing that the TAOO will oversee the administration of any such trust account in conformity with the requirements of Rule 1.15, including, specifically, the requirements of this Rule 1.15-4. More than one partner may be designated as a TAOO for a law firm.

(b) Limitations on Delegation.

Designation of a TAOO does not relieve any lawyer in the law firm of responsibility for the following:

(1) oversight of the administration of any dedicated trust account or fiduciary account that is associated with a legal matter for which the lawyer is primary legal counsel or with the lawyer's performance of professional fiduciary services; and

(2) review of the disbursement sheets or statements of costs and receipts, client ledgers, and trust account balances for those legal matters for which the lawyer is primary legal counsel.

(c) Training of the TAOO.

(1) Within the six months prior to beginning service as a TAOO, a lawyer shall,

(A) read all subparts and comments to Rule 1.15, all formal ethics opinions of the North Carolina State Bar interpreting Rule 1.15, and the North Carolina State Bar *Trust Account Handbook*;

(B) complete one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a lawyer to serve as a TAOO;

(C) complete two hours of training (live, online, or self-guided) presented by a qualified educational provider on one or more of the following topics: (i) financial fraud, (ii) safeguarding funds from embezzlement, (iii) risk assessment and management for bank accounts, (iv) information security and online banking, or (v) accounting basics; and

(D) become familiar with the law firm's

accounting system for trust accounts.

(2) During each year of service as a TAOO, the designated lawyer shall attend one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a TAOO or one hour of training, presented by a qualified educational provider, on one or more of the subjects listed in paragraph (c)(1)(C).

(d) Designation and Annual Certification.

The written agreement designating a lawyer as the TAOO described in paragraph (a) shall contain the following:

(1) A statement by the TAOO that the TAOO agrees to oversee the operation of the firm's general trust accounts in compliance with the requirements of all subparts of Rule 1.15, specifically including the mandatory oversight measures in paragraph (e) of this rule;

(2) Identification of the trust accounts that the TAOO will oversee;

(3) An acknowledgement that the TAOO has completed the training described in paragraph (c)(1) and a description of that training;

(4) A statement certifying that the TAOO understands the law firm's accounting system for trust accounts; and

(5) An acknowledgement that the lawyers in the firm remain professionally responsible for the operation of the firm's trust accounts in compliance with Rule 1.15.

Each year on the anniversary of the execution of the agreement, the TAOO and the managing lawyers shall execute a statement confirming the continuing designation of the lawyer as the TAOO, certifying compliance with the requirements of this rule, describing the training undertaken by the TAOO as required by paragraph (c)(2), and reciting the statements required by subparagraphs (d)(1), (2), (4), and (5). During the lawyer's tenure as TAOO and for six years thereafter, the agreement and all subsequent annual statements shall be maintained with the trust account records (*see* Rule 1.15-3(g)).

(e) Mandatory Oversight Measures.

In addition to any other record keeping or accounting requirement set forth in Rule 1.15-2 and Rule 1.15-3, the firm shall adopt a written policy detailing the firm's trust account management procedures which shall annually be reviewed, updated, and signed by the TAOO and the managing lawyers. Each version of the policy shall be retained for the min-

imum record keeping period set forth in Rule 1.15-3(g).

Comment [to follow Rule 1.15-4]

[1]...

*Responsibility for Records and Accountings* [16]...

[17] The rules permit the retention of records in electronic form. A storage device is appropriate for backing up electronic records if it reasonably assures that the records will be recoverable despite the failure or destruction of the original storage device on which the records are stored. For a discussion of storage methods not solely under the control of the lawyer, see 2011 FEO 6.

~~[17]~~[18] Many businesses....

[Renumbering the following paragraphs.]

*Fraud Prevention Measures*

[23] The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduciary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts. In addition, Rule 1.15-3(i)(2) requires quarterly reviews of a random sample of three transactions for each trust account, dedicated trust account, and fiduciary account including examination of the statement of costs and receipts, client ledger, and cancelled checks for the transactions. Review of these documents will enable the lawyer to verify that the disbursements were made properly. Although not required by the rule, a larger sample than three transactions is advisable to increase the likelihood that internal theft will be detected.

[24] Another internal control to prevent fraud is found in Rule 1.15-2(s), which addresses the signature authority for trust account checks. The provision prohibits an employee who is responsible for performing the monthly or quarterly reconciliations for a trust account from being a signatory on a check for that account. Dividing the check signing and reconciliation responsibilities makes it more difficult for one

employee to hide fraudulent transactions. Similarly, signature stamps, preprinted signature lines on checks, and electronic signatures are prohibited to prevent their use for fraudulent purposes.

[25] In addition to the recommendations in the North Carolina State Bar Trust Account Handbook (see the chapter on Safeguarding Funds from Embezzlement), the following fraud prevention measures are recommended:

(1) Enrolling the trust account in an automated fraud detection program;

(2) Implementation of security measures to prevent fraudulent wire transfers of funds;

(3) Actively maintaining end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and periodic consultation with an information technology security professional to advise firm employees; and

(4) Insuring that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

Lawyers should frequently evaluate whether additional fraud control measures are necessary and appropriate.

*Duty to Report Misappropriation or Misapplication*

[26] A lawyer is required by Rule 1.15-2(p) to report to the trust account compliance counsel of the North Carolina State Bar Office of Counsel if the lawyer knows or reasonably believes that entrusted property, including trust funds, has been misappropriated or misapplied. The rule requires the reporting of an unintentional misapplication of trust funds, such as the inadvertent use of one client's funds on deposit in a general trust account to pay the obligations of another client, unless the lawyer discovers and rectifies the error on or before the next scheduled quarterly reconciliation. A lawyer is required to report the conduct of lawyers and nonlawyers as well as the lawyer's own conduct. A report is required regardless of whether information leading to the discovery of the misappropriation or misapplication would otherwise be protected by Rule 1.6. If disclosure of confidential client information is necessary to comply with this rule, the lawyer's disclosure should



be limited to the information that is necessary to enable the State Bar to investigate. *See* Rule 1.6, cmt. [15].

#### *Designation of a Trust Account Oversight Officer*

[27] In a firm with two or more lawyers, personal oversight of all of the activities in the general trust accounts by all of the lawyers in the firm is often impractical. Nevertheless, any lawyer in the firm who deposits into a general trust account funds entrusted to the lawyer by or on behalf of a client is professionally responsible for the administration of the trust account in compliance with Rule 1.15 regardless of whether the lawyer directly participates in the administration of the trust account. Moreover, Rule 5.1 requires all lawyers with managerial or supervisory authority over the other lawyers in a firm to make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. Rule 1.15-4 provides a procedure for delegation of the oversight of the routine administration of a general trust account to a firm partner, shareholder, or member (*see* Rule 1.0(h)) in a manner that is professionally responsible. By identifying, training, and documenting the appointment of a trust account oversight officer (TAOO) for the law firm, the lawyers in a multiple-lawyer firm may responsibly delegate the routine administration of the firm's general trust accounts to a qualified lawyer. Delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1.

[28] Nevertheless, designation of a TAOO does not insulate from professional discipline a lawyer who personally engaged in dishonest or fraudulent conduct. Moreover, a lawyer having actual or constructive knowledge of dishonest or fraudulent conduct or the mismanagement of a trust account in violation of the Rules of Professional Conduct by any firm lawyer or employee remains subject to professional discipline if the lawyer fails to promptly take reasonable remedial action to avoid the consequences of such conduct including reporting the conduct as required by Rule 1.15-2(p) or Rule 8.3. *See also* Rule 5.1 and Rule 5.3.

#### *Limitations on Delegation to TAOO*

[29] Despite the designation of a TAOO pursuant to Rule 1.15-4, each lawyer in the firm remains professionally responsible for the trust account activity associated with the legal matters for which the lawyer provides

representation. Therefore, for each legal matter for which the lawyer is primary counsel, the lawyer must review and approve any disbursement sheet or settlement statement, trust account entry in the client ledger, and trust account balance associated with the matter. Similarly, a lawyer who establishes a dedicated trust account or fiduciary account in connection with the representation of a client is professionally responsible for the administration of the dedicated trust account or fiduciary account in compliance with Rule 1.15.

#### *Training for Service as a TAOO*

[30] A qualified provider of the educational training programs for a TAOO described in Rule 1.15-4(c)(1)(C) need not be an accredited sponsor of continuing legal education programs (*see* 27 NCAC 1D, Rule .1520), but must be knowledgeable and reputable in the specific field and must offer educational materials as part of its usual course of business. Training may be completed via live presentations, online courses, or self-guided study. Self-guided study may consist of reading articles, presentation materials, or websites that have been created for the purpose of education in the areas of financial fraud, safeguarding funds from embezzlement, risk management for bank accounts, information security and online banking, or basic accounting.

#### Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) ...

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) ...

(e) ...

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can



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uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. A lawyer is not generally required by this rule to report the lawyer's own professional misconduct; however, to advance the goals of self-regulation, lawyers are encouraged to report their own misconduct to the North Carolina State Bar or to a court if the misconduct would otherwise be reportable under this rule. Nevertheless, Rule 1.15-2(p) requires a lawyer to report the misappropriation or misapplication of entrusted property, including trust funds, to the North Carolina State Bar regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.

[2]... ■

# What's All the Buzz About?

BY ROBYNN MORAITES

A recent national ABA study on attorney mental health and drinking has been getting a lot of buzz. Pun intended. Based on some small, historic studies and anecdotally, to be sure, we have known for years that attorneys are at greater risk for depression, anxiety, and alcohol problems than the general public and even other professionals. This landmark study, however, is the first to ever bring into sharp focus, with hard data and real numbers, what we are facing in our profession across a spectrum of mental health issues. The study was conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs. The findings were published in the peer-reviewed *Journal of Addiction Medicine* in February 2016.

Over 15,000 attorneys participated in the national study, and the dataset was culled to retain only currently licensed and employed attorneys. Responses from attorneys who were retired, unemployed, working outside of the legal profession, suspended, or otherwise on any form of inactive status were eliminated, leaving approximately 12,800 responses. Demographics were diverse in both gender and race and captured a robust range of practice settings, practice areas, years in practice, and positions held. This is the most comprehensive data ever collected regarding attorney mental health, and the single largest dataset.

## Drinking: 21% Drinking at Harmful or Dependent Levels and 36% Drinking at Problematic Levels

Study participants completed a ten-question instrument known as the Alcohol Use Disorders Identification Test (AUDIT-10), which screens for different levels of

problematic alcohol use, including hazardous use, harmful use, and possible alcohol dependence. The test asks about quantity and frequency of use and includes questions as to whether an individual has experienced consequences from drinking. The study found that 21% scored at levels consistent with harmful use including possible alcohol dependence. Males scored higher at 25%, compared to 16% for women. When examining responses purely for quantity and frequency of use (known as the AUDIT-3), the study found an astonishing 36% of respondents drinking at problematic levels. While there is no hard and fast line to define “problematic” levels, problematic drinking behaviors can include drinking at lunch or regularly binge drinking. Binge drinking is typically defined as consuming enough to have a blood alcohol content level of 0.08. That’s about four drinks for women and five drinks for men in a two hour timeframe. When the same AUDIT-3 screening measure was used in a comprehensive survey of physicians, 15% of physicians reported use at this level—less than half of the number of attorneys reporting such use. It appears that more than one in three attorneys are crossing the line from social drinking to using alcohol as a coping mechanism.

## Shocking Reversal of Earlier Findings: Today's Younger Lawyers at Far Greater Risk

In a significant reversal of a conclusion reached by the last documented, statistically valid study—a 1990 study out of Washington State—the study found that younger lawyers struggle the most with alcohol abuse. Respondents identified as 30 years or younger had a 32% rate of problem drinking, almost one in three, higher than any other age group. This finding directly contradicts the Washington study that found the longer an

attorney practiced, the greater the risk of developing problems with alcohol. That data reversal is very significant, signaling major changes in the profession in the last 20 to 30 years. And with job prospects at an all-time low, and student debt at an all-time high, these younger lawyers who are most in need of treatment are least able to afford it. The LAP Foundation of NC, Inc. is working to bridge that gap. Please see page 20 for the story.

## Depression, Stress, and Anxiety: 28% Report Concerns with Depression

Depression and anxiety often go hand in hand. The study found that 28% of attorneys, more than one in four, struggle with some level of depression, representing almost a ten percent increase from the 1990 Washington study. Males reported at a higher rate than females for depression. Nineteen percent reported mild or high levels of anxiety, with females reporting at a higher rate than males. Interestingly, when examining the full span of one’s career, approximately 61% and 46% reported experiencing concerns with anxiety and depression, respectively, at some point in their career. Respondents also reported experiencing unreasonably high levels of stress (23%), social anxiety (16%), attention deficit hyperactivity disorder (12.5%), panic disorder (8%), and bipolar disorder (2.4%). More than 11% reported suicidal thoughts during their career. Three percent reported self-injurious behavior, and 0.7% reported at least one suicide attempt during the course of their career.

Like the findings associated with alcohol use, mental health conditions were higher in younger, less experienced attorneys and generally decreased as age and years of experience increased. The study also revealed significantly higher levels of anxiety, depression, and stress among those with problematic alcohol use, meaning mental health concerns often co-

occurred with an alcohol use disorder.

### Barriers to Seeking Help – No Surprises

As part of the study, participants were asked to identify the biggest barriers to seeking treatment or assistance. Categorically, fear of being “found out” or stigmatized was the overwhelming first choice response. Regarding alcohol use, 67.5% said they didn’t want others to find out, and 64% identified privacy and confidentiality as a major barrier. The responses for mental health concerns for these same two reasons were 55% and 47%, respectively. Additional reasons included concerns about losing their law license, not knowing who to ask for help, and not having insurance or money for treatment.

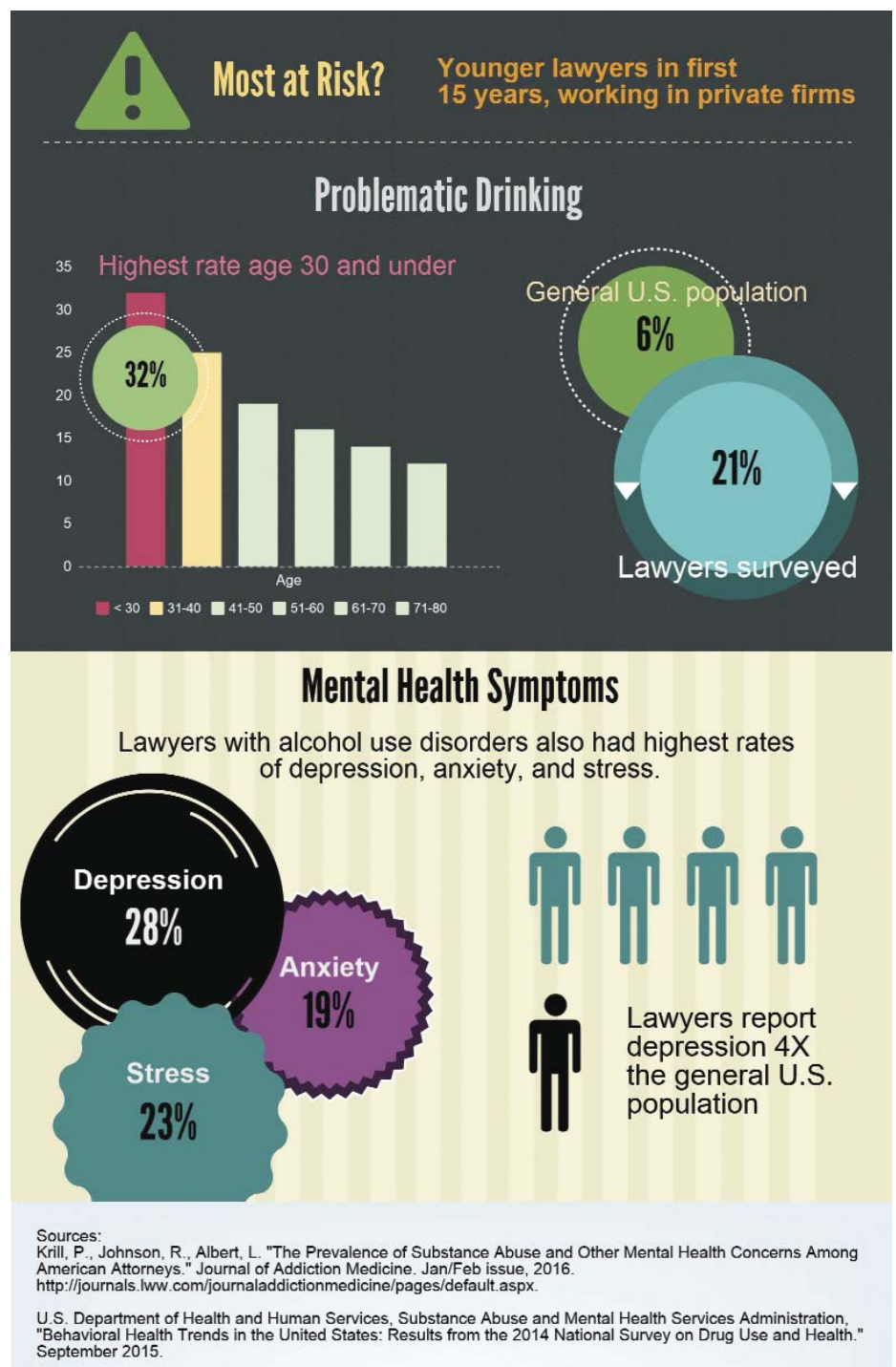
A surprising 84% indicated awareness and knowledge of lawyer assistance programs (LAPs), but only 40% would be likely to utilize the services of a LAP with privacy and confidentiality concerns again cited as the major barrier to seeking help through LAP programs.

### Help and Hope

The data is far more extensive than can be outlined in this short article. There are telling findings about drug use, including use of prescription stimulants. Rates of depression, anxiety, and problematic drinking were also correlated to practice setting, with large firms and bar associations ranking highest. We can slice the data and analyze it extensively for years to come. But the key takeaway is that we now have hard data showing that one in three-to-four of us are at real risk and are not likely to seek out assistance.

Only 7% of participants reported that they obtained treatment for alcohol or drug use, and only 22% of those respondents went through programs tailored to legal professionals. Participants who sought help from programs tailored specifically for legal professionals had significantly better outcomes and lower (healthier) scores than those who sought treatment elsewhere. This suggests that programs with a unique understanding of lawyers and their work can better address the problems.

When I first took this job as director of our NC LAP, I met a lawyer in a spin class. She was sitting on the bike next to me and recognized me because my photo had appeared in a local bar newsletter. She said, “I hope I never have to call you or have need for your program’s services.” I thought about her com-



ment for a moment and said, “Our volunteers are some of the happiest, most balanced, most resilient lawyers—people—you could ever hope to meet. They don’t come to us that way. But if they follow our suggestions, they become so. And they even like being lawyers again.” She said, “Wow. That’s cool. I never thought about it like that.” Because we are confidential, most lawyers never see the miracles of healing and regeneration that take place every day in the transformed lives of those

who are willing to pocket their pride and simply ask for help. There is help and there is hope, and plenty of it. ■

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

*Infographic reprinted with permission from the February 2016 Wisconsin Lawyer article, “Landmark Study: US Lawyers Face High Rates of Problem Drinking and Mental Health Issues,” published by the State Bar of Wisconsin.*

# Reinvigorated Foundation Aids Worthy Cause

BY ZEB E. BARNHARDT

The idea of lawyers and judges struggling with issues of substance abuse and mental illness is not pleasant to think about. But,

the reality is that these struggles happen every day among our brethren in NC.

And, while the affected lawyers suffer directly, the impact of their issues goes much

further. Their capacity to practice law is impaired. Their practices suffer, as do their clients. Their families and those who work alongside them

are put in peril. And, without intervention and treatment, things only get worse.

Many reading this article have likely witnessed a lawyer friend, law partner, or colleague in his or her district spiral out of control and the ensuing havoc it wreaks on clients, law firms, support staff, and opposing counsel. The good news is that many lawyers and judges seek help before the situation becomes this extreme.

The NC Lawyer Assistance Program (NC LAP) traces its origins to 1979 when a group of lawyers—themselves recovering alcoholics—saw the need to offer assistance voluntarily to other lawyers who were suffering from addiction and alcoholism. After an unprecedented series of lawyer suicides in the late 1990s, the mission was expanded to address stand-alone mental health issues like burnout, depression, and anxiety. NC LAP

today provides free, confidential assistance to more than 400 lawyers, judges, and law students each year who are struggling with substance abuse, mental health issues, and/or other stressors that may impair their ability to practice law effectively.

In 1998, volunteers working with NC LAP formed the LAP Foundation of North Carolina, Inc. (Foundation), for the purpose of providing “last dollar” financial support for NC LAP participants who desperately needed it for treatment, counseling, or medications and to mitigate the impact of their behaviors on those around them. The Foundation is qualified as a 501(c)(3) organization for federal income tax purposes, and is free-standing, self-governing, and independent. Volunteers govern the

Foundation through a nine-member Board of Directors that coordinates closely yet confidentially with NC LAP staff to determine funding needs.

Through funding from the NC State Bar, NC LAP staff provide assessments, counseling, and treatment referrals, short-term direct counseling, peer support (both individually and in groups), interventions, and monitoring. In the course of working with lawyers and judges who need assistance, NC LAP staff make counseling or treatment referrals that will address an issue at the level of care needed to adequately begin the recovery process. NC LAP does not pay for these treatments or services; lawyers must cover those costs themselves, whether through health care insurance, co-pays, family



If not for the confidential nature of what we do, you'd hear about our success stories all the time.



One of these lawyers contacted LAP for help and today has several years of recovery. Can you tell which one?

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assistance, credit cards, borrowing against a 401K, and the like. One of the collateral effects of any form of impairment is severe financial distress as lawyers lose the capacity to manage their practices and lives and to make sound financial decisions. Unfortunately, some lawyers and judges do not have access to those resources and simply cannot afford the treatment or counseling services they so desperately need. The cost of care can be high. Residential treatment facilities can run as much as \$60,000. Relapse prevention and other forms of mental health counseling can cost as much as \$8,000 a year, not counting the cost of medications. By the time they need this level of care, many lawyers are without the funds to pay for it.

The Foundation helps NC LAP leverage its impact by providing “last dollar” support for the cost of in-patient treatment, therapy appointments, out-patient treatment, and medications with grants and loans that generally are between \$1,000 and \$5,000. Since 2007 the Foundation has provided nearly \$100,000 for all forms of treatment for 31 attorneys and judges who could not afford the appropriate level of care. The Foundation boasts that 67% of the persons it has assisted have been successful with their recovery programs. That is an incredibly high success rate, one that is unheard of in the general treatment arena. Part of the reason for the high success rate is the support mechanism and accountability NC LAP provides—tools that are not available to the general public. These lawyers and judges who were on a dangerous precipice have turned their lives around and are thriving five and ten years after they received financial assistance from the Foundation. Roughly two-thirds of Foundation funds are parsed out as loans, and the other one-third as grants. Foundation funds go directly to service providers, never to those who are receiving treatment. As loans are repaid, the money goes to a revolving loan fund where it can provide future assistance to others who need it.

A cornerstone in both NC LAP and the Foundation is confidentiality. NC LAP is a confidential program. Reports from NC LAP to the NC State Bar or others use only statistics to describe programs and results. The identity of lawyers or judges who benefit from funds provided by the Foundation is never divulged to anyone outside of LAP staff. Even members of the Foundation

Board do not know who benefits from the loans or grants.

Another cornerstone in both NC LAP and the Foundation is volunteer participation. Although NC LAP has professional staff to provide its services, its network of 200 volunteer lawyers and judges across the state is critical to the continuing success of the program through peer support and personal contact. The Foundation has no paid staff, and the Foundation Board is a self-selecting body of volunteers who are passionate about providing assistance for recovery and treatment. Except for fundraising expenses, which are kept to a bare minimum, no Foundation funds are used for administrative purposes.

Sadly, the problem of lawyers and judges being unable to afford needed care has escalated in recent years. With the prolonged economic downturn, many lawyers who used to have thriving law practices are now barely making ends meet and remain uninsured, despite the enactment of the Affordable Care Act. And for those who are insured, NC LAP staff is discovering that some health care insurance companies are finding new and creative ways to decline coverage for treatment or counseling services despite the mental health parity requirement of the Affordable Care Act. Meanwhile, the cost of care continues to escalate.

To help combat the issue, the Foundation has launched a campaign to raise \$250,000 to fund its mission. The goal is to triple the number of lawyers and judges in North Carolina who receive assistance annually for substance abuse and mental illness treatment. Historically there have been more lawyers in need than there were funds to distribute. We hope to change that.

We have raised nearly half of our goal with many of the gifts coming from lawyers and judges who have been helped by NC LAP and, because of that help, are now back on their feet. Corporate partners like Lawyers Mutual Insurance Company and Chicago Title Insurance Company have made significant gifts to this effort, because they recognize the value of healthy, productive lawyers. Local bar foundations, like the Mecklenburg Bar Foundation and specialty bars and associations like the Association for Corporate Counsel - Charlotte Chapter, have supported this drive as well, because they believe in the Foundation’s mission. These organizations want to sup-

port colleagues who need help at a critical juncture that can determine their future trajectory: one that can be transformational rather than dismal.

The cost of not getting care is high to both the public and the profession. NC LAP protects the public from impaired lawyers and judges; supports their ongoing recovery process; and educates the legal community about issues of substance abuse and mental health. The Foundation’s mission is to support that same effort.

NC LAP has never turned away anyone in the legal profession who has called for help. Helping lawyers and judges recover is an investment in the justice system that benefits everyone. When lawyers get the help they need, the risk of tainting the reputation of lawyers in general is thwarted, benefiting the legal community. Knowing that they can get the help they need in a totally confidential manner enables these lawyers to avoid the stigma of asking for help.

Telling this story to the NC LAP “family” has brought exciting success to the Foundation’s fundraising campaign. More than 120 individuals have made pledges and gifts to the Foundation, many out of gratitude for what NC LAP has meant to them through recovery or treatment made available to themselves, family members, friends, or colleagues. It is a worthy cause.

It is my pleasure to serve as president of the Foundation. We hope that, after reading this article, you will add your support to the campaign. Please visit the Foundation’s website at [lapfoundationnc.org](http://lapfoundationnc.org) where you can learn more information. You can contribute via the website, or feel free to contact me at [zebarnhardt@gmail.com](mailto:zebarnhardt@gmail.com) or 336-213-9030 for more information. ■

*Zeb Barnhardt practiced for 30 years in corporate and securities law. He currently serves as an arbitrator and mediator. He was a member of the founding Board of Directors of BarCARES of North Carolina; chaired the NC Bar Association Foundation’s Lawyer Effectiveness and Quality of Life Committee; served a three-year term as a member of the American Bar Association’s Commission on Lawyer Assistance Programs; chaired a task force to bring BarCARES and the NC Lawyer Assistance Program together for discussions on how to focus on their common goals; and now serves as president of LAP Foundation of North Carolina, Inc.*

# \$250,000

Major Gifts Goal

“May I not die while I am still alive. This simple prayer was lost on me in 2012, for I was dead in spirit and drowning in alcohol. My life was in shambles. My practice had dropped off, creating constant worry about how to pay the bills. I saw no way out of my circumstances. I spent my days drinking, lying in bed, listening to NPR. Chronic despair made me wish I were dead. I had given up.

When LAP intervened and told me I needed to go into treatment, I was shocked, humiliated, and terrified. I was panicked about cost, but the LAP Foundation gave me a loan on extremely reasonable payment terms. That loan allowed me to get the help I needed without the added anxiety about finances. I am so grateful. My life is now full and alcohol-free and my practice is thriving.

**Now my first prayer upon rising is thank you.”**

**2-4**

Average number of lawyers per year the Foundation currently can afford to assist

**12-18**

Average number of lawyers each year who cannot afford the level of care needed & qualify for financial support

**\$92,825**

**31 Lawyers**

Total Assistance Since 2007

**\$35,000-\$45,000**

Average Cost for a 90-Day In-Patient Program

“After 25 years of child abuse and neglect cases, I was incapacitated by depression. I had stopped sending in fee aps for court-appointed work and stopped billing private clients. It took what little energy I had to show up in court. I broke down in court one day. I could not go on. LAP was a God send. But I had no money and my house was in foreclosure. I could not afford medication or counseling. The LAP Foundation paid for my medication and counseling until I was stable enough to work and bill again. I cannot imagine where I'd be today without the help I received. Thank you from the bottom of my heart.”

*Saved my life,  
my career, my dignity*

“When I was totally broke (financially, spiritually, emotionally...) and was willing and wanting to go to a residential treatment center for substance abuse treatment, I was unable. I had no insurance, no real savings, tapped out credit and no one that I could confidentially ask for money to finance the treatment. LAP discreetly found me a bed at a residential program and the Foundation loaned me the necessary money to reserve that bed. It saved my life, my career and my dignity. I would not have been able to now have almost two years of sobriety without that loan.”

**\$3,000**

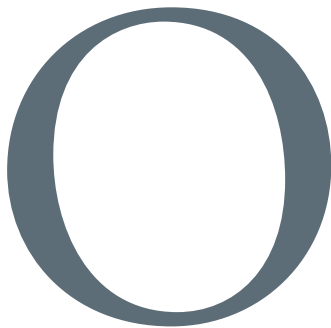
Average amount of each loan or grant provided to a lawyer in need of treatment services

**\$5,000-\$8,000**

Average Cost for a Year of Counseling (Without Medication)

# The Supreme Court is Taking a Roadtrip

BY JUSTICE SAM J. ERVIN IV



In May 17 and 18, 2016, the Supreme Court of North Carolina plans to hold a two day

oral argument session in the old Burke County courthouse. The Supreme Court's May ses-

sion represents the

Court's return to

Morganton, in which it sat each August during a portion of the antebellum

period to escape the Raleigh heat and to provide a more convenient forum for

lawyers and litigants in western North Carolina.

According to the North Carolina Constitution, “[t]he sessions of the Supreme Court shall be held in the city of Raleigh unless otherwise provided for by the General Assembly.”<sup>1</sup> For many years, N.C.G.S. § 7A-10(a) and its predecessors provided that “sessions of the [Supreme Court] shall be held in the city of Raleigh and scheduled by rule of court so as to discharge expeditiously the court’s business.”<sup>2</sup> For that reason, the Supreme Court did not sit outside Raleigh for many years following the Civil War.

In 1997 the General Assembly amended N.C.G.S. § 7A-10(a) by adding language providing that “[t]he [Supreme Court] may by rule hold sessions not more than twice annually in the old Chowan County Courthouse (1767) in the town of Edenton, which is a state-owned court facility that is designated as

a National Historic Landmark by the United States Department of the Interior.”<sup>3</sup> In light of the enactment of this 1997 legislation, the Supreme Court held sessions in Edenton in 2004 and 2013.<sup>4</sup>

In 2015 the General Assembly enacted legislation sponsored by Senator Warren Daniel, with the assistance of Representative Hugh Blackwell, who had introduced similar legislation in the House of Representatives, which further amended N.C.G.S. § 7A-10(a) to provide that “the Court may by rule hold sessions not more than twice annually in the city of Morganton; unless a more suitable site is identified by the Court, the Court shall



*Burke County courthouse ca 1888, facing Sterling Street in downtown Morganton, NC. This image was submitted by Historic Burke Foundation (R.M. Lineberger Collection) to Picture Burke, a digital photograph preservation project of the Burke County Public Library.*

meet in the old Burke County Courthouse, the location of summer sessions of the Supreme Court from 1847-1862.”<sup>5</sup> As a result, the Supreme Court is now authorized to hold sessions in three different locations in North Carolina: one in the east, one in the Piedmont, and one in the west.

“Morganton was the center of the oldest



established district court system in the western region.”<sup>6</sup> In fact, the General Assembly’s decision to create the Morgan Judicial District in 1784 and to specify that the superior court of the district should meet “at the courthouse in Burke County” appears to have placed a substantial role in the establishment of Morganton itself.<sup>7</sup> The old Burke County Courthouse, which “occupies a large central square,” and in which the Supreme Court will sit, is “[t]he oldest courthouse in western” North Carolina.<sup>8</sup>

“In 1846 the lawyers of the western portion of the state induced the General Assembly to order a term of the [Supreme Court] to be held in Morganton on the first Monday of August for all cases in the counties west of Stokes, Davidson, Union, Stanly, and Montgomery, and for cases from these counties with the consent of the parties.”<sup>9</sup> In support of its decision to provide that “a session of the supreme court of this State, shall be held yearly and every year hereafter, at Morganton in the county of Burke, on the first Monday of August,” with the “session [to] continue from day to day so long as the business may require,” the General Assembly found that “[i]t will greatly promote the convenience of the people of the western part of the State, and will improve the administration of Justice without imposing undue labor or serious inconvenience upon the Judges of the Supreme Court, to have a term of that court held, yearly, in some place west of the city of Raleigh.”<sup>10</sup> A few years after authorizing the Supreme Court to sit in Morganton, the General Assembly enacted legislation providing for the establishment of a Supreme Court Library in Morganton, with that collection to be created through purchases and the transfer of books from Raleigh to Morganton.<sup>11</sup>

Pursuant to the authority granted by the General Assembly, the Supreme Court held its August term in the old Burke County Courthouse in Morganton from 1847 until 1861, with this practice having ceased when “the commencement of hostilities in 1861 made travel increasingly dangerous.”<sup>12</sup> On September 11, 1861, the General Assembly enacted legislation providing “[t]hat there shall be but one term of the supreme court of the State, which shall be held in the city of Raleigh, at the usual time for holding the summer term thereof” and “[t]hat the Morganton term of said court shall be discontinued.”<sup>13</sup> As a result, the Court did not return to Morganton after the August 1861 session.

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According to President Kemp P. Battle of the University of North Carolina, the “experiment” of holding sessions in Morganton as “not satisfactory to the Court or to the profession.”<sup>14</sup> As a result of the “want of a law library, ‘Morganton decisions,’ as they were called, were regarded as less certainly sound than those at Raleigh.”<sup>15</sup>

Among the members of the Supreme Court to sit in Morganton from 1847 until 1862 were Chief Justice Thomas Ruffin (who retired in 1852), Chief Justice Frederick Nash (who died in 1858), Chief Justice Richmond Pearson, and Associate Justices Joseph J. Daniel, William H. Battle, and Matthias Manly.<sup>16</sup> Although a number of these judicial officials had a significant impact on North Carolina law, Chief Justice Ruffin is, by far, the most famous, having been described as “the greatest factor in moulding the law of the state.”<sup>17</sup> “Ranked by Harvard Law School Dean Roscoe Pound as one of the ten greatest jurists in American history,” Chief Justice Ruffin “singlehandedly transformed the common law of North Carolina into an instrument of economic change.”<sup>18</sup> Among other things, Chief Justice Ruffin’s “writings on the

subject of eminent domain...paved the way for the expansion of railroads into North Carolina...and helped enable North Carolina...to embrace the Industrial Revolution.”<sup>19</sup>

Although a thorough study of the opinions resulting from the sessions that the Court held in Morganton is beyond the scope of this article, a cursory and non-scientific review of a pair of volumes of the North Carolina reports establishes that the Supreme Court heard a wide variety of cases when it sat in the old Burke County courthouse. For example, the Supreme Court addressed cases addressing the failure to deliver a valid deed following the consensual partition of a tract of real property, the vacation of an injunction preventing the sale of property used to secure a debt, the proper construction of a will in light of the testator’s acquisition of additional real property after the execution of the will, the application of the Statute of Frauds in cases involving attempts to have alleged contracts for the conveyance of real property enforced—the extent to which a release had been procured by what we would now term constructive fraud—and a request for the reformation of a deed that

allegedly should have taken the form of a mortgage, among others, at the August 1853 term.<sup>20</sup> Similarly, at the August 1861 term, which was the last occasion on which the Court sat in Morganton, the Supreme Court addressed cases, among others, in which the defendant had been convicted of unlawfully removing a fence, the defendant had been acquitted of stealing a carpet bag, the defendant had waived the right to object to the service of a warrant in an action for debt, a guarantor had been held liable despite the plaintiff's failure to notify the defendant of the original debtor's default, the trial court had failed to allow the executor to testify in a caveat proceeding, the plaintiff sought to recover for slander, and the defendant was accused of having sold the property of an estate by means other than a public auction.<sup>21</sup>

A review of these decisions suggests that the Supreme Court's Morganton docket was heavily weighted in favor of civil, rather than criminal cases. In addition, the Supreme Court's Morganton decisions reflect the traditional differentiation between law and equity courts. A much larger percentage of the Supreme Court's civil docket in Morganton appears to have consisted of cases arising from disputes over real property than would be the case today. Moreover, the amount of tort litigation as compared to the amount of property-related litigations is relatively small. On the other hand, the amount of estate-related litigation does not seem to have changed much over the course of the last century and a half. Finally, and perhaps not surprisingly, the Supreme Court's Morganton decisions take the existence of the evil of slavery as a given, deeming it completely unexceptional that the personal property that was at issue in one of the 1853 cases summarized above consisted of two slaves.

The opinions resulting from the sessions that the Supreme Court held in Morganton bear only a limited resemblance to the decisions handed down by a modern appellate court. For example, the opinions filed in the cases heard in Morganton contain extensive recitations from or summaries of the parties' pleadings. In addition, particularly compared to modern standards, the opinions that the Supreme Court filed in cases heard in Morganton contain limited citations to authority and a number of assertions as to the content of the law that rest, apparently exclusively, upon the authoring justice's general knowledge of the law. However, given that the opinions that the Supreme Court handed

down in Raleigh do not appear to overflow with extensive citations to authority either, it is not clear to me that the Court's Morganton opinions do, in fact, have a more off-the-cuff quality than was true of the opinions handed down in cases heard in Raleigh. As a result, it is not possible for me to confirm the validity of the assertion that the Supreme Court's Morganton's decisions were deemed less authoritative than decisions handed down in Raleigh cases.

The Supreme Court's sessions in Morganton appear to have had a substantial theatrical and social component as well. According to a unidentified source quoted by the leading historian of Burke County:

With the opening of the Court came a crowd of all ages and occupations, that filled the old hotels....The Chief Justice and his associates—with the other officers of the Court and most of the visitors—traveled in Concord Mail coaches drawn by four or six horses.<sup>22</sup>...A large red coach with a driver on the top seat, heralding his approach to the post office and the hotel by blowing on his long horn the refrain known as "apple dumplings for supper," drew a larger crowd of small boys than an engine followed by a vestibule train for Mexico would now gather.

And the law students too came to get their licenses. Most of these who were in straitened circumstances traveled by horseback, but many dashing fellows came from the summer school of the university, prepared by Judge Battle and Solicitor General Phillips, then a comparatively young lawyer. Hence, the girls were interested in the courts. Wealthy tourists from the east moved in more imposing style, bringing their own servants, carriages, and horses....Between visitors and home folks, there was never a lack of couples at a hotel dance. And in those days when every woman had a supply of trained servants and every man kept an open house,<sup>23</sup> there was a round of parties at the old country homes to which people sometimes went to spend the night and danced a week.<sup>24</sup>

As a result of the fact that the railroad only reached a point within five miles of Morganton before the beginning of the Civil War,<sup>25</sup> the scene depicted in this document is probably typical of the events surrounding the Court's sessions throughout most of the decade and a half during which the Supreme Court sat in Morganton.<sup>26</sup>

The Court's upcoming session in Morganton does, in many ways, resemble the events of 1847 through 1861. Although I doubt that the arrival of the members of the Court will be saluted by a rousing chorus of "apple dumplings for supper," the citizens of Morganton, including the Burke County bar, have welcomed the members of the Court and the Court staff with open arms. The members of the Court should enjoy having a chance to see Morganton, which has a vibrant downtown and is surrounded by sites with considerable historic interest. The level of public interest in the sessions that the Court will hold in the old Burke County Courthouse among local citizens has been high. As was true of the sessions held in Morganton during the antebellum period, the cases on the Supreme Court's docket for the May 2016 session involve, for the most part, issues of particular interest to the citizens of western North Carolina. However, unlike the apparent practice of the Court from 1847 through 1861, we will not attempt to file the opinions from the cases that are heard in Morganton before we leave town for the purpose of returning to Raleigh.

Aside from being more convenient for the lawyers and litigants involved in the cases that the Court will actually hear in May, the Court's Morganton session should have other important benefits as well. As the chief justice has noted in his administration of justice plan, our state and nation needs to improve the level of civics education available to our citizens. Obviously, the Morganton session will give residents and representatives of the media in western North Carolina an opportunity to see the Supreme Court in action. In conjunction with the sessions that have been held in Edenton, the increased visibility of the Supreme Court's activities resulting from the Morganton session should improve the level of understanding that our citizens have of the role that the Supreme Court and, by extension, other courts play in our system of government. Moreover, the Supreme Court's ability to sit in different parts of the state should help alleviate any concerns that the Court is a Raleigh-based body that has no exposure to or understanding of the issues faced by citizens in all parts of the state that the Court serves. For all of these reasons, the members of the Court are grateful to the General Assembly for giving us the opportunity to sit in Edenton and Morganton, and look forward to taking advantage of the opportunities that we will have in the future to hold court in different

parts of North Carolina. ■

*Justice Ervin is a graduate of the Burke County public schools, Davidson College, and Harvard Law School. In 1981, Justice Ervin returned to his home town of Morganton, where he engaged in the private practice of law for nearly 18 years. After leaving private practice, Justice Ervin has served as a member of the North Carolina Utilities Commission, the North Carolina Court of Appeals, and the Supreme Court of North Carolina.*

## Endnotes

1. N.C. Const., art. IV, s. 6(2). Although there are references to “Judges of the Supreme Court of Law and Equity” in sections XIII, XXI, and XXIX of the form of government provisions contained in the 1776 Constitution, J. Cheney, *North Carolina Government 1585-1979: A Narrative and Statistical History*, 892-94 (1981), the Supreme Court was not, until the adoption of the 1868 constitution, a constitutional body. For that reason, there are no references in either the 1776 Constitution or the 1835 amendments to that document relating to the location or locations at which the Supreme Court was authorized to hold sessions of court. Article IV, section 9 of the 1868 Constitution provided, among other things, that “[t]here shall be two terms of the Supreme Court held at the seat of government of the State in each year...” Cheney, 856. In 1875 the relevant constitutional language was amended to read that “[t]he terms of the Supreme Court shall be held in the City of Raleigh, as now, until otherwise provided by the General Assembly.” Cheney, 878. In 1935 the constitution was amended to provide that “[a]ll sessions of the Court shall be held in the City of Raleigh.” Cheney, 922. The current language governing the locations at which the Supreme Court is allowed to hold sessions of court was adopted in 1962 and has remained unchanged since that time.
2. N.C.G.S. § 7A-10(a).
3. 1997 N.C. Sess. L. c. 56, s. 1.
4. Press release found at [media.visitnc.com/news/nc-supreme-court-to-convene-in-edenton-during-tricentennial-celebration](http://media.visitnc.com/news/nc-supreme-court-to-convene-in-edenton-during-tricentennial-celebration).
5. 2015 N.C. Sess. L. c. 89, s. 1.
6. C. Bisher, M. Southern, and J. Martin, *A Guide to the Historic Architecture of Western North Carolina*, 148 (1999).
7. E. Phifer, Burke: *The History of a North Carolina County 1770-1920, With a Glimpse Beyond*, 66-67 (Rev. ed. 1982).
8. Bisher, Southern, and Martin, 148.
9. K. Battle, *Address on the History of the Supreme Court*, 103 N.C. 447 (1889). However, the General Assembly also provided “that all appeals, taken from any of said superior or courts of law [held in the counties in the area from which appeals would ordinarily go to the Supreme Court sitting in Morganton], at the fall terms thereof, in criminal cases, where the defendant shall be confined in prison pending the appeal, shall be returned to, and heard and determined by the supreme court holding its sessions at Raleigh as heretofore.” *Laws of the State of North Carolina Passed by the General Assembly at the Session of 1846-1847*, c. XXVIII, s. 2.
10. 1846-1847 Laws, c. XXVIII, Preamble and s. 1.
11. Phifer, 142.
12. M. Brinkley, “The Supreme Court of North Carolina: A Brief History,” *North Carolina Manual: 1995-1996*, 697-698 (1995).
13. *Public Laws of the State of North Carolina Passed by the General Assembly at Sessions of 1861-’62-’63-’64 and One in 1859*, c. 4, ss. 13, 14.
14. Battle, 485.
15. *Ibid*.
16. Phifer, 142. Former Chief Justice Ruffin returned to Morganton to sit as an associate justice at the 1859 term as well.
17. Battle, 498.
18. Brinkley, 696.
19. *Ibid*.
20. 45 N.C. 235-275.
21. 53 N.C. 396-415.
22. The members of the Court traveled by train from Raleigh to Salisbury and then journeyed to Morganton by stage coach. Ervin 24.
23. Enslaved individuals made up 31.6% of the population of Burke County in 1860. J. Inscoc, *Mountain Master: Slavery and the Sectional Crisis in Western North Carolina*, 61 (1996).
24. Phifer, 142-143.
25. *Ibid*, 186.
26. The stage coach line that ran from Salisbury to

## COURTHOUSE RESEARCHER:

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Morganton was operated by Harvey Newland, who was very angered by Chief Justice Ruffin’s decision that, for tax purposes, stage coaches were pleasure vehicles. For that reason, Mr. Newland ordered the driver responsible for transporting Chief Justice Ruffin to the next session of the Supreme Court held in Morganton to drive into every rut and hole and across every root and rock on the way. Upon arriving in Morganton, Chief Justice Ruffin told the driver of the stage coach in which he had ridden that the trip he had just completed was the roughest ride that he had ever experienced. When reminded that he had ruled that the stage coach in question was a pleasure vehicle, Chief Justice Ruffin replied that the trip had involved no pleasure at all and that he would reverse his earlier decision if given the opportunity to do so. Ervin, 24.

## President’s Message (cont.)

outstanding statewide network of trained lawyer volunteers who are ready at any time to provide assistance to LAP clients and other lawyers and law students. If you know of a lawyer who could benefit from any of LAP’s services, please go on the LAP website at [nclap.org](http://nclap.org) for more information on the services provided and on how to make a confidential referral.

## Attorney-Client Assistance Program

This program helps to resolve issues between clients and lawyers on an informal basis. The State Bar employs three public liaisons to respond to members of the public who have complaints or concerns about their lawyers. Where appropriate, the public liaison will contact the lawyer to help find a solution to the client’s problem. This program frequently helps to resolve problems between clients and lawyers before the dispute escalates. During 2015 the public liaisons responded to 11,167 telephone calls and 1,363 emails from the public, and contacted 2,970 lawyers as a result of those calls and emails. In addition, the public liaisons responded to 2,224 letters from

inmates during 2015.

## New State Bar Website

Please use the State Bar’s newly redesigned website at [ncbar.gov](http://ncbar.gov) for more information about these and other State Bar programs and services. The recent redesign has improved the navigation and functionality of the website and improved the website’s appearance on mobile devices. If you have any problems using the website, please email the webmaster from the website.

Over the past 83 years, thousands of North Carolina lawyers have volunteered their time, talent, and expertise to the work of the State Bar, serving as officers, councilors, advisory members of State Bar Committees, and as members of boards and commissions of the State Bar. It is through the hard work of these lawyers and the outstanding staff of the State Bar that the programs written about today and other State Bar programs have been created so that all North Carolina lawyers have the opportunity to become better lawyers. I encourage you to take advantage of them. ■

*Margaret M. Hunt, an alumnus of Wake Forest University Law School, has practiced law in Brevard since being admitted to practice in North Carolina in 1975.*

# Escheat Happens

BY SUZANNE LEVER

Ethics counsel periodically receives calls from lawyers seeking guidance as to the proper disposition of “dormant” funds in their trust account. As it happens, this is not simply a matter of “finders keepers, losers weepers.” At the April Ethics Committee meeting, the State Bar’s field auditor reported that for the past quarter, 28% of lawyers audited failed to properly designate and “escheat” unidentified and/or abandoned funds as required by N.C. Gen. Stat. § 116B-53. Given that the most recent formal ethics opinion discussing escheat is from 1991, a refresher course seems in order.

First of all, what exactly is “escheat” and how the heck do you pronounce it? *Apparently*, the word is pronounced “es-cheet.” (Honestly, I have been pronouncing it “es-sheet” all of these years. How embarrassing!) Escheat is one of those overachieving words that can be either a noun or a verb. According to *Black’s Law Dictionary* (8th ed. 2004), escheat is the reversion of property to the state when the property has no known owner. It is also used to refer to the actual property that has been reverted. In the old days, there was also an “escheater” who was appointed to value the property escheating to the state. Hence, it would be perfectly proper to state: “The escheater escheated the escheat.” And if the escheater happened to be less than honest (as was, reportedly, sometimes the case), you would have to proclaim that, “The escheater cheated when escheating the escheat.” (Three times fast—I dare you.)

In any event, escheating refers to the power of the state to acquire abandoned or unclaimed property. Escheating becomes relevant in the legal profession when a lawyer holds funds in a general trust account and does not know the identity or the location of the owner.

During the required quarterly reconciliation of trust account records, lawyers should perform a classification of all funds held. Property is presumed “abandoned” if the

owner has not communicated with the lawyer or indicated an interest in the property within its “dormancy holding period.” The holding periods are defined in N.C. Gen. Stat. § 116B-53(c). In most cases, the dormancy period for funds in a lawyer’s trust account is five years.

Pursuant to RPC 89 (1991), a lawyer should consider four factors when determining whether the applicable dormancy period has run. The lawyer needs to establish whether during the dormancy period (1) the fund’s principal has increased; (2) the owner has accepted payment of principal or income; (3) the owner has corresponded in writing; or (4) the owner has otherwise indicated an interest in the account as evidenced by a memorandum or other record on file with the lawyer. If any of the four events enumerated above have occurred, no abandonment will be deemed to have occurred and the client’s funds must remain in the lawyer’s trust. In addition, whenever any of the four events occurs, a new dormancy period begins to run. The property may only be deemed abandoned if none of the four enumerated events has occurred.

Once the lawyer has determined that the dormancy period has run, Rule 1.15(q) provides that the lawyer must make “due inquiry” of his personnel, records, and other sources of information in an effort to determine the identity and location of the owner of the property. The *legal* investigative requirements are more specific. N.C. Gen. Stat. § 116B-59 states that a holder (the lawyer in this scenario) must make a good faith effort to locate the owner. For properties over \$50 in value, a holder must send a written notice by first-class mail to the last known address of the apparent owner as reflected in the holder’s records. Holders who fail to perform due diligence may be subject to penalties and interest as outlined in N.C. Gen. Stat. § 116B-77.

If the lawyer is unsuccessful in ascertaining the identity or the location of the owner

of the funds, the lawyer should contact the North Carolina State Treasury Department. ([nctreasurer.com/upp/Pages/default.aspx](http://nctreasurer.com/upp/Pages/default.aspx)). The Unclaimed Property and Escheats Division oversees and maintains the state’s database of unclaimed property and is responsible for recovering and returning such property to all rightful owners. A helpful FAQ section can be accessed online: [nctreasurer.com/upp/Resources/HolderReportingFAQs.pdf](http://nctreasurer.com/upp/Resources/HolderReportingFAQs.pdf)

Trust account funds for which the dormancy period has run must be escheated to the state even if it is believed, but cannot be conclusively documented, that the funds belong to the lawyer. *But cf.* RPC 226 (when a law firm *receives* funds that are not identified as client funds, the firm must investigate the ownership of the funds and, if it is reasonable to conclude the funds do not belong to a client or a third party, the firm may conclude that the funds belong to the firm).

Pending escheatment, the funds should be held and accounted for in the lawyer’s trust account. N.C. Gen. Stat. § 116B-57(a) permits a holder of abandoned or unclaimed funds to charge a reasonable “dormancy” fee, thereby reducing the amount of funds transferred to the State Treasurer’s Office, so long as (1) the holder has made a good faith effort to locate the owners of the funds; (2) there is a valid and enforceable written contract which imposes the charge; and (3) the charge is applied on a regular basis. In 2006 FEO 15, the Ethics Committee concluded that lawyer/holders may also charge a reasonable dormancy fee against unclaimed funds with the *additional requirements* that (1) the client receives prior notice of and gives written consent to the dormancy fee; and (2) the amount of the fee is appropriate under Rule 1.5(a) of the Rules of Professional Conduct.

According to our field auditor, the abandoned funds are often the result of

CONTINUED ON PAGE 35

## 2016 Service and Excellence Awards

BY LANICE HEIDBRINK

The Specialization Service and Excellence Awards were presented to three exemplary specialists at the 2016 Annual Specialist Luncheon on April 29, 2016.

The awards were originally established by the specialization board in 2006 to honor former board chairs Sara H. Davis, bankruptcy specialist; James E. Cross Jr., real property law specialist; and Howard L. Gum, family law specialist. The awards recognize specialists who meet the following performance criteria:

**The Sara H. Davis Excellence Award**—Nominations for this award are accepted from North Carolina board certified specialists. The award is presented to a certified specialist who exemplifies excellence in his/her daily work as a lawyer and serves as a model for other lawyers. Special consideration is given for a long and consistent record of handling challenging matters successfully, sharing knowledge and experience with other lawyers, earning the respect and admiration of others with whom the lawyer comes into contact in his/her daily work, and high ethical standards.

**The James E. Cross Jr. Leadership Award**—Nominations for this award are accepted from members of the North Carolina State Bar who have worked closely with the nominee. The award is presented to a certified specialist who has taken an active leadership role in his/her specialty practice area through presentations at CLE seminars, scholarly writings, participation in groundbreaking cases, or service to an established professional organization.

**The Howard L. Gum Service Award**—This award is given to a specialty committee member who consistently excels in completing committee tasks. The recipient is highly dedicated to legal specialization, donates his/her time to committee responsibilities, and responds to the needs of the staff and the board in exemplary fashion. Nominations are accepted only from NC State Bar Specialization Committee members.

The 2016 recipient of the Davis award was Albert F. Durham, a bankruptcy law specialist

since 2003 from Charlotte. Durham received overwhelming praise and accolades from his associates, colleagues, and partners. One nominator said, “I have known Al to be an enthusiastic advocate and straightforward counselor for his clients, a caring mentor for other attorneys (both within his firm and outside), and an example to the entire bankruptcy bar for his meticulous analytical abilities and encyclopedic knowledge of the Bankruptcy Code. His law partners, associates, and staff unanimously agree that Al serves as an exceptional role model for other lawyers and practices with the highest ethical standards. He is known for his consistent willingness to share his knowledge and experience with other lawyers.”

Another nominator noted that “[Al’s] view is no client is too small to receive the Cadillac Treatment. If a client needs work to be done that the client simply cannot afford, Al does it anyway, regardless of whether or not he will be paid for his efforts, because it is the right thing to do and the right way to do it.”

The 2016 Cross award was presented to Ann Robertson, immigration law specialist since 2001 from Raleigh. One nominator wrote that Robertson “has handled every imaginable an immigration matter over her years of practice.” Some of the many highlights of Robertson’s legal career are securing visas for the principal dancers of the Carolina Ballet, being the first to secure a humanitarian parole for a deported father of two US citizen children whose parental rights were threatened with termination simply because of his nationality, serving as a retained attorney for the Mexican Consulate General of Raleigh



2016 Service and Excellence Award winners (from left to right) Julie Boyer, Albert Durham, and Ann Robertson

since its founding in 2000, and winning grants of refugee protection for clients from such countries as Congo, Liberia, Colombia, Togo, China, and many other nations. Another nominator shared that Robertson is a highly valued speaker and has an extensive list of presentations on immigration law. This list includes not only the presentations associated with her involvement in the Carolinas Chapter of the American Immigration Lawyers Association (AILA), but also her speaking engagements at local churches and community organizations. Robertson is an advocate for immigration reform and has frequently visited Congressional offices in Washington, DC, as part of the AILA’s National Day of Action efforts to advocate for sensible immigration reform.

The 2016 Gum award was presented to Julie Boyer, juvenile delinquency law and specialty subcommittee member from Winston-Salem. Boyer has been a specialist since the juvenile delinquency law specialty was created in 2011. Boyer was nominated by her fellow subcommittee members for her dedication to the Juvenile Delinquency Law Specialty Subcommittee and the specialization program as a whole. Boyer, being a strong advocate and speaker on the representation of youth in

CONTINUED ON PAGE 31

# Grievance Committee and DHC Actions

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## Disbarments

**Tiffany L. Ashhurst** of Durham surrendered her law license to the Wake County Superior Court and was disbarred. Ashhurst admitted that she misappropriated entrusted client funds, did not properly maintain entrusted funds, engaged in dishonest conduct, did not communicate with clients, and did not act with reasonable diligence and promptness in her representation of clients.

The DHC disbarred Fuquay-Varina lawyer **Robert E. Griffin**. The DHC concluded that Griffin made a false statement to the State Bar, did not timely respond to a fee dispute, did not communicate with a client, disclosed confidential client information, and did not timely refund fees. Griffin was suspended in 1989 and in 2014 and was reprimanded in 2005.

The DHC disbarred **Hugh McManus** of Wilmington. McManus misappropriated entrusted client funds and abandoned his law practice.

**Karla Simon** of California and/or Connecticut surrendered her law license and was disbarred by the State Bar Council. Simon was convicted in Massachusetts of felony stalking and multiple counts of misdemeanor harassment and violation of protective order.

**Jack B. Styles** of Raleigh surrendered his law license and was disbarred by the State Bar Council. He admitted that he misappropriated fiduciary funds totaling at least \$84,542.50.

Greensboro lawyer **Devin Ferree Thomas** was disbarred by the DHC. The DHC concluded that Thomas misappropriated entrusted client funds, did not respond to a lawful demand for information from the State Bar, and neglected and did not communicate with clients.

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## Suspensions & Stayed Suspensions

**Kevin P. Byrnes** of Charlotte was suspended by the DHC for five years. After serving two years of the suspension, Byrnes may petition for a stay of the balance upon

showing compliance with numerous conditions. The DHC concluded that Byrnes engaged in gross trust account mismanagement and failed to file or pay income taxes for seven years.

The chair of the Grievance Committee suspended **JoAnne Denison** of Chicago, Illinois, by order of reciprocal discipline. On September 21, 2015, the Supreme Court of Illinois suspended Denison for three years and until further order of the Court. The Court concluded that Denison posted statements to a public blog in which she accused judges and attorneys of being corrupt and accepting bribes without providing any factual basis. Denison may petition for reinstatement of her North Carolina law license only after her license to practice law in Illinois is reinstated.

Chapel Hill lawyer **Michelle Hickerson** was suspended by the DHC for five years. The DHC concluded that she gave false testimony in a deposition and made false representations in a pleading filed with the court. After serving one year of the suspension, Hickerson may petition for a stay of the balance upon showing compliance with numerous conditions.

The DHC concluded that **Thomas Hicks** of Wilmington mismanaged his trust account, neglected a client, and misappropriated interest earned on fiduciary funds. The DHC suspended him for five years. After serving 18 months of the suspension, Hicks may petition for a stay of the balance upon showing compliance with numerous conditions.

The DHC concluded that **Bridgette Johnson** of Greensboro mismanaged entrusted funds, violated trust account recordkeeping requirements, and did not respond to the State Bar. She was suspended by the DHC for three years. The suspension is stayed for three years upon her compliance with numerous conditions.

The DHC concluded that **Wade Leonard** of Mocksville did not supervise his non-lawyer assistants, did not timely submit mortgage payoffs, did not perform quarterly three-way reconciliations of his trust

account, did not maintain proper trust account records, used clients' entrusted funds to pay other clients' late fees that were assessed due to Leonard's failure to timely submit mortgage payoffs, and split his legal fee with his nonlawyer assistant. The DHC suspended Leonard for two years. The suspension is stayed for two years upon his compliance with numerous conditions.

The DHC concluded that **Katherine Heath Pekman** of Hickory did not communicate with and act diligently on behalf of a client, did not return unearned fees, and did not respond to the Grievance Committee. The DHC suspended Pekman for one year. The suspension is stayed for three years upon her compliance with numerous conditions.

The DHC concluded that **Nathan M.J. Workman** of Indian Trail committed trust account violations and did not comply with two orders to appear and show cause why he should not be held in contempt. The DHC suspended Workman for one year. The suspension is stayed for one year upon his compliance with numerous conditions.

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## Interim Suspensions

The chair of the DHC entered an interim suspension of the law license of **Joseph Lee Levinson** of Benson. Levinson pled guilty to the felony offense of conspiracy to obtain money in the custody of a bank by false pretenses.

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## Censures

Pembroke lawyer **Gregory Bullard** was censured by the Grievance Committee. Bullard neglected his client's adoption case, did not communicate with his client, and did not supervise a nonlawyer assistant, resulting in a three-year delay in filing the adoption petition.

**William West** of Winston-Salem was censured by the Grievance Committee. West represented a client under circumstances creating a conflict of interest without obtaining a written waiver of the conflict and made a false statement of material fact to the Grievance Committee.

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## Reprimands

**Alfred P. Carlton Jr.** of Raleigh was reprimanded by the Wake County Superior Court. The court found that Carlton received ten payments that exceeded the amounts he had billed for work performed for his client and placed these payments in his operating account. The excess money paid by the client was entrusted property and should have been placed in his trust account until it was earned.

The Grievance Committee reprimanded **Lawrence D'Amelio** of Greensboro. D'Amelio provided legal services to a North Carolina resident at the request of an out-of-state law firm that is not authorized to provide legal services in North Carolina. The client paid the firm, which then paid D'Amelio. The firm directed which legal services D'Amelio provided to the client. D'Amelio thereby assisted another in the unauthorized practice of law and shared a fee with a nonlawyer.

The Grievance Committee reprimanded **Jason Kimble** of Fayetteville. Kimble did not adequately communicate with his client and did not timely respond to the State Bar.

The Grievance Committee reprimanded **Patrick Megaro** of Orlando, Florida. Megaro provided legal services to North Carolina residents as a local "associate attorney" of one out-of-state law firm and as a local "partner" of another. Neither organization was authorized to provide legal services in North Carolina. Both organizations directed which legal services Megaro provided to the client. Megaro assisted others in the unauthorized practice of law and made false or misleading statements about his services.

**Corinne Railey** of Clinton was reprimanded by the Grievance Committee. Railey did not respond to discovery in a domestic case, did not act with diligence, did not communicate with her client, and did not adequately supervise a nonlawyer assistant. As a result, her client was sanctioned by the court for failing to fulfill his obligations under a court order of which he was unaware.

The chair of the Grievance Committee reprimanded **Christopher J. Seufert** of Franklin, New Hampshire, by order of reciprocal discipline. The Professional Conduct Committee of the New Hampshire Supreme Court reprimanded Seufert on September 30, 2015, for failing to competently repre-

sent his clients' interests in a bankruptcy case and for failing to act with reasonable diligence and promptness in advancing their interests.

**Cecil Summers** of Winston-Salem was reprimanded by the Grievance Committee. Summers did not act with diligence and competence in filing pleadings for a domestic client and did not adequately communicate with the client.

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## Admonition

The DHC concluded that **Christine C. Mumma** of Durham used methods of obtaining evidence that violated the rights of a third person. She was admonished.

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## Transfers to Disability Inactive Status

**Judith C. Fraser** of Asheville was transferred to disability inactive status by the chair of the Grievance Committee.

**James I. Averitt** of Raleigh contended in his answer to the complaint in 16 DHC 4 that he is disabled. The DHC hearing panel transferred Averitt to disability inactive status pending a disability hearing.

**Brad Harrison Ferguson** of Sylva was transferred to disability inactive status by the Haywood County Superior Court.

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## Reinstatements

On September 22, 2010, the DHC suspended Jacksonville lawyer **Janet Reed** for five years. The panel found that Reed engaged in plea negotiations with an assistant district attorney but did not disclose the existence of an additional criminal charge against her client and added this charge to the plea agreement form for dismissal without notifying the prosecutor or obtaining his consent. The panel found that, in an unrelated case, Reed filed a motion containing false factual allegations. She was reinstated by the secretary on February 22, 2016.

**Stephen L. Snyder** was transferred to disability inactive status in March 2014 due to severe vertigo. The DHC entered a consent order returning Snyder to active status in February 2016.

**Dawn Johnson Warren** of Mebane was suspended by the DHC for three years for numerous rule violations, including engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and neglecting her clients. The DHC entered a consent order of reinstatement in February 2016.

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## Stays of Existing Suspensions

In July 2015 the DHC concluded that **William Wallace Respass** of Lenoir had sex with a client, loaned money to a client, and testified falsely in a deposition. The DHC suspended Respass for two years. After serving six months of the suspension, Respass was eligible to petition for a stay of the balance. In February 2016 the DHC granted Respass' petition for stay under specified conditions.

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## Dismissals

The DHC dismissed the complaint in *North Carolina State Bar v. Christine C. Mumma*, 15 DHC 24. ■

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## Legal Specialization (cont.)

the adult system, was a founding member of the subcommittee, and, as her fellow committee member describes, "instrumental in the creation of the qualifications and exam from scratch, as there were no national examples at the time." Her nominator goes on to say,

[t]he committee worked diligently over the course of a year and half soliciting support for the subspecialization, drafting the qualification standards, and drafting the exam. Boyer has done all of this while maintaining a caseload, either in private practice or as a member of the Capital Defender's Office. She has attended practically every meeting of the committee over the last five years and has been present at every crucial decision point, always offering helpful insight. She has never turned down a request to assist, and constantly volunteers to partake in any additional work needed.

The Board of Legal Specialization extends hardy congratulations to the winners for their milestone achievements.

For more information about the Service and Excellence Awards you can visit [nclawspecialists.gov](http://nclawspecialists.gov), or contact Denise Mullen or Lanice Heidbrink at 919-828-4620. ■

*Lanice Heidbrink is executive assistant to Alice Mine and administrative assistant to the specialization board. For more information on the State Bar's specialization programs, visit us online at [nclawspecialists.gov](http://nclawspecialists.gov).*

# A Parent's Roller Coaster Ride into Recovery, Part 2

BY ANONYMOUS

*This story is continued from the last edition of the State Bar Journal.*

Finally, the time came for Brian to leave the treatment center. The day we picked him up, my wife and I met with Brian and his counselor for a discharge conference. I have a vivid memory of two points from that meeting that have remained very important in my own ongoing journey with recovery in the months and years since. First, the counselor said that recovery is not a microwave process. In other words, Brian was not completely and permanently healed or cured by 90 days in treatment. Recovery for the addict is an ongoing, lifelong process with ups and downs, and it depends on how hard and honestly the addict works on his recovery program. The same is true of my recovery as a family member.

Second, the counselor presented a recovery contract between Brian and us. It required him to do many recovery-related things including attending an intensive outpatient treatment program (“IOP”), and prescribed a certain process to follow in the event of a relapse. My wife and I also had obligations. The contract imposed consequences for violations, and we agreed in writing to enforce those consequences. This was my first experience in setting boundaries—a very important tool for family members in dealing with addicts. In this context, a boundary is not something that I draw around the addict to restrict him or punish him. Instead, a boundary is one I draw around myself for my own self-care, so that I do not become a doormat or an enabler. It can sometimes be difficult for us family members to discern where, when, and how to set and enforce boundaries. But the boundaries in the treatment center’s contract came from professional experts in recovery so we trusted them.

I had mixed emotions about Brian’s homecoming. He is my son, so the natural inclina-

tion is to want him near, to have him back home. But on the other hand, I was apprehensive and uncertain. Our relationship before he went away was filled with conflict and chaos, and I did not know if or how that would change. And I had the natural fear that he might relapse.

In addition to enrolling Brian in an IOP program and otherwise following the contract, my wife and I had one practical immediate goal for Brian—to graduate from high school (keeping in mind, of course, the “What good is a well-educated dead person” admonition). He finished just enough work to graduate, although we were all sweating it a bit up to the last few days. This illustrates an important point for recovery of family members: often we have to adjust our expectations of the addict downward to be realistic. For so long I had dreamed of Brian going to college. He had so much potential. But I knew I had to accept the facts as they were—he had lost a lot to addiction and was just beginning the recovery journey, and the most that could be expected at that particular time was for him simply to graduate. While his peers were getting high grades and getting accepted into college, Brian had barely scraped by with passing grades on the minimal number of courses. But to us, at that time, that was progress and it was enough. We knew we had to grieve the lost dreams but move on and stay focused on supporting Brian in his most important priority—his continuing recovery from addiction.

Brian’s outstanding criminal charge was dismissed after his discharge from the treatment center. The judge dismissed the charge based on his completion of the treatment program.

We found an excellent IOP program for Brian in the area. We attended Saturday morning family group sessions. Life at home with Brian was a bit calmer than before. Al-Anon and other education had helped me understand Brian better and to work on the things I had done that had contributed to our inflamed relationship before treatment. Brian



was more respectful and expressed gratitude for the opportunity for recovery. I continued to go to Al-Anon and made gradual progress in working the program. But sometimes I still lapsed into the old behaviors, impulsively checking behind Brian, playing detective—Was he really going to his AA meetings? Did he really have an AA sponsor as required by his contract and IOP program? In other words, I still had not completely let go of his recovery and that hampered my own serenity.

I was also in the midst of preparing to move my law practice to the new firm. It was going well, but it took a lot of extra energy and focus on top of my normal workload and the stress of Brian’s return.

Brian and I did some fun things together during that time. Most memorably, Brian, his brother, and I went to Atlanta to see our favorite baseball team play a series against the Braves. It was Father’s Day weekend and we had a great time. I felt so grateful just for the moment.

Then Brian relapsed. He began using again, and admitted that he just wasn’t into recovery and didn’t want to go to IOP any longer. The IOP terminated him from the program, and Brian’s failure to seek recovery steps after relapse constituted a serious violation of the contract. Under the contract, Brian was required to leave our home.

This was a huge test for my wife and me.



Would we follow through and enforce it? We were filled with apprehension and fear. But we trusted the boundaries and consequences set out in the contract by the professionals who had long experience with addiction. We listened to what we had heard from others' experience in Al-Anon, and we did not want to further enable Brian's addictive behaviors. The family program leader's quote—about how the addict will not get into recovery until the pain of using is worse than the pain of not using—now echoed in my mind. We followed through and told Brian that he had to leave. He had chosen not to continue with recovery, and it was crucial that we allow him to live with the consequences of that decision. It was not easy for us; in fact it was excruciating. Many fears ran through my head and heart—Where would he go? How would he get food? How bad would his drug use become? Would he be safe? I knew I had no control over that and had to let it go and put it in the hands of a power much greater than me. It was a critical moment in my own recovery. One of the biggest lessons I had heard in Al-Anon was the importance of examining our true motives for what we do. At first blush, it seems natural and compassionate for us to want to rescue our children and protect them from harm. But the problem with an addict is that rescuing him from the adverse consequences of his actions will only further enable his use and addictive behaviors. If, despite that fact, we still choose to rescue and protect, then our choice to do so often comes largely out of self-centered motives, i.e. to protect ourselves from experiencing our own pain that would come from seeing bad things happen to our beloved child. This is often called self-centered fear. Even though we may think we are acting for the safety of the child when we rescue him, it is important that we do some thorough, honest self-examination to see if self-centered motives are also at play.

I will never forget the day Brian left. I was outside in the yard when he came out with a backpack and got in a car with someone and they drove off. It seemed so surreal. My son, who I had loved with all my heart since the day he was born, of whom I had a million beautiful past memories and many more recent painful ones, was now homeless, or at least he was "out there" beyond our sight and control. After he drove away I went into the house and found Brian's little brother sobbing. I broke down sobbing with him. The weight of the moment finally came down on me. But

I remained convinced that we had done the right thing.

Brian was gone for about a month. It was very hard not knowing where or how he was. Per the IOP counselor's recommendation, we did not initiate contact. But we heard from Brian occasionally, which was a relief when it happened, just to know he was alive and safe. We mostly detached from him and the situation. To this day I don't know where he went or what he did or how he got by, other than we learned that he had another arrest during that time.

Whatever happened to Brian while he was out there, apparently it didn't agree with him because after a month he begged my wife to let him come home. He said he did not want to go back to IOP and that he wanted to try to make it on his own, without any recovery program. We knew he would not succeed. My wife told him that he could come back. She admitted that she was just not emotionally ready to endure any more of the fear and uncertainty of Brian being out there.

This occurred in the middle of a very stressful time for me. I had just moved to a new firm, and I was in the midst of handling a demanding *pro bono* matter that was heating up. Although I did not like the idea of letting Brian come back into our home while he openly disavowed recovery efforts, I respected that my wife just couldn't get there emotionally at that time. There were times when the roles were reversed and I was the one who was not yet emotionally ready to do the right thing and my wife had been patient with me. The counselor encouraged us to always try to be together on these big decisions. Thus, I went along with it. But we committed to each other that we would not allow this to go on indefinitely. We would see how it played out and try our best to take the appropriate actions when we were both ready.

For the next year Brian lived in our home. My relationship with him during that time was somewhat better than before. I tried to focus on taking care of myself and not directing anger and judgment at Brian. My Al-Anon work contributed greatly to this changed attitude. Brian attended community college. But he was using drugs and hanging out with the old friends. Over time he gradually got worse and his school performance suffered as well. He also had two more drug-related arrests. One of those was truly a milestone moment in our recovery journey. My wife and I were asleep one night when Brian

called and said he was being arrested and wanted us to help. My wife answered the phone, and after listening, flatly told him no, we weren't going to come rescue him, he was on his own. The second arrest occurred a few months later. Apparently he got the message the last time around, because he didn't even tell us about it. We found out about it as attorney solicitation letters poured into our mailbox. We never did get involved in either of those charges. We left it up to Brian to face the court system on his own. One day I actually bumped into him in the parking lot across from the courthouse, and he said he was headed to court on one of his charges. I didn't inquire any further, I just left it to him.

At some point my wife and I finally decided to put an end to Brian's stay with us. It was not easy. We gave him a target date when he would have to leave. We told him we would give him a nominal amount of money to get started in an apartment, but beyond that he would be on his own and would have to get a job and support himself. His initiative and overall condition had declined so badly by that point that we were quite confident he would not be able to make it on his own under those conditions. We offered him one alternative: go back to inpatient treatment.

As the target date got closer, Brian eventually decided to go to inpatient treatment. He said he was sick and tired and did not want to live that way anymore. He admitted that during his first inpatient rehab and IOP, he wasn't ready to give up the drug life, that he didn't yet want recovery and was just going through the motions in those programs. Even though Brian's outcomes from those programs did not seem positive, he has since told us that he was exposed to recovery principles there that sunk in and came back to him later in recovery. This highlights one very important point for family members' recovery: We should not place too much emphasis on the outcome at any particular moment because recovery is a process and we never know if what seems to be a bad event or outcome might actually be the very thing that eventually leads to recovery. In any event, this time around Brian seemed more genuine in his desire for recovery. From some things Brian has told us since, the two criminal charges he was forced to handle on his own might have been the final straw in his surrender.

The treatment center had a wonderful feel to it—a peaceful setting, and staff with a reputation for being committed, caring, and very

professional. We left with a renewed sense of hope that Brian might find his way to recovery there. We visited him after he had been there about a week, and he seemed genuinely committed to trying to make it. His whole demeanor seemed more genuine and intent, although he was clearly struggling emotionally and mentally after having detoxed.

A couple of days later we received a call from a nurse at the facility who told us that Brian appeared to be suffering from psychosis and that we needed to come take him to the psych ward at the local hospital for diagnosis and treatment. The nurse made it clear that they were not discharging Brian from the treatment center and they expected him back soon. We took Brian to the hospital where he was admitted and diagnosed with psychosis. His symptoms were that he heard voices. It apparently was a drug-induced psychosis. Needless to say, after all Brian and we had been through to that point, it was quite a blow to get this news. We were filled with shock and sadness to see our son check into a ward behind locked doors with other psych patients, and with such a serious diagnosis and unknown future implications. At the hospital, Brian got stabilized and began appropriate medications. After a few days he returned to treatment.

Although we had hoped that the psychosis might be a temporary condition, that turned out not to be so. Brian and the treatment center's psychiatrist engaged in a continuous process of adjustment over the ensuing months and years to find the right mix of medication to treat the psychosis. I am grateful to say that Brian's psychosis has been managed over the past ten-plus years such that it does not interfere with him having a normal and productive life.

After returning to the treatment center, Brian stepped back into the groove of recovery work, and although he had a lot of trauma to overcome, he did well. During the family week we were asked to write a letter to the disease of addiction—a memorable experience for me. As I read back over that letter today, I see at least two important points: First, I had made a lot of progress in that first year and a half thanks to Al-Anon, the family education programs we had attended, and cold, hard experience. Second, the humbling realization that I was still intensely swept up in the family disease and had a lot of recovery work yet ahead of me.

On the last day of the family program, our

entire family met with the counselor who led the program. He raised the question of where Brian would live upon discharge from treatment. The staff recommended their halfway house for a continuing recovery environment. Brian said he wanted to try it on his own and asked if we would support him financially and otherwise in that. Having already anticipated this question and discussed it with my wife, I immediately responded, as firmly but lovingly as I could, that if he intended to live on his own, he would have to do so without our support. But I added that if he chose to move on to the halfway house, we would support him in that. It was yet another moment of truth for Brian and all of our family in the room. With a sigh of resignation, Brian said he would move into the halfway house. From his reaction and body language, it appeared to us that he had surrendered and that his plea to go out on his own was only half-hearted. Some months later he recalled this moment and confirmed it was his final surrender.

Brian's stay in the halfway house went well. He began to assimilate into the AA recovery community in that city. When he finished there, he made a decision on his own that turned out to be one of the best decisions of his life. He decided that, rather than return to our home or our town, he would stay in that city where he had established some recovery contacts, and move into a sober Oxford House where he would have a strong recovery environment and could begin to build a life for himself. He got a job and was feeling proud of his independence. I still had some lingering regret about my lost hopes and dreams for him, but because of Al-Anon I mostly felt acceptance of his situation just as it was and joy for Brian's sense of accomplishment on his own.

Brian eventually enrolled in community college and got an apartment with a sober friend. I stayed out of his program. I left his recovery to him, as it should be, and I focused on my own recovery.

Earlier I made the point that we should not get too discouraged by a bad outcome at a particular point in time because we don't know for sure where it might lead in the future. Brian's psychosis is a great example. Seeing Brian's symptomatic state in the hospital and hearing the diagnosis were a staggering blow to me. I shared the deep sense of sadness along with his little brother on that bench outside the hospital. But after getting some recovery time under his belt, Brian related to us that

his psychosis was a major disincentive to using drugs again, as he never wanted to endure those symptoms again. So you never know—what seems like a desperately dark event might turn out to be an important contributor to the addict's recovery.

It has now been over ten years since Brian last used drugs or alcohol. He has lived a life of continuing recovery. He completed his college education. He has a wife and children, and a productive job that he loves and allows him to support his family. Naturally, I have deep gratitude for all of that. But I am also grateful for the entire journey because it has led me to a life of greater serenity than I ever dreamed of. My experiences, and the Al-Anon program, have shown me how I can better live at peace with myself and others, and how I can, with the proper attitude, place my problems in their true perspective so that they lose the power to dominate my thoughts and my life. This quote from the Al-Anon daily reader, *Hope for Today* (p. 141), says it well:

The serenity I am offered in Al-Anon is not an escape from life. Rather, it is the power to find peacefulness within life.

Al-Anon does not promise me freedom from pain, sorrow, or difficult situations. It does, however, give me the opportunity to learn from others how to develop the necessary skills for maintaining peace of mind, even when life seems most unbearable...

Al-Anon also gives me the opportunity to live a serene life free from the burden of responsibility for others' decisions. It teaches me that I can direct my life toward personal growth and satisfaction. It increases my confidence, which comes from trusting that the Higher Power of my understanding will sustain me and guide me through life's ups and downs.

Serenity is not about the absence of pain. It's about my ability to flourish peacefully no matter what life brings my way. ■

*The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may impair a lawyer's ability to practice. If you would like more information, go to [nclap.org](http://nclap.org) or call: Cathy Killian (for Charlotte and areas west) at 704-910-2310, Towanda Garner (in the Piedmont area) at 919-719-9290, or Nicole Ellington (for Raleigh and down east) at 919-719-9267.*

# IOLTA News Improves

## Income

All IOLTA income earned in 2015 has now been received. We are pleased to report that, for the first time since 2008, we did not post a decrease from the previous year in income from IOLTA accounts. Income from the accounts increased by almost 10% but did not exceed \$2 million and is more than a 50% decrease from our highest income of over \$5 million recorded in 2008. We did receive the largest number of cy pres awards to date (five), which brought us another \$75,000. We hope this indicates greater awareness of the North Carolina statute regarding class action residuals and other court award possibilities. Most significantly, we did receive our portion (\$842,896) of the funding for IOLTA programs included in the settlement with Bank of America announced by the Department of Justice in August 2014. We remain hopeful that a rise in interest rates and perhaps further funds from other sources will bring income back to normal levels.

For 2016 we have received a distribution of \$12,071,404 from the Bank of America (BoA) settlement. The funds were specified to be sent to IOLTA programs under certain conditions. The trigger for the release of these funds was the extension of the Mortgage Forgiveness Debt Relief Act of 2007 through the end of 2015, which waived tax liability due to a mortgage debt being eliminated, making the (\$490 million) Tax Relief Fund established by the settlement unnecessary. Under the Settlement Agreement, 75% of any surplus in that Fund is to be distributed to IOLTA programs throughout the country. The funds are to be used for the same restricted purposes as the first BoA settlement funds received—provision of foreclosure prevention legal services and community redevelopment legal services.

## Grants

As previously reported, the IOLTA trustees dramatically reduced the number of grants beginning in 2010 as we dealt with a

significantly changed income environment due to the economic downturn, which has seen unprecedented low interest rates being paid on lower principal balances in the accounts. The trustees decided to focus grant-making on organizations providing core legal aid services. Even with that change, IOLTA grants have dramatically decreased by over 50% from their highest level of just over \$4 million in 2008 and 2009. During this downturn in income from IOLTA accounts, we have relied heavily on cy pres and other court awards designated for the provision of civil legal aid to the poor. Receiving our portion of the funding for IOLTA programs included in the settlement with Bank of America was crucial to our ability to make 2016 grants.

IOLTA Trustees decided to use half the Bank of America settlement funds, leaving half to remain invested to use in 2017, as otherwise our reserve would be just under \$250,000. We were able to make just over a 3% increase in the individual grants and to bring total grants back to \$2 million—an emotional boost to all. Though the settlement funds are restricted to foreclosure work, we do have six strong legal aid programs that have been collaboratively handling significant foreclosure work. That effort is highlighted in an article in the 2015 Winter issue of the North Carolina State Bar *Journal*. As other funds for this work are decreasing or ending, these funds will provide significant support to continue the foreclosure projects.

The IOLTA board decided to open a separate grant cycle in 2016-17 to begin to make grants with the additional Bank of America settlement funds recently received. It is expected that these restricted funds will be granted over a number of years.

## State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. Total state funding distributed for the 2013-14 fiscal year was \$3.5 million. The state budget adjust-

ments for 2014-15 eliminated the appropriation for legal aid work (\$671,250 at that time). Total state funding distributed from dedicated filing fees alone for the 2014-15 fiscal year was just under \$2.8 million. The Equal Access to Justice Commission and the NC Bar Association continue to work to sustain and improve the funding for legal aid. ■

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## Legal Ethics (cont.)

uncleared checks or leftover funds from real estate closings due to miscalculations of taxes or recording fees. Sometimes the amount of these dormant funds is annoyingly small. One way to avoid escheat issues on small amounts is to obtain consent for the disposition of these “leftover” funds in the original retainer agreement. An unpublished ethics advisory opinion, EA 2217 (1998), provides that a lawyer may obtain consent from a client at the beginning of the representation to waive the lawyer’s obligation to return a *di minimis* amount (an aggregate amount of less than \$10) owed to the client at the conclusion of the representation.

So don’t “es-cheet” yourself out of a stellar trust account audit by failing to properly handle dormant trust funds. Much of the information above is contained in the Lawyer’s Trust Account Handbook, which can be quickly and easily accessed online: [ncbar.gov/media/283992/lawyer-trust-account-handbook.pdf](http://ncbar.gov/media/283992/lawyer-trust-account-handbook.pdf). The handbook is always a good place to start when trust account issues arise. You may also contact our field auditor Anne Parkin ([aparkin@ncbar.gov](mailto:aparkin@ncbar.gov)) or our trust account compliance counsel Peter Bolac ([pbolac@ncbar.gov](mailto:pbolac@ncbar.gov)). You may also contact me, and I will do my best to assist you with the es-sheet process. ■

*Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.*

# Totality of Circumstances Analysis Applied by Committee to Former Client Conflicts in Domestic Representation

## Council Actions

No proposed formal ethics opinions were considered by the State Bar Council at its meeting on April 22, 2016.

## Ethics Committee Actions

At its meeting on April 21, 2016, the Ethics Committee voted to table proposed 2016 Formal Ethics Opinion 1, *Contesting Opposing Counsel's Fee Request to Industrial Commission*, pending the issuance of an opinion on similar facts by the court of appeals. The committee also voted to publish two revised proposed opinions and two new proposed opinions. All appear below.

The comments of readers on proposed opinions are welcomed. Comments received by July 7, 2016, will be considered at the next meeting of the Ethics Committee. Comments may be emailed to [ethicsadvice@ncbar.gov](mailto:ethicsadvice@ncbar.gov).

## Proposed 2015 Formal Ethics

### Opinion 8

### Representing One Spouse on Domestic and Estate Matters After Representing Both Spouses

April 21, 2016

*Proposed opinion rules that a lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.*

### Inquiry #1:

Lawyer A is a partner in ABC Law Firm. Lawyer A represented Husband and Wife jointly for over 15 years. During this time, Lawyer A prepared wills for Husband and Wife, represented the estate of Wife's mother,

represented the couple's son on several traffic citations, represented the couple on the purchase of three parcels of real property, and advised the couple on the filing of a joint bankruptcy petition (which was not filed). Lawyer A has not represented Husband and Wife on any matter in two years.

Husband and Wife are having marital difficulties and have separated. Husband has asked Lawyer A to represent him on all matters related to the dissolution of the marriage.

May Lawyer A represent Husband in the domestic action against Wife?<sup>1</sup>

### Opinion #1:

No, Lawyer A has a conflict of interest under Rule 1.9(a) and may not represent Husband in the domestic action unless Wife gives informed consent.

In RPC 32 (1989), the Ethics Committee considered an inquiry essentially the same as the current inquiry and ruled that the lawyer had a conflict of interest in representing the husband against the wife in alimony and equitable distribution proceedings. The opinion holds that it is a conflict because of the nature of the prior representations and the information received by the lawyer:

[t]hese [prior representations] all require or involve communication concerning property, income, and matters relevant to the spouses' financial circumstances so that Lawyer A will necessarily have received confidential information relevant to the pending proceedings.

RPC 32.

The Ethics Committee affirms the holding in RPC 32; however, the opinion provides little analysis of why representation of a husband and wife may disqualify a lawyer from the subsequent representation of one spouse in the legal actions attendant to a domestic dissolution. Because this situation occurs frequently—especially in small communities where

## 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.

## Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

there are a limited number of lawyers—the committee concluded that more explicit guidance should be provided.

Rule 1.9(a) states that a lawyer who has formerly represented a client in a matter is prohibited from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent. Obviously, Husband's and Wife's interests in the domestic action are materially adverse. However, whether the domestic action is the same or substantially related to the prior representations of Husband and Wife by Lawyer A is more difficult to determine.

Comment [3] to Rule 1.9 states that matters are substantially related “if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” As further noted in comment [3],

[a] former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

A “domestic dissolution” or “domestic action” is essentially a winding-up and comprehensive reorganization of the economic affairs of a husband and a wife. The legal representation of either spouse necessitates an examination of the financial affairs of both spouses. Confidential information from a prior representation relative to the financial interests of the other spouse may materially advance a client’s position in the domestic dissolution.

To determine whether there is a disqualifying “substantial relationship” conflict when a lawyer who previously represented spouses proposes to represent one spouse in a domestic action, the lawyer must exercise discretion in the thoughtful and thorough analysis of the following: (1) the nature of prior representations, including an examination of whether any representation involved sensitive family issues or serious financial matters (e.g., representation on a contemplated bankruptcy); (2) the number and frequency of the prior representations; (3) the passage of time since the last representation;<sup>2</sup> and (4) the substance of the confidential information received by the lawyer during any of the representations.

In addition to the protection of confidences, loyalty is an essential element of a lawyer’s relationship to a client. *See* Rule 1.7, Cmt. [1]. There are few situations in which a former client will feel more acutely that this loyalty has been compromised than when a marriage is dissolving and a lawyer who was considered the “family lawyer” takes the side of one spouse. For this reason, the lawyer must consider the totality of the circumstances and has the burden of demonstrating that prior representations of the husband and wife were not substantially related to the domestic disso-

lution. When it is unclear whether there is a substantial relationship between the prior representations and the current one, the lawyer must err on the side of declining to represent one spouse unless the other spouse gives informed consent.

In light of the number of prior representations over a number of years, the serious and sensitive financial interests and personal issues addressed in the prior representations, the limited passage of time since the last representation, and the relevant confidential information received during the prior representations of Husband and Wife, there is a substantial relationship between the prior representations and current representation of Husband in the domestic action. Therefore, the proposed representation of Husband violates Rule 1.9(a). Accordingly, unless Wife gives her informed consent, Lawyer A has a conflict of interest and may not undertake representation of Husband.

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

May another lawyer in ABC Law Firm represent Husband in the domestic matter?

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

No, if Lawyer A has a conflict of interest, that conflict is imputed to all of the other lawyers in the firm. Rule 1.10(a). Another lawyer in the firm may represent Husband only with the informed consent of Wife.

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

Lawyer A also previously represented Husband and Wife jointly on the preparation of reciprocal wills. May Lawyer A, or another lawyer in his firm, prepare a new will/estate plan for Husband?

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

Yes, if there is a separation agreement between Husband and Wife that authorizes each spouse to prepare a new estate plan, the wife gives informed consent confirmed in writing, or an order of divorce has been entered. *Cf.* RPC 229 (1996)(lawyer who jointly represented husband and wife on estate plan may not prepare codicil to the will of one spouse without knowledge of the other if each spouse agreed not to change estate plan without informing other spouse).

As noted in Opinion #1, Rule 1.9(a) prohibits a lawyer who has represented a client in a matter from representing another client in the same or a substantially related matter in

which the new client’s interests are materially adverse to those of the former client unless the former client consents. Lawyer A’s prior representation of Husband and Wife on the preparation of reciprocal wills constitutes the same matter as the preparation of a new will for Husband. However, once the couple has executed an agreement to waive their claims against each other’s estates or they are divorced, the element of material adversity required for disqualification under Rule 1.9 is no longer present.

#### **Endnotes**

1. This opinion applies to all domestic partner relationships.
2. *See* Rule 1.9, Comment [3]: “[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.”

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### **Proposed 2015 Formal Ethics Opinion 9 Holding Out Non-Equity Firm Lawyers as “Partners” April 21, 2016**

*Proposed opinion rules that a lawyer who does not own equity in a law firm may be held out to the public by the designation “partner,” “income partner,” or “non-equity partner,” provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.*

#### **Inquiry:**

ABC Law Firm is a North Carolina professional corporation. Three lawyers, A, B, and C, are shareholders in the firm and own all of the equity of the firm. In the firm’s communications, Lawyers A, B, and C are held out as “partners” at the firm, and they are referred to internally as “equity partners.”

Lawyers E and F also work for the firm, but they do not own any interest in the firm and are not shareholders. However, Lawyers A, B, and C consider Lawyers E and F to be “partners in every sense of the word except actual ownership.” Lawyers E and F have the authority to bind the firm and to sign opinion letters on behalf of the firm, but they do not vote on matters of corporate governance. Within the firm, Lawyers E and F are referred to as “income partners.”

The firm would like to hold Lawyers E and F out to the public as “partners” or “income partners.” May the firm do so?

## Opinion:

Yes, provided that any lawyer who is held out by the firm as a “partner,” “income partner,” or “non-equity partner” has been officially promoted by the law firm’s management or pursuant to the law firm’s governing documents and such promotion is based upon legitimate criteria.

*Black’s Law Dictionary* defines “partner” as “[o]ne of two or more persons who jointly own and carry on a business for profit.” *Black’s Law Dictionary* (10th ed. 2014). However, within the legal profession, the designation is often used without regard to the legal definition. For example, shareholders in a professional corporation for the practice of law are frequently referred to as “partners.” Like lawyers themselves, laymen generally equate the designation with the achievement by a lawyer of a certain level of experience, status, or authority within a law firm.

Nevertheless, referring to a lawyer as a “partner” in external communications cannot be a sham. Rule 7.1(a)(1) states that a communication is false or misleading if it “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” To avoid misrepresentation, a law firm may designate a lawyer as a partner, regardless of whether the lawyer satisfies the legal definition of that term, if the lawyer was promoted to the position by formal action or vote of firm management or pursuant to the firm’s governing documents. Further, to prevent the public from being misled as to the lawyer’s achievements, the promotion must be based upon criteria that indicates that the lawyer is worthy of the promotion. The Ethics Committee acknowledges that law firms have different standards or criteria for promoting a lawyer to equity or non-equity partner, and the committee declines to dictate what those criteria must be. However, the following list provides examples of legitimate criteria for such a promotion:

- Experience: Engaged in the practice of law for a substantial period of time.
- Integrity: Adherence to principles of honesty and high professional ethics.
- Industry: Willingness to work hard, beyond normal hours where clients’ needs and professional development so require, evidencing a drive to achieve.
- Intelligence: Ability to analyze law and facts; imagination and creativity.
- Communication: Ability to express

thoughts clearly, both orally and in writing.

- Legal knowledge: Skill in general and specialized areas of law.
- Motivation: Willingness to accept responsibility for client’s problems, to perform work assigned punctually.
- Judgment: Ability to make logical, practical decisions.
- Efficiency: Ability to do high quality work in a reasonable amount of time.
- Involvement: Participation in professional, civic, and other outside activities.

Any firm lawyer who is identified as a “partner” shall be held to the professional responsibilities in the Rules of Professional Conduct that may arise from that designation. *See, e.g.*, Rule 5.1.

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## Proposed 2016 Formal Ethics

### Opinion 2

#### Duty of Defense Counsel Appointed after Defendant Files *Pro Se* Motion for Appropriate Relief April 21, 2016

*Proposed opinion rules that, when advancing claims on behalf of a criminal defendant who filed a pro se Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous pro se filing.*

#### Inquiry:

A motion for appropriate relief (MAR) is a procedure whereby defendants may challenge a conviction or sentencing. A MAR seeks relief from an error committed at the trial level and may be made before or after the entry of judgment. *See* N.C. Gen. Stat. §15A-1411. Indigent defendants filing *pro se* MARs may have legal counsel appointed. *See* N.C. Gen. Stat. §7A-451(a) (3). Pursuant to the statute and upon request, the court will appoint defense counsel to represent the defendant on the MAR. Defense counsel is generally allowed 120 days to investigate the defendant’s case and file either an amended MAR or a written notice of intent not to file an amended MAR. The district attorney and his or her assistants are responsible for filing a response on behalf of the state.

In support of the defendant’s legal arguments and request for relief, many of the MARs filed by *pro se* defendants cite case law that has been overruled by an appellate court and is, therefore, no longer binding authority.

If in defense counsel’s informed and reasonable legal opinion the MAR is frivolous, is

defense counsel professionally obligated to file an amended MAR or provide written notice to the tribunal that the legal authority cited in the *pro se* MAR is no longer good law?

## Opinion:

No.

This is a difficult position for defense counsel who has an obligation to protect defendant’s constitutional rights and to seek relief from the court, but must also adhere to her duties to the court.

As an advocate for the defendant, defense counsel is duty-bound to abide by the defendant’s decisions concerning the objectives of the representation, and as required by Rule 1.4, to consult with the client as to the means by which they are to be pursued. Rule 1.2. Defense counsel must pursue defendant’s objectives unless doing so would violate the law, a court order, or the Rules of Professional Conduct.

Defense counsel must provide competent and diligent representation to the defendant. Competent and diligent representation requires defense counsel to familiarize herself with the facts in defendant’s underlying criminal matter; research the relevant law, including the statutes and case law cited in the defendant’s *pro se* MAR; and determine whether a reasonable interpretation of the law cited in the MAR supports the defendant’s claims for relief. *See* Rule 1.1 and Rule 1.3. Defense counsel must also determine whether there is a good faith basis in law and fact, that is not frivolous, to proceed. *See* Rule 3.1.

The comment to Rule 3.1 provides,

[w]hat is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

Rule 3.1, cmt 2.

Ordinarily, defense counsel is prohibited from defending a claim she knows is frivolous. *See* Rule 3.1. However, as stated in Rule 3.1, “[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding

that could result in incarceration, may nevertheless so defend the proceeding, as to require that every element of the case be established.”

The Ethics Committee has previously opined that a lawyer may not proceed if the lawyer determines that the client’s civil claims are frivolous. In 2006 FEO 9 the Ethics Committee concluded that if after filing a civil complaint the lawyer concludes that pursuit of the lawsuit is frivolous, but the client insists on continuing the litigation, the lawyer must move to withdraw from the representation. *But see* 2008 FEO 17 (Ethics Committee found that a lawyer may sign and file a notice of appeal although the lawyer did not believe that the appeal had merit because the notice of appeal preserves a client’s options and does not assert a particular legal argument).

In addition to following the requirements of Rule 3.1, defense counsel must follow Rule 3.3, *Candor Toward the Tribunal*. The rule provides, in pertinent part, that,

[a] lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel...

Rule 3.3(a) (2).

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. Rule 3.3, cmt [4].

Under the present circumstances, the MAR was filed *pro se* by defendant. Defense counsel did not affirmatively make representations to the court that defense counsel knew to be false, inaccurate, or frivolous. Defense counsel, by virtue of being appointed, is not professionally obligated to assume defendant’s position in the *pro se* MAR or any other *pro se* filing. If defense counsel elects to advance any potential MAR claims on behalf of defendant, counsel must observe the duties under Rule 3.1 and Rule 3.3 regarding any such claim and statement of law or fact upon which counsel will rely to advance the claim including any statement of law or fact in a previous *pro se* filing. However, if defense counsel is allowed to withdraw from the representation before advancing any of defendant’s potential MAR claims, counsel is not professionally obligated to correct any previous *pro se* filing.

If after reviewing the *pro se* MAR defense counsel reaches an informed and reasonable

legal opinion that there is no good faith basis in fact or law for the MAR and that the MAR is frivolous, defense counsel must advise defendant of the same. Defense counsel must further advise defendant that she is prohibited from affirmatively making an argument (oral or written) to the court that she believes is frivolous. If defendant insists that defense counsel make frivolous arguments to the court, defense counsel must seek the court’s permission to withdraw. *See* Rule 1.16(a).

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**Proposed 2016 Formal Ethics  
Opinion 3  
Negotiating Private Employment with  
Opposing Counsel  
April 21, 2016**

*Proposed opinion rules that a lawyer may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer’s client unless both clients give informed consent.*

**Note:** This opinion is limited to the explanation of the professional responsibilities of a lawyer moving from one place of private employment to another. Rule 1.11(d)(2)(B) governs the conduct of a government lawyer seeking private employment.

**Inquiry:**

May a lawyer negotiate for employment with a law firm that represents a party on the opposite side of a matter in which the lawyer’s firm is also representing a party?

**Opinion:**

Yes, with client consent.

A lawyer shall not represent a client if the representation of a client may be materially limited by a personal interest of the lawyer unless the lawyer reasonably believes that he can provide competent and diligent representation to the affected client and the client gives informed consent, confirmed in writing. Rule 1.7(b)(2). As observed in Rule 1.7, cmt. [10], when a lawyer has discussions concerning possible employment with an opponent of the lawyer’s client, or with a law firm representing the opponent, such discussions could materially limit the lawyer’s representation of the client.

ABA Formal Ethics Op. 96-400 (1996) advises that while the exact point at which a lawyer’s own interest may materially limit his representation of a client may vary, clients, lawyers, and their firms are all best served by a rule that requires consultation and consent at the earliest point that a client’s interests could

be prejudiced. Therefore, a lawyer who is interested in negotiating employment with a firm representing a client’s adversary must obtain the client’s consent before engaging in substantive discussions with the firm or the lawyer must withdraw from the representation. Likewise, the law firm that is interested in hiring the lawyer must obtain consent from its own client before substantive employment discussions begin.

*The Restatement (Third) of The Law Governing Lawyers* advises that once the discussion of employment has become concrete and the interest is mutual, the lawyer must promptly inform the client; without effective client consent, the lawyer must terminate all discussions concerning the employment, or withdraw from representing the client. *Restatement (Third) of The Law Governing Lawyers: A Lawyer’s Personal Interest Affecting the Representation of a Client* §125, cmt. d (2000). *See also* Kentucky Ethics Op. E-399 (1998) (lawyer may not negotiate for employment with another firm where firms represent adverse parties and lawyer is involved in the client’s matter or has actual knowledge of protected client information, unless the client consents to negotiation).

We agree: a job-seeking lawyer who is representing a client, or has confidential information about the client’s matter, may not engage in substantive negotiations for employment with the opposing law firm without the client’s informed consent.

To obtain the client’s informed consent, the job-seeking lawyer must explain to the client the current posture of the case, including what, if any, additional legal work is required and whether another firm lawyer is available to take over the representation should the lawyer seek to withdraw. If the client declines to consent, the job-seeking lawyer must either cease the employment negotiations until the client’s matter is resolved or withdraw from the representation—but only if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b)(1). Because personal conflicts of interests are not imputed to other lawyers in the firm, another lawyer in the firm may continue to represent the client. Rule 1.10(a).

Similarly, the hiring law firm must not engage in substantive employment negotiations with opposing counsel unless its own client consents. If the client does not consent,

CONTINUED ON PAGE 55

# Amendments Pending Supreme Court Approval

At its meetings on October 23, 2015, February 1, 2016, and April 22, 2016, the North Carolina State Bar Council voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of all proposed rule amendments, visit the State Bar website, or see the Fall 2015, Winter 2015, and Spring 2016 editions of the *Journal* unless otherwise noted):

## Proposed Amendments to the Rules Governing the Board of Law Examiners

27 N.C.A.C. 1C, Section .0100, Board of Law Examiners

Proposed amendments to Rule .0101, Election, were recommended by the North Carolina Board of Law Examiners to modernize the outdated rule and to conform provisions of the rule to current practice in regard to the appointment of members of the board. The proposed amendments were originally submitted to the Supreme Court following the February 1, 2016, meeting of the council; however, the Court asked that the rule be revised to employ consistent terminology in reference to the "appointment" of the board's members. The rule was redrafted with consistent terminology for resubmission to the Court. In the absence of any substantive change, the revised proposed amendments were not republished before submission to the Court.

A proposed amendment to Rule .0105, Approval of Law Schools, recommended by the Board of Law Examiners, eliminates the ten year experience requirement from the rule which allows a graduate of a non-ABA accredited law school to be considered for admission to the State Bar if the graduate was previously admitted to the bar of another jurisdiction and remained in good standing with that bar for ten years.

## Proposed Amendments to the Procedures for the Administrative Committee

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

Proposed amendments to the rules on reinstatement from inactive status and administrative suspension eliminate from the CLE requirements for reinstatement the condition that five of the 12 CLE credit hours required for each year of inactive or suspended status must be earned by taking practical skills courses. Sponsors and the Board of CLE do not designate courses as practical skills courses; therefore, it has been difficult for petitioners for reinstatement to identify courses that satisfy this requirement.

Proposed amendments to Rule .0905 specify that *pro bono* practice status for an out-of-state lawyer ends when the lawyer ceases working under the supervision of a North Carolina legal aid lawyer, and clarify that the status may be revoked by the council without notice to the out-of-state lawyer or an opportunity to be heard.

## Proposed Amendments to the Rules and Regulations Governing the Administration of the CLE Program

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

The proposed amendments to the CLE rules clarify that the exemption from CLE requirements for members who teach law-related courses at professional schools has reference only to graduate level courses; require a sponsor of the Professionalism for New Attorneys Program to be an accredited sponsor; and allow credit to be granted to private/in-house CLE programs on professional responsibility and professional negligence/malpractice under certain circumstances.

## Proposed Amendments to the Hearing and Appeal Rules of the Board of Legal Specialization

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization

Proposed amendments to Rule .1804 of

the hearing rules for the specialization program simplify the procedure for a failed applicant to appeal a final certification decision of the Board of Legal Specialization to the council.

## Proposed Amendments to the Standards for the Estate Planning and Probate Law Specialty

27 N.C.A.C. 1D, Section .2300, Certification Standards for the Estate Planning and Probate Law Specialty

The proposed amendments to the standards for the estate planning specialty eliminate the subject matter listings for related-field CLE and the exam, and explain that these listings will be posted on the specialization website.

## Proposed Amendment to the Standards for the Workers' Compensation Specialty

27 N.C.A.C. 1D, Section .2700, Certification Standards for the Workers' Compensation Specialty

The proposed amendment to the standards for recertification in the workers' compensation specialty clarifies that a specialist must earn at least six CLE credits in workers' compensation law courses in each year of the five year period of certification.

## Proposed Standards for a New Specialty in Utilities Law

27 N.C.A.C. 1D, Section .3200, Certification Standards for Utilities Law Specialty

A proposed new section of the rules for the specialization program sets forth standards for a new specialty in utilities law. The proposed standards are comparable to the standards for the other areas of specialty certification.

## Proposed Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals; Section .0200, Rules Governing Continuing Paralegal Education



Proposed amendments to the standards for certification of paralegals add the disciplinary suspension or revocation of an occupational or professional (non-legal) license and the unauthorized practice of law to the list of conduct that may be considered by the Board of Paralegal Certification when determining whether an applicant is honest, trustworthy, and fit to be certified as a paralegal. A proposed amendment to the rules on paralegal continuing education eliminates the \$75 accreditation fee for any program that is presented without charge to attendees.

### Proposed Amendments to the Trust Accounting Rule in the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15, Safekeeping Property

In the Spring, Summer and Fall 2015 editions of the *Journal*, proposed amendments to Rule 1.15, Safekeeping Property (and its subparts, Rule 1.15-1, Rule 1.15-2, and Rule 1.15-3) and to Rule 8.5, Misconduct were published. The proposed amendments add requirements that will facilitate the early detection of internal theft and errors and adjust the

trust account recordkeeping requirements to accommodate “paperless” work environments. A new subpart, Rule 1.15-4, Alternative Trust Account Management Procedure for Multiple-Member Firm, was proposed to create a procedure whereby a firm with two or more lawyers may designate a firm principal to serve as the “trust account oversight officer” to oversee the administration of the firm’s general trust accounts in conformity with the requirements of Rule 1.15.

## Proposed Amendments

At its meeting on April 22, 2016, the council voted to withdraw previously published proposed amendments to the Discipline and Disability Rules and to publish a new version of the proposed amendments. Proposed amendments to the Discipline and Disability Rules were originally published in the Winter 2015 edition of the *Journal* and approved for transmission to the Supreme Court at the February 1, 2016, council meeting. Upon review, however, the staff determined that some of the proposed amendments in the published version were inconsistent or redundant. Upon the staff’s recommendation, the council withdrew the version published in the Winter 2016 *Journal* to be replaced with the version below.

### Proposed Amendments to the Discipline and Disability Rules

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

The proposed amendments to the Discipline and Disability Rules separate Rule .0114, Formal Hearing, into five shorter rules; to wit: Rule .0114, Proceedings Before the Disciplinary Hearing Commission: General Rules Applicable to All Proceedings; Rule .0115, Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure; Rule .0116, Proceedings Before the Disciplinary Hearing Commission: Formal Hearing; Rule .0117, Proceedings Before the Disciplinary Hearing Commission: Post-trial Motions; and Rule .0118, Proceedings Before the Disciplinary Hearing Commission: Stayed Suspensions. In addition, the content of existing Rule .0114 is

reorganized within this five-rule structure, and numerous substantive changes are proposed, including amendments to the provisions on mandatory scheduling conferences, settlement conferences, default, sanctions, and post hearing procedures relative to stayed suspensions. Proposed amendments to the substance of existing Rule .0115, Effect of a Finding of Guilt in Any Criminal Case, (renumbered as Rule .0119), explain the documents constituting conclusive evidence of conviction of a crime and the procedure for obtaining an interim suspension.

With the division of existing Rule .0114 into five shorter rules, existing Rule .0115 and all subsequent rules in this section will be renumbered and cross references to other rules throughout the section will be renumbered accordingly.

#### .0114 Formal Hearing Proceedings Before the Disciplinary Hearing Commission: General Rules Applicable to All Proceedings

(a) Applicable Procedure Complaint and Service - Except where specific procedures are provided by these rules, pleadings and proceedings before a hearing panel will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trial of nonjury civil cases in the superior courts. Any specific procedure set out in these rules controls, and where specific procedures are set out in these rules, the Rules of Civil Procedure will be supplemental only. Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the com-

~~plaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.~~

~~(b) Service - Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.~~

~~(b)(c) Continuances - The chairperson of the hearing panel may continue any hearing for good cause shown. After a hearing has commenced, continuances will only be granted pursuant to Rule .0116(b). Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.~~

~~(c)(d) Appearance By or For the Defendant Designation of Hearing Committee and Date of Hearing - The defendant may appear pro se or may be represented by counsel. The defendant may not act pro se if he or she is represented by counsel. Within 20 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing panel from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing panel. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint.~~

When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the last complaint upon the defendant. By agreement between the parties and with the consent of the chair, the date for the initial setting of the hearing may be set less than 90 days after the date of service on the defendant.

(1) Pro Se Defendant's Address - When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the clerk, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from the address on record with the State Bar's membership department.

(2) Notice of Appearance - When a defendant is represented by an attorney in a proceeding, the attorney will file with the clerk a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing will be sent to defendant's attorney of record in lieu of transmission to the defendant.

(d)(e) Filing Time Limits Answer - Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the clerk of the commission within the time limits, if any, for such filing. The date of the receipt by the clerk, and not the date of deposit in the mail, is determinative. Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing panel upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

(e)(f) Form of Papers Default - All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The clerk will require a party to refile any paper that does

not conform to this size. Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing panel for a default order imposing discipline, and the hearing panel will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing panel may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing panel may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing panel upon the defendant's default, the hearing panel may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(f)(g) Subpoenas Discovery - The hearing panel will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing, as permitted in civil cases under the North Carolina Rules of Civil Procedure. Such process will be issued in the name of the hearing panel by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. The plaintiff and the defendant have the right to invoke the powers of the panel with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents. Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing panel. The chairperson of the hearing panel may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(g)(h) Admissibility of Evidence Settlement - In any hearing, admissibility of evidence will be governed by the rules of evidence applicable in the superior court of

## 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. Amendments become effective upon approval by the Court. Unless otherwise noted, proposed additions to rules are printed in bold and underlined; deletions are interlined.

## Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

North Carolina at the time of the hearing. The chairperson of the hearing panel will rule on the admissibility of evidence, subject to the right of any member of the panel to question the ruling. If a member of the panel challenges a ruling relating to admissibility of evidence, the question will be decided by a majority vote of the hearing panel. The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. If the panel rejects a proposed settlement, another hearing panel must be empaneled to try the case, unless all parties consent to proceed with the original panel. The parties may submit a proposed settlement to a second hearing panel, but the parties shall not have the right to request a third hearing panel if the settlement order is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hear the disciplinary matter.

(h) Defendant as Witness - The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either party.

(j) **Pre-Hearing Conference**—At the discretion of the chairperson of the hearing panel, and upon five days' notice to parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the panel designated by its chairperson, who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the following:

- (1) the simplification of the issues;
- (2) the exchange of exhibits proposed to be offered in evidence;
- (3) the stipulation of facts not remaining in dispute or the authenticity of documents;
- (4) the limitation of the number of witnesses;
- (5) the discovery or production of data;
- (6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding. The chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

(j) **Pretrial Motions**—The chairperson of the hearing panel, without consulting the other panel members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing panel. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing panel.

(k) **Continuance of Hearing Date**—The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing panel for good cause shown.

(l) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate

court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) **Public Hearing**—The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) **Procedure for Pleadings and Proceedings**—Pleadings and proceedings before a hearing panel will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) **Filing Time Limits**—Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing. The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.

(p) **Form of Papers**—All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

(q) **Pro Se Defendant's Address**—When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

(r) **Notice of Appearance**—When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written com-

munication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(s) **Subpoenas**—The hearing panel will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the panel by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the panel with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(t) **Admissibility of Evidence**—In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing panel will rule on the admissibility of evidence, subject to the right of any member of the hearing panel to question the ruling. If a member of the hearing panel challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing panel.

(u) **Orders**—If the hearing panel finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing panel finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing panel will enter an order of discipline. In either instance, the panel will file an order which will include the panel's findings of fact and conclusions of law.

(v) **Preservation of the Record**—The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing panel will then consider any evidence relevant to the discipline to be imposed:

- (1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or

the legal profession, and lesser discipline is insufficient to adequately protect the public. The following factors shall be considered in imposing suspension or disbarment:

- (A) intent of the defendant to cause the resulting harm or potential harm;
  - (B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;
  - (C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;
  - (D) elevation of the defendant's own interest above that of the client;
  - (E) negative impact of defendant's actions on client's or public's perception of the profession;
  - (F) negative impact of the defendant's actions on the administration of justice;
  - (G) impairment of the client's ability to achieve the goals of the representation;
  - (H) effect of defendant's conduct on third parties;
  - (I) acts of dishonesty, misrepresentation, deceit, or fabrication;
  - (J) multiple instances of failure to participate in the legal profession's self-regulation process;
- (2) Disbarment shall be considered where the defendant is found to engage in:
- (A) acts of dishonesty, misrepresentation, deceit, or fabrication;
  - (B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;
  - (C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source;
  - (D) commission of a felony.
- (3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:
- (A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;
  - (B) remoteness of prior offenses;
  - (C) dishonest or selfish motive, or the absence thereof;
  - (D) timely good faith efforts to make restitution or to rectify consequences of misconduct;
  - (E) indifference to making restitution;
  - (F) a pattern of misconduct;
  - (G) multiple offenses;
  - (H) effect of any personal or emotional

- problems on the conduct in question;
- (I) effect of any physical or mental disability or impairment on the conduct in question;
- (J) interim rehabilitation;
- (K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;
- (L) delay in disciplinary proceedings through no fault of the defendant attorney;
- (M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;
- (N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (O) refusal to acknowledge wrongful nature of conduct;
- (P) remorse;
- (Q) character or reputation;
- (R) vulnerability of victim;
- (S) degree of experience in the practice of law;
- (T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;
- (U) imposition of other penalties or sanctions;
- (V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(x) **Stayed Suspensions**—In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing panel as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing panel that originally heard the matter wherev-

er practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing panel and the time and place for the hearing. After such a hearing, the hearing panel may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing panel finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing panel will include in its order findings of fact and conclusions of law in support of its decision.

(y) **Service of Orders**—All reports and orders of the hearing panel will be signed by the members of the panel, or by the chairperson of the panel on behalf of the panel, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested or personal service. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

#### (z) **Posttrial Motions**

(1) **Consent Orders After Trial**—At any time after a disciplinary hearing and prior to the execution of the panel's final order pursuant to Rule .0114(y) above, the panel may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

#### (2) **New Trials and Amendment of Judgments**

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing panel's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure. (B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing panel which heard the disciplinary case

no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

### (3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.

(4) Effect of Filing Motion - The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.

### .0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure

(a) Complaint and Service - The counsel will file the complaint with the clerk of the commission. The counsel will cause a summons and a copy of the complaint to be served upon the defendant and will inform the clerk of the date of service. The clerk will deliver a copy of the complaint to the chairperson of the commission and will inform the chairperson of the date that service on the defendant was effected. Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(b) Notice Pleading - Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(c) Answer - Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the commission or of the hearing panel upon good cause shown, the defendant will file an answer to the complaint with the clerk of the commission and will serve a copy on the counsel.

(d) Designation of Hearing Panel - Within 20 days after service of the complaint upon the defendant, the chairperson of the commission will designate a hearing panel from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing panel.

(e) Scheduling Conference - The chairperson of the hearing panel will hold a scheduling conference with the parties within 20 days after the filing of the answer by the defendant unless another time is set by the chairperson of the commission. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, video conference) of the scheduling conference. At the scheduling conference, the parties will discuss anticipated issues, amendments, motions, any settlement conference, and discovery. The chairperson of the hearing panel will set dates for the completion of discovery and depositions, for the filing of motions, for the pre-hearing conference, for the filing of the stipulation on the pre-hearing conference, and for the hearing, and may order a settlement conference. The hearing date shall not be less than 60 days from the final date for discovery and depositions unless otherwise consented to by the parties. The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in the scheduling conference or willfully fails to comply with a scheduling order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Civil Procedure.

(f) Failure to File an Answer - Failure to file an answer admitting or denying the allegations of the complaint or asserting the grounds for failing to do so within the time specified by this rule will be grounds for entry of the defendant's default. If the defendant fails to file an answer to the complaint, the allegations contained in the complaint will be deemed admitted.

(g) Default

(1) The clerk will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise.

(2) The counsel may thereupon apply to the hearing panel for default orders as follows:

(A) For an order making findings of fact and conclusions of law. Upon such motion, the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. The hearing panel shall then set a date for hearing at which the sole issue shall be the discipline to be imposed.

(B) For an order of discipline. Upon such motion the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. If such facts provide sufficient basis, the hearing panel shall enter an order imposing the discipline deemed to be appropriate. The hearing panel may, in its discretion, set a hearing date and hear such additional evidence as it deems necessary to determine appropriate discipline prior to entering the order of discipline.

(3) For good cause shown, the hearing panel may set aside the entry of default.

(4) After an order imposing discipline has been entered by the hearing panel upon the defendant's default, the hearing panel may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(h) Discovery - Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed by the date set in the scheduling order unless the time for discovery is extended by the chairperson of the hearing panel for good cause shown. Upon a showing of good cause, the chairperson of the hearing panel may reschedule the hearing to accommodate completion of reasonable discovery.

(i) Settlement - The parties may meet by mutual consent prior to the hearing to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. If the panel rejects a proposed settlement, another hearing panel must be empan-

elled to try the case, unless all parties consent to proceed with the original panel. The parties may submit a proposed settlement to a second hearing panel, but the parties shall not have the right to request a third hearing panel if the settlement order is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hold a hearing upon the allegations of the complaint.

(j) Settlement Conference - Either party may request, or the chair of the hearing panel may order, appointment of a commission member to conduct a settlement conference.

(1) Such request shall be filed with the clerk of the commission and must be made no later than 60 days prior to the date set for hearing.

(2) Upon such request, the chairperson of the commission shall select and sign a commission member not assigned to the hearing panel in the case to conduct a settlement conference and shall notify the parties of the commission member assigned and the date by which the settlement conference must be held. The settlement conference must be no later than 30 days prior to the date set for hearing.

(3) The commission member conducting the settlement conference will set the date, time, and manner.

(4) At the settlement conference, the parties will discuss their positions and desired resolution and the commission member will provide input regarding the case and resolution.

(5) The commission member's evaluation and input shall be advisory only and not binding.

(6) All statements and/or admissions made at the settlement conference shall be for settlement purposes only and shall not be admissible at any hearing in the case. Evidence that is otherwise discoverable, however, shall not be excluded from admission at hearing merely because it is presented in the course of the settlement conference.

(k) Prehearing Conference and Order

(1) Unless default has been entered by the clerk, the parties shall hold a prehearing conference. The prehearing conference shall be arranged and held by the dates established in the scheduling order.

(2) Prior to or during the prehearing conference, the parties shall: exchange witness and exhibit lists; discuss stipulations of

undisputed facts; discuss the issues for determination by the hearing panel; and exchange contested issues if the parties identify differing contested issues.

(3) Within five days after the date of the prehearing conference, each party shall provide the other with any documents or items identified as exhibits but not previously provided to the other party.

(4) The parties shall memorialize the prehearing conference in a document titled "Stipulation on Prehearing Conference" that shall address the items and utilize the format in the sample provided to the parties by the clerk. By the date set in the scheduling order, the parties shall submit the Stipulation on Prehearing Conference to the clerk to provide to the hearing panel.

(5) Upon five days' notice to the parties, at the discretion of the chairperson of the hearing panel, the chairperson may order the parties to meet with the chairperson or any designated member of the hearing panel for the purpose of promoting the efficiency of the hearing. The participating member of the panel shall have the power to issue such orders as may be appropriate. The venue (e.g., telephone, videoconference, in person) shall be set by the hearing panel member.

(6) The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in a prehearing conference or hearing or who willfully fails to comply with a prehearing order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Procedure.

(7) Evidence or witnesses not included in the Stipulation on Prehearing Conference may be excluded from admission or consideration at the hearing.

(l) Prehearing Motions - The chairperson of the hearing panel, without consulting the other panel members, may hear and dispose of all prehearing motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing panel. The following procedures shall apply to all prehearing motions, including motions which could result in dis-

missal of all or any of the allegations or could result in final judgment for either party on all or any claims:

(1) Parties shall file motions with the clerk of the commission. Parties may submit motions by regular mail, overnight mail, or in person. Motions transmitted by facsimile or by email will not be accepted for filing except with the advance written permission of the chairperson of the hearing panel. Parties shall not deliver motions or other communications directly to members of the hearing panel unless expressly directed in writing to do so by the chairperson of the hearing panel.

(2) Motions shall be served as provided in the NC Rules of Civil Procedure.

(3) The non-moving party shall have ten days from the filing of the motion to respond. If the motion is served upon the non-moving party by regular mail only, then the non-moving party shall have 13 days from the filing of the motion to respond. Upon good cause shown, the chairperson of the hearing panel may shorten or extend the time period for response.

(4) Any prehearing motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing panel. The chairperson shall set the time, date, and manner of oral argument. The chairperson may order that argument on any prehearing motion may be heard in person or by telephone or electronic means of communication.

(5) Any motion included in or with a defendant's answer will not be acted upon, and no response from the non-moving party will be due, unless and until a party files a notice requesting action by the deadline for filing motions set in the scheduling order. The due date for response by the non-moving party will run from the date of the filing of the notice.

.0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

(a) Public Hearing - The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel may exclude from the hearing room all persons except the parties, counsel, and those engaged in the

hearing. No hearing will be closed to the public over the objection of the defendant.

(b) Continuance After a Hearing Has Commenced - After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(c) Burden of Proof

(1) Unless otherwise provided in these rules, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the defendant violated the Rules of Professional Conduct.

(2) In any complaint or other pleading or in any trial, hearing, or other proceeding, the State Bar is not required to prove the nonexistence of any exemption or exception contained in the Rules of Professional Conduct. The burden of proving any exemption or exception shall be upon the person claiming its benefit.

(d) Orders - At the conclusion of any disciplinary case, the hearing panel will file an order which will include the panel's findings of fact and conclusions of law. When one or more rule violations has been established by summary judgment, the order of discipline will set out the undisputed material facts and conclusions of law established by virtue of summary judgment, any additional facts and conclusions of law pertaining to discipline, and the disposition. All final orders will be signed by the members of the panel, or by the chairperson of the panel on behalf of the panel, and will be filed with the clerk.

(e) Preservation of the Record - The clerk will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The clerk will preserve the record and the pleadings, exhibits, and briefs of the parties.

(f) Discipline - If the charges of misconduct are established, the hearing panel will consider any evidence relevant to the discipline to be imposed.

(1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately pro-

tect the public. The following factors shall be considered in imposing suspension or disbarment:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication;

(J) multiple instances of failure to participate in the legal profession's self-regulation process.

(2) Disbarment shall be considered where the defendant is found to engage in:

(A) acts of dishonesty, misrepresentation, deceit, or fabrication;

(B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;

(C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source; or

(D) commission of a felony.

(3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:

(A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;

(B) remoteness of prior offenses;

(C) dishonest or selfish motive, or the absence thereof;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) indifference to making restitution;

(F) a pattern of misconduct;

(G) multiple offenses;

(H) effect of any personal or emotional problems on the conduct in question;

(I) effect of any physical or mental dis-

ability or impairment on the conduct in question;

(J) interim rehabilitation;

(K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;

(L) delay in disciplinary proceedings through no fault of the defendant attorney;

(M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(O) refusal to acknowledge wrongful nature of conduct;

(P) remorse;

(Q) character or reputation;

(R) vulnerability of victim;

(S) degree of experience in the practice of law;

(T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;

(U) imposition of other penalties or sanctions;

(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(g) Service of Final Orders - The clerk will serve the defendant with the final order of the hearing panel by certified mail, return receipt requested, or by personal service. A defendant who cannot, with reasonable diligence, be served by certified mail or personal service shall be deemed served when the clerk deposits a copy of the order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service addressed to the defendant's last known address on file with the NC State Bar.

.0117 Proceedings Before the Disciplinary Hearing Commission : Posttrial Motions

(a) New Trials and Amendments of Judgments (N.C. R. Civ. 59)

(1) Either party may request a new trial or amendment of the hearing panel's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(2) A motion for a new trial or amend-

ment of judgment will be filed with the clerk no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(3) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(4) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

R. Civ. 60)

(1) Either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(2) A motion for relief from the final judgment or order will be filed with the clerk no later than one year after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(3) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(4) The clerk will promptly transmit the motion and any response to the chairperson of the commission, who will appoint a hearing panel. The chairperson will appoint the members of the hearing panel that originally heard the matter wherever practicable.

(5) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

(c) Effect of Filing Motion - The filing of a motion requesting a new trial, amendment of the judgment, or relief from the final judgment or order under this section will not automatically stay or otherwise affect the effective date of an order of the commission.

.0118 Proceedings Before the Disciplinary Hearing Commission: Stayed Suspension

(a) Procedures: Non-compliance with Conditions - In any case in which a period

of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. The following procedures apply during a stayed suspension:

(1) If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the clerk of the commission specifying the violation and seeking an order lifting the stay and activating the suspension. The counsel will serve a copy of the motion upon the defendant.

(2) The clerk will promptly transmit the motion to the chairperson of the commission. The chairperson will appoint a hearing panel to hold a hearing, appointing the members of the hearing panel that originally heard the matter wherever practicable. The chairperson of the commission will notify the counsel and the defendant of the composition of the hearing panel and the time and place for the hearing.

(3) At the hearing, the State Bar will have the burden of proving by the greater weight of the evidence that the defendant violated a condition of the stay.

(4) If the hearing panel finds by the greater weight of the evidence that the defendant violated a condition of the stay, the panel may enter an order lifting the stay and activating the suspension, or any portion thereof. Alternatively, the panel may allow the stay to remain in effect for the original term of the stay, may extend the term of the stay, and/or may include modified or additional conditions for the suspension to remain stayed. If the panel finds that the defendant violated a condition of the stay, the panel may tax the defendant with administrative fees and costs.

(A) In any order lifting a stay and activating a suspension in whole or in part, the panel may include a provision allowing the defendant to apply for a stay of the activated suspension on such terms and conditions as the panel concludes are appropriate.

(B) The panel may impose modified or additional conditions: (a) which the defendant must satisfy to obtain a stay of

an activated suspension; (b) with which the defendant must comply during the stay of an activated suspension; and/or (c) which the defendant must satisfy to be reinstated to active status at the end of the activated suspension period.

(C) If the panel activated the entire period of suspension, in order to be reinstated at the end of the activated suspension, the defendant must comply with the requirements of Rule .0129(b) of this subchapter and with any requirements imposed in previous orders entered by the commission.

(D) If the panel activated only a portion of the suspension, in order to be returned to active status at the end of the period of activated suspension the defendant must file a motion with the commission seeking a stay of the remainder of the original term of suspension. If the defendant is granted a stay of the remainder of the original term of suspension, the panel may impose modified and/or additional conditions with which the defendant must comply during the stayed suspension.

(5) If the panel finds that the greater weight of the evidence does not establish that the defendant violated a condition of the stay, it will enter an order continuing the stay.

(6) In any event, the panel will include in its order findings of fact and conclusions of law in support of its decision.

(b) Completion of Stayed Suspension; Continuation of Stay if Motion Alleging Lack of Compliance is Pending

(1) Unless there is pending a motion or proceeding in which it is alleged that the defendant failed to comply with the conditions of the stay, the defendant's obligations under an order of discipline end upon expiration of the period of the stay.

(2) When the period of the stay of the suspension would otherwise have terminated, if a motion or proceeding is pending in which it is alleged that the defendant failed to comply with the conditions of the stay, the commission retains jurisdiction to lift the stay and activate all or any part of the suspension. The defendant's obligation to comply with the conditions of the existing stay remains in effect until any such pending motion or proceeding is resolved.

(c) Applying for Stay of Suspension - The



following procedures apply to a motion to stay a suspension:

(1) The defendant shall file a motion for stay with the clerk and serve a copy of the motion and all attachments upon the counsel. Such motion shall be filed no earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion filed earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion unless it is delivered to the clerk and served upon the counsel contemporaneously.

(2) The motion must identify each condition for stay and state how the defendant has met each condition. The defendant shall attach supporting documentation establishing compliance with each condition. The defendant has the burden of proving compliance with each condition by clear, cogent, and convincing evidence.

(3) The counsel shall have 30 days after the motion is filed to file a response.

(4) The clerk shall transmit the motion and the counsel's response to the chairperson of the commission. Within 14 days of transmittal of the motion and the response, the chairperson shall issue an order appointing a hearing panel and setting the date, time, and location for the hearing. Wherever practicable, the chairperson shall appoint the members of the hearing panel that entered the order of discipline.

(d) Hearing on Motion for Stay

(1) The defendant bears the burden of proving compliance with all conditions for a stay by clear, cogent, and convincing evidence.

(2) Any hearing on a motion for stay will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts.

(3) The decision to grant or deny a defendant's motion to stay a suspension is discretionary. The panel should consider whether the defendant has complied with Rule .0128 and Rule .0129 of this section, and any conditions in the order of discipline, as well as whether reinstatement of the defendant will cause harm or potential harm to clients, the profession, the public, or the administra-

tion of justice.

(e) Order on the Motion for Stay - The hearing panel will determine whether the defendant has established compliance with all conditions for a stay by clear, cogent, and convincing evidence. The panel must enter an order including findings of fact and conclusions of law. The panel may impose modified and/or additional conditions: (a) for the suspension to remain stayed; (b) for eligibility for a stay during the suspension; and/or (c) for reinstatement to active status at the end of the suspension period. The panel may tax costs and administrative fees in connection with the motion.

~~.0115~~ .0119 Effect of a Finding of Guilt in Any Criminal Case

~~(a) Criminal Offense Showing Professional Unfitness~~ Any member who has been found guilty of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing professional unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.

~~(b)(a) Conclusive Evidence of Guilt~~ - A certified copy certificate of the conviction of an attorney for any crime or a certified copy certificate of the a judgment entered against an attorney where a plea of *guilty, nolo contendere*, or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member. For purposes of any disciplinary proceeding against a member, such conviction or judgment shall conclusively establish all elements of the criminal offense and shall conclusively establish all facts set out in the document charging the member with the criminal offense.

~~(c) Discipline Based on Criminal Conviction~~ Upon receipt of a certified copy of a jury verdict showing a verdict of guilty, a certificate of the conviction of a member of a criminal offense showing professional unfitness, or a certificate of the judgment entered against an attorney where a plea of *nolo contendere* or no contest has been accepted by the court, the Grievance Committee, at its next meeting following notification of the conviction, may authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the

conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d)(1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

~~(d)(b) Interim Suspension~~ Upon the receipt of a certificate of conviction of a member of a criminal offense showing professional unfitness, or a certified copy of a plea of guilty or no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the commission chairperson may, in the chairperson's discretion, enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension. Any member who has been convicted of, pleads guilty to, pleads no contest to, or is found guilty by a jury of a criminal offense showing professional unfitness in any state or federal court may be suspended from the practice of law as set out below.

(1) The counsel shall file with the clerk of the commission and serve upon the member a motion for interim suspension accompanied by proof of the conviction, plea, or verdict.

(2) The member shall have ten days in which to file a response.

(3) The chairperson of the commission may hold a hearing to determine whether the criminal offense is one showing professional unfitness and whether, in the chairperson's discretion, interim suspension is warranted. In determining whether interim suspension is warranted, the chairperson may consider harm or potential harm to a client, the administration of justice, the profession, or members of the public, and impact on the public's perception of the profession. The parties may present additional evidence pertaining to harm or to the circumstances surrounding the offense, but the member may not collaterally attack the conviction, plea or verdict.

(4) The chairperson shall issue an order containing findings of fact and conclusions of law addressing whether there is a qualifying conviction, plea, or verdict, and whether interim suspension is warranted, and either granting or denying

the motion.

(5) If the member consents to entry of an order of interim suspension, the parties may submit a consent order of interim suspension to the chairperson of the commission.

(6) The provisions of Rule .0128(c) of this subchapter will apply to the interim suspension.

~~(c) Criminal Offense Which Does Not Show Professional Unfairness— Upon the receipt of a certificate of conviction of a member of a criminal offense which does not show professional unfitness, or a certificate of judgment against a member upon a plea of no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the Grievance Committee will take whatever action, including authorizing of the filing of a complaint, it may deem appropriate. In a hearing on any such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d)(1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceedings.~~

In addition to the other powers contained herein, in proceedings before any subcommittee or panel of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the panel contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.

**.0116 .0120 Reciprocal Discipline & Disability Proceedings**

...

[Renumbering all remaining rules and internal cross-references to rules.]

Also at the meeting on April 22, 2016, the council voted to publish the following proposed rule amendments for comment from the members of the bar:

**Proposed Amendments to the Rules on the Organization of the State Bar**

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

The proposed amendments establish the Technology and Social Media Committee as a standing committee of the State Bar Council.

**.0701 Standing Committees and Boards**

(a) **Standing Committees.** Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) Executive Committee. ...

(8) Technology and Social Media Committee. It shall be the duty of this committee to stay abreast of technological developments that might enable the North Carolina State Bar to better serve and communicate with its members and the public, and to develop processes, procedures and policies for the deployment and use of social media and other means of disseminating official information.

(b) Boards ...

**Proposed Amendments to the Discipline and Disability Rules**

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

The proposed amendments to the confidentiality rule in the Discipline and Disability Rules clarify that the State Bar may disclose, after the DHC proceeding is concluded or to address publicity not initiated by the State Bar, the fact that a complaint was filed before the Disciplinary Hearing Commission pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4) because the defendant rejected discipline imposed by the Grievance Committee.

**.0129 [.0133]<sup>1</sup> Confidentiality**

(a) **Allegations of Misconduct or Alleged Disability** - Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or

alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice;

(5) the member files an affidavit of surrender of license; or

(6) a member is transferred to disability inactive status pursuant to Rule .0118(g) [.0122(g)]. In such an instance, the order transferring the member shall be public. Any other materials, including the medical evidence supporting the order, shall be kept confidential unless and until the member petitions for reinstatement pursuant to Rule .0118(c), unless provided otherwise in the order.

(b) Disciplinary Complaints filed pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4)

The State Bar may disclose that it filed the complaint before the Disciplinary Hearing Commission pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4):

(1) after proceedings before the Disciplinary Hearing Commission have concluded; or

(2) while proceedings are pending before the Disciplinary Hearing Commission, in order to address publicity not initiated by the State Bar.

~~(c)(b)~~ Letter of Warning or Admonition

...

~~(d)(e)~~ Attorney's Response to a Grievance

...

[Relettering remaining paragraphs]

**Endnote**

1. The extensive amendments to the Discipline and Disability Rules published above, if adopted, will change the number of this rule and an internal reference in this rule.

**Proposed Amendments to the Continuing Legal Education Rules**

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

Governing the Administration of the Continuing Legal Education Program

The proposed amendments to Rule .1512 clarify that the sponsor/attendee fee charged for each hour of CLE credit is earned for every hour reported regardless of subsequently claimed exemption or adjustment in reported hours. In addition, proposed amendments to Rule .1517 add full-time tribal chiefs and vice-chiefs to the list of lawyers holding political office who are exempt from mandatory CLE.

#### .1512 Source of Funds

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) ...

(b) ...

#### (c) No Refunds for Exemptions and Record Adjustments.

(1) Exemption Claimed. If a credit hour of attendance is reported to the board, the fee for that credit hour is earned by the board regardless of an exemption subsequently claimed by the member pursuant to Rule .1517 of this subchapter. No paid fees will be refunded and the member shall pay the fee for any credit hour reported on the annual report form for which no fee has been paid at the time of submission of the member's annual report form.

(2) Adjustment of Reported Credit Hours. When a sponsor is required to pay the sponsor's fee, there will be no refund to the sponsor or to the member upon the member's subsequent adjustment, pursuant to Rule .1522(a) of this subchapter, to credit hours reported on the annual report form. When the member is required to pay the attendee's fee, the member shall pay the fee for any credit hour reported after any adjustment by the member to credit hours reported on the annual report form.

#### .1517 Exemptions

(a) Notification of Board.

...

(b) Government Officials and Members of Armed Forces. The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly, full-time principal chiefs and vice-chiefs of any Indian tribe

officially recognized by the United States or North Carolina state governments, and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks.

...

(d) Nonresidents.

...

#### Proposed Amendments to the Standards for the Family Law Specialty

27 N.C.A.C. 1D, Section .2400, Certification Standards for the Family Law Specialty

The proposed amendment will permit a family law specialist who was elected or appointed to the district court bench to meet the substantial involvement requirement for recertification if the specialist's service on the bench involved hearing a substantial number of family law cases.

#### .2406 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter; however, for the purpose of continued certification, service as a district court judge in North Carolina, hearing a substantial number of family law cases, may be substituted, year for year, for the experience required to meet the five-year requirement.

(b) Continuing Legal Education - ...

#### Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct

The proposed amendments to Rule 1.0, Terminology, replace the term "Partner" with the more generic and apt term "Principal" and modify the definition of the term to include lawyers who have management authority over legal departments of a company, organization, or government entity. In accordance with this change in terminology, the proposed amendments in the other rules (and the comments thereto) below replace the word "partner" with the word "principal" where appropriate.

#### Rule 1.0, Terminology

(h) ~~"Partner"~~ **"Principal"** denotes a member of a partnership for the practice of law, a shareholder in a law firm organized as a professional corporation, ~~or~~ a member of an association authorized to practice law, or a lawyer having management authority over the legal department of a company, organization, or government entity.

#### Rule 1.17, Sale of a Law Practice

...

#### Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing ~~partners~~ principals of law firms. See Rules 5.4 and 5.6.

#### Rule 5.1, Responsibilities of ~~Partners~~ Principals, Managers, and Supervisory Lawyers

(a) A ~~partner~~ principal in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

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(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a **partner principal** or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

**Comment**

[1] ...

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm or organization, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated **senior partner principal** or special committee. See Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and the **partners principals** and managing lawyers may not assume that all lawyers associated with the firm or organization will inevitably conform to the Rules.

[4] ...

[5] Paragraph (c)(2) defines the duty of a **partner principal** or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. **Partners Principals** and lawyers with comparable authority have at least indirect responsi-

bility for all work being done by the firm, while a **partner principal** or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a **partner principal** or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] ...

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a **partner principal**, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] ...

**Rule 5.3, Responsibilities Regarding Nonlawyer Assistance**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a **partner principal**, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a **partner principal** or has comparable managerial authority in the law

firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

**Rule 5.4 Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, **partner principal**, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) ...

(b) ...

**Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law**

...

**Comment**

[1] ...

[2] There are occasions in which lawyers admitted to practice in another United States jurisdiction, but not in North Carolina, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in North Carolina under circumstances that do not create an unreasonable risk to the interests of their clients, the courts, or the public. ... A lawyer not admitted to practice in North Carolina must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in North Carolina. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is **partner a principal**, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

...

**Rule 7.5, Firm Names and Letterheads**

...

**Comment**

[1] A firm may be designated by the names of all or some of its members, by the

CONTINUED ON PAGE 55

## Law School Briefs

### Campbell University School of Law

**Campbell Law to launch community clinic to support indigent, most at risk**—Campbell Law will add a fourth service-focused clinic to its roster with the addition of the Campbell Law Community Clinic. The new clinic will provide backup legal services free of charge to area nonprofit agencies and their clients when legal issues complicate such important steps as acquiring housing or a new career. A grant of \$150,000 from the Z. Smith Reynolds Foundation that has been matched by other donors is making this effort possible.

The Campbell Law Community Clinic joins a roster of clinical support programs designed to help in key social matters such as bankruptcy (Stubbs Bankruptcy Clinic), the elderly (Senior Law Clinic), and youth who find themselves in trouble (Restorative Justice Clinic).

The clinic will launch in the fall 2016 semester and will immediately support organizations like StepUp Ministry, Urban Ministries of Wake County, and the Raleigh Rescue Mission.

**NCBA's Bohm named director of development at Campbell Law**—Campbell Law School Dean J. Rich Leonard has announced that David Bohm will join the law school as director of development effective May 10. Bohm has served as the assistant executive director of the North Carolina Bar Association (NCBA) since 2008.

At the NCBA, Bohm oversaw a budget and endowment of \$10 million each, coordinated development and strategic planning, and handled the day-to-day administration of the state's largest voluntary legal membership organization.

**NC Supreme Court Chief Justice Martin to deliver commencement address**—North Carolina Supreme Court Chief Justice Mark Martin will deliver the commencement address at Campbell Law School's 38th annual hooding and graduation ceremony on Friday, May 13. The celebration is scheduled for 10 AM at Meymandi Concert Hall at the Duke Energy Center for the Performing Arts in Raleigh.

### Duke Law School

**Bradley named Andrew Carnegie fellow**—Professor Curtis A. Bradley has been named an Andrew Carnegie fellow by the Carnegie Corporation of New York. Bradley, the William Van Alstyne professor of law and professor of public policy studies whose expertise spans the area of international law in the US legal system, the constitutional law of foreign affairs, and federal jurisdiction, is the first Duke University scholar to receive the prestigious fellowship. He will use the \$200,000 award to develop a global project on comparative foreign relations law, a relatively new field of study that his project will help to define. The project will result in a book and a course on comparative foreign relations law.

The Andrew Carnegie Fellows Program was established in 2015 to support high-caliber scholarship that applies fresh perspectives to pressing social and political challenges of the next 25 years, both at home and abroad.

**Duke Wrongful Convictions Clinic client Howard Dudley wins release**—Howard Dudley, a client of the Duke Law Wrongful Convictions Clinic, was released from prison on March 2 after 23 years of incarceration for a crime he didn't commit. Following a hearing in Kingston, Superior Court Judge W. Douglas Parsons called Dudley's 1992 conviction for sexually assaulting his then nine-year-old daughter "an injustice." Having always maintained his innocence, Dudley had rejected a 1992 plea deal and several parole options, because they required an admission of guilt. His daughter also has been insisting he was innocent since shortly after his conviction.

Duke Law faculty, students, and alumni have worked on Dudley's case for years to build the elements of a post-conviction relief motion that could lead to a new hearing. Wrongful Convictions Clinic Supervising Attorney Jamie Lau argued at the March hearing alongside Raleigh attorney Spencer Parris, who worked *pro bono* on the case.

### Elon University School of Law

**National recognition**—Elon Law was

described as a "pioneer" by *U.S. News & World Report* in a feature story on innovative approaches to legal education published in the "Best Graduate Schools 2017" guidebook. Elon Law's first-of-its-kind residency program begins in the fall.

**Distinguished visitors**—Elon Law welcomed this spring prominent figures in law, politics, and media, including *New York Times* US Supreme Court Correspondent Adam Liptak and ESPN Commentator Jay Bilas; Lawrence Lessig, a Harvard professor, former Democratic presidential candidate, and an acclaimed Internet policy pioneer; and Charles Geyh, a professor at the Indiana University Maurer School of Law, who discussed his new book *Courting Peril: The Political Transformation of the American Judiciary*.

**Successful moot court competition**—Forty teams, representing 24 law schools from 13 states, visited Elon Law in April for the Sixth Annual Billings, Exum & Frye National Moot Court Competition. The competition recognizes former chief justices of the North Carolina Supreme Court: Rhoda Bryan Billings, James G. Exum Jr., and Henry E. Frye. A team from Florida Coastal School of Law won the final round before Judge Allyson K. Duncan of the United States Court of Appeals for the Fourth Circuit; Judge William Osteen Jr., chief judge of the United States District Court for the Middle District of North Carolina; and the competition's namesakes.

**Honored student**—Elon Law third-year student Angelique Ryan was named one of the country's 25 "law students of the year" by *National Jurist* magazine. Ryan has worked as a legal extern in the Guilford County Public Defender's Office since December 2014 and as a student attorney in Elon Law's Humanitarian Immigration Law Clinic, and is president of the Elon Law Democrats, vice president of the Immigration Law Society, and an Honor Council Defender, among other affiliations.

### North Carolina Central School of Law

**School of law hosts US ambassadors roundtable**—A panel of five international relations experts came together at NCCU for a round

table discussion of issues and opportunities in American diplomacy and international relations on February 29, 2016.

The panel included: Andrew Young, Brenda Schoonover, W. Robert Pearson, Gwen C. Clare, and Michael Cotter. The discussion was moderated by Attorney Kimberly Cogdell, professor in NCCU's School of Law.

**NCCU School of Law establishes IP Law Institute**—NCCU School of Law is establishing a new Intellectual Property (IP) Law Institute that will provide legal expertise, curriculum, and training for students while serving the public interest. Analytics leader SAS has provided funding to help NCCU launch the institute.

"NCCU's law school is committed to provide education and training in emerging areas of legal practice," said Phyllis Craig-Taylor, JD, dean of the NCCU School of Law. "IPLI will allow us to matriculate practice-ready graduates prepared to address the difficult IP questions in the 21st century."

NCCU's School of Law is one of only 11 law schools certified by the USPTO to offer both a Patent Clinic and a Trademark Clinic. The new institute will work initially with industries in North Carolina, later expanding across the country to help to improve patent quality and protect organizations' intellectual property.

**United States 4th Circuit Court of Appeals at the school of law**—On March 24, 2016, the school of law hosted the US 4th Circuit Court of Appeals. The court heard three cases, giving students an opportunity to see one of the highest courts in the nation in its full capacity. The school's moot courtroom was filled to capacity with students, faculty, government officials, and citizens observing this historic moment.

### University of North Carolina School of Law

**Environmental law center expands**—In partnership with the Duke Energy Foundation, the UNC Center for Law, Environment, Adaptation, and Resources (CLEAR) is now the UNC School of Law Center for Climate, Energy, Environment, and Economics (CE3). The new name reflects the center's expanded mission to become the nation's first law and policy center specifically devoted to the intersection of climate, energy law, environmental law, and economic development. Duke Energy has committed \$200,000 in initial funding and anticipates an additional \$400,000 investment over the following two years that will enable CE3 to hire

## In Memoriam

**Kenneth R. Berglund**  
Cashiers, NC

**Joe Freeman Britt**  
Lumberton, NC

**Blackwell Markham Brogden Jr.**  
Raleigh, NC

**Earl T. Brown**  
Greenville, NC

**Lester Grant Carter Jr.**  
Fayetteville, NC

**Willis Robert Casey Jr.**  
Raleigh, NC

**Cleveland Price Cherry**  
Rocky Mount, NC

**John Martin Cooney**  
Fort Lauderdale, FL

**Lorimer Philip Covington**  
Garner, NC

**Marion Jackson Foster**  
Raleigh, NC

**Jan Stephen Gray**  
Salisbury, NC

**David Ray Guin**  
Louisburg, NC

**Ronnie Lee Jessup**  
Mount Airy, NC

**John Richard Jordan Jr.**  
Raleigh, NC

**Wayne Quay Justesen Jr.**  
Greenwood, SC

**Stephen Dennis Kaylor**  
Shelby, NC

**Charles Cadmus Lamm Jr.**  
Terrell, NC

**Charles Edward Lyons II**  
Charlotte, NC

**Timothy Matthew Mullinax**  
Hendersonville, NC

**David W. Norville**  
Monroe, NC

**John Fulton Pendergrass**  
Pittsboro, NC

**Richard A. Phillips**  
Statesville, NC

**John DeWitt Phillips**  
Birmingham, AL

**Alfred Luther Purrington III**  
Raleigh, NC

**Thomas Billy Rallings Jr.**  
Charlotte, NC

**Neil F. Sandler**  
 Mooresville, NC

**Samuel Stuart Stephenson**  
Lexington, SC

**John Cristwell Stroupe Jr.**  
Hickory, NC

**Ryan Francis Tennant**  
Wilmington, NC

**Mark Stanton Thomas**  
Raleigh, NC

**Thomas Eugene Wagg III**  
Greensboro, NC

**Carl Edison Wallace Jr.**  
Burlington, NC

**Neil David Weber**  
Wilmington, NC

**Robert White Wilson Jr.**  
Emerald Isle, NC

additional staff to assist with planning projects; submitting grants; and developing programs, workshops, and seminars. Funds will also be used to create new courses and provide scholarships to law students.

**Speakers of note**—In April UNC School of Law hosted Jerry Buting (Class of 1981), the defense attorney featured in the popular Netflix docu-series "Making a Murderer," for a Q&A session with Professor Joseph E. Kennedy. Buting spoke to 200 law students

about his time as a student at Carolina Law, his work on the series, and his career as a criminal defense attorney. Sister Helen Prejean visited with students about her career opposing capital punishment, her best-selling book *Dead Man Walking*, and her advocacy for Richard Glossip, who is currently on death row in Oklahoma. Wade Smith '63, one of North Carolina's best known and most acclaimed

CONTINUED ON PAGE 55

# John B. McMillan Distinguished Service Award

## Alex Warlick Jr.

Alex Warlick Jr. was born in Iredell County, NC, to Alex Warlick Sr. and Christine Catharine Shell. He spent his childhood in Catawba County and graduated from Hickory High School in 1948. Mr. Warlick served in the US Navy—both active and reserves—from 1948 to 1956. Mr. Warlick graduated from Lenoir Rhyne College in 1952 and UNC Law School in 1955. After graduating from law school, Mr. Warlick married Marijennie Barringer and began practicing law in Jacksonville, NC. Mr. Warlick has four daughters: Christine, Rebecca, Karen, and Mary Alexis. During his legal career, Mr. Warlick served as city municipal judge from 1960-1968. He served as the attorney for Coastal Carolina Community College for 26 years and the attorney for Onslow Memorial Hospital for 36 years. Mr. Warlick also served as a member of the State Bar Council for three terms. He served on the Grievance Committee and was chair of the Ethics Committee. Upon retirement, Mr. Warlick became a volunteer at Clyde Erwin

Elementary School where he helps students learn to read. Mr. Warlick is an avid outdoorsman. He has backpacked across the entire North Carolina portion of the Appalachian Trail and parts of the trail in Virginia. Mr. Warlick has been an outstanding lawyer his entire career. He has faithfully served his country, profession, and community, and is a deserving recipient of the John B. McMillan Distinguished Service Award.

## Seeking Award Nominations

The John B. McMillan Distinguished Service Award honors current and retired members of the North Carolina State Bar who have demonstrated exemplary service to the legal profession. Awards will be presented in recipients' districts, with the State Bar councilor from the recipient's district introducing the recipient and presenting the certificate. Recipients will also be recognized in the *Journal* and honored at the State Bar's annual meeting in Raleigh.

Members of the bar are encouraged to nominate colleagues who have demonstrat-

ed outstanding service to the profession. The nomination form is available on the State Bar's website, [ncbar.gov](http://ncbar.gov). Please direct questions to Suzanne Lever, [SLever@ncbar.gov](mailto:SLever@ncbar.gov) ■

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## Proposed Amendments (cont.)

names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic."...A firm name that includes the surname of a deceased or retired **partner principal** is, strictly speaking, a trade name. However, the use of such names, as well as designations such as "Law Offices of John Doe," "Smith and Associates," and "Jones Law Firm" are useful means of identification and are permissible without registration with the State Bar. However, it is misleading to use the surname of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired **partner principal** may be used in the name of a law firm only if the **partner principal** has ceased the practice of law.

[2] ... ■

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## Proposed Opinions (cont.)

the firm must cease the employment negotiations or withdraw from the representation. The firm may only withdraw if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b) (1).

A job-seeking lawyer who is only peripherally involved in a client's matter and who does not have confidential client information is not required to seek the client's consent before engaging in substantive employment negotiations with an opposing law firm. ■

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## Law School Briefs (cont.)

lawyers for nearly 50 years, spoke at Carolina Law's commencement in May.

**Banking Institute**—About 200 banking attorneys and other industry professionals attended the 20th annual Banking Institute, held March 31-April 1 in Charlotte. Hosted by the UNC Center for Banking and Finance, sessions covered community banking, mergers and acquisitions, and bankruptcy for bankers.

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## Wake Forest University School of Law

Wake Forest University School of Law has launched a fully online, part-time Master of Studies in Law (MSL) degree for working professionals interested in enriching careers in health law and policy or human resources. The 30-credit hour program, which can be com-

pleted in five semesters, combines the flexibility and accessibility of online learning with the rigor and academic excellence of Wake Forest Law. "We are thrilled to be able to bring a Wake Forest Law education to individuals who would not have been able to take advantage of this unique opportunity solely because of geography," explains Dean Suzanne Reynolds (JD '77). "Our new online MSL program is designed to help professionals reach the next level in their careers." Designed with the input of business and industry leaders, the tailored curriculum combines a foundational understanding of the law and its relevance in the workplace. All courses are specially designed for and taught only to MSL students. The fully asynchronous degree takes advantage of the latest technology to combine flexibility with interactivity and collaborative learning. Learn more at [msl.law.wfu.edu](http://msl.law.wfu.edu). ■

## Client Security Fund Reimburses Victims

At its April 21, 2016, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$196,329.75 to ten applicants who suffered financial losses due to the misconduct of North Carolina lawyers and authorized reimbursement of \$2,500 to one additional applicant if the lawyer has not reimbursed the applicant within 60 days as promised.

The payments authorized were:

1. An award of \$370 to a former client of Garey Ballance of Warrenton. The board determined that Ballance was retained to handle the applicant's daughter's speeding ticket. Ballance failed to provide any valuable legal services for the fee paid. Ballance was disbarred on November 13, 2015.

2. An award of \$700 to a former client of Robert A. Bell of Fayetteville. The board determined that Bell was retained to handle an expungement of a prior conviction for a client. Bell failed to provide any valuable legal services for the fee paid. Bell was transferred to Disability Inactive status on April 10, 2015. The board previously reimbursed four other Bell clients a total of \$9,175.

3. An award of \$2,500 to a former client of Robert A. Bell. The board determined that Bell was retained to handle a client's foreclosure proceedings. Bell failed to provide any valuable legal services for the fee paid.

4. An award of \$81,856.75 to the beneficiary of a guardianship in which Peter C. Capece of Lincolnton was the guardian. The board determined that Capece was appointed guardian for a minor who would receive assets from an estate. In addition to failing in his fiduciary duty to protect the guardianship's assets from the decedent's wife who continued to initiate withdrawals from an annuity she was no longer entitled to, Capece also embezzled funds from the guardianship for his own benefit. Capece was bonded as guardian. The reimbursement was awarded to the adult beneficiary of the guardianship who had reached his majority. Capece was disbarred on May 18, 2015.

5. An award of \$100,000 to a trust of which Peter C. Capece was the former trustee. The board determined that while acting as trustee, Capece embezzled more from the trust than was awarded.

6. An award of \$1,915 to a former client of Ronald T. Ferrell of Wilkesboro. The board determined that Ferrell was retained to file suit on behalf of a client to get the client's home deeded back to her from the client's former power of attorney. Ferrell failed to provide any valuable legal services for the fee paid.

7. An award of \$500 to a former client of Ronald T. Ferrell. The board determined that Ferrell was retained to seek visitation for a client with the child of the client's incarcerated son. Ferrell failed to provide any valuable legal services for the fee paid.

8. An award of \$2,000 to a former client of Derek Fletcher of Charlotte. The board determined that Fletcher was retained by a client to get a NC court to make a hardship finding that might alter her former home state's requirement that she get an interlock system installed before getting her driver's license reinstated. Fletcher provided no valuable legal services for the fee paid. Fletcher was administratively suspended on December 1, 2014. The board previously reimbursed two other Fletcher clients a total of \$8,450.

9. An award of \$2,500 to a former client of Eric Stiles of Murphy. The board determined that Stiles was retained to represent a client on criminal charges. Stiles failed to provide any valuable legal services for the fee paid prior to being arrested on drug charges. Stiles was suspended on an interim basis on December 28, 2015.

10. An award of \$3,988 to a former client of Devin F. Thomas of Winston-Salem. The board determined that Thomas was retained to handle a client's personal injury claim. Thomas received med pay on his client's behalf, but failed to make all the proper disbursements to the medical providers. Due to misappropriation,

Thomas' trust account balance is insufficient to pay all of his client obligations. Thomas was disbarred on April 20, 2016. The board previously reimbursed two other Thomas clients a total of \$42,062.67.

A conditional award of \$2,500 was made to former clients of a lawyer. The board determined that the lawyer was retained by a couple to handle their foreclosure proceeding. Five days after accepting the clients' fee, the lawyer signed an affidavit surrendering his law license. The lawyer attended the meeting and contended that the clients owed him for work performed previously. The lawyer wanted time to pay the applicants himself if the board determined the claim to be reimbursable. The board determined the claim to be reimbursable and gave the lawyer 60 days to pay the applicant himself or the fund would reimburse the clients.

At its meeting in January 2016 the board authorized paying claims of \$32,617 and \$14,500 to two clients of a lawyer if the lawyer didn't pay the applicants himself by February 10, 2016. The lawyer was not able to pay the applicants by the deadline and the applicants were paid by the fund. The lawyer against these claims were made was Donald H. Bumgardner of Gastonia.

Pursuant to the rules adopted by the North Carolina Supreme Court for operation of the Client Security Fund, the Board of Trustees of the Client Security Fund "shall operate the fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately \$1,000,000 is maintained." 27 N.C.A.C. 1D, § .1418(e). Adding uncollected assessment income and investment revenue to the March 31, 2016, fund balance, less anticipated expenses for the remaining fiscal year, leaves the fund balance at \$1,018,000. Thus, reimbursement to the two Peter C. Capece applicants will not be able to be paid until additional funds become available. ■



# July 2016 Bar Exam Applicants

The July 2016 Bar Examination will be held in Raleigh on July 26 and 27, 2016. Published below are the names of the applicants whose applications were received on or before April 28, 2016. 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>Taylor Abbasi</b> Charlotte, NC	<b>Eric Anderson</b> Raleigh, NC	<b>Seth Barefoot</b> Raleigh, NC	<b>Mitchell Blankenship</b> Winston-Salem, NC	<b>Corey Brown</b> Chapel Hill, NC
<b>Andrew Abbasi</b> Charlotte, NC	<b>Christina Anderson</b> Carrboro, NC	<b>Joshua Barfield</b> Jacksonville, FL	<b>Anna Blood</b> Monroe, NC	<b>Lindsey Brown</b> Carrboro, NC
<b>Morgan Abbott</b> Raleigh, NC	<b>Denise Anderson</b> Concord, NC	<b>Katharine Barnes</b> Myrtle Beach, SC	<b>Erik Blowers</b> Matthews, NC	<b>Catherine Brown</b> Wilmington, NC
<b>Mikhaela Ackerman</b> Ararat, VA	<b>Rachel Anderson</b> Charlotte, NC	<b>Andrew Barnhill</b> Wilmington, NC	<b>Marvilyn Bohannon</b> Mebane, NC	<b>Rachel Brunswig</b> Chapel Hill, NC
<b>Gregory Adair</b> Charlotte, NC	<b>Lucas Anderson</b> Nashville, TN	<b>Heather Baron</b> Cary, NC	<b>Tiffany Bolling</b> Charlotte, NC	<b>Hampton Bruton</b> Durham, NC
<b>Taylor Adams</b> Monroe, NC	<b>Jessica Ans</b> Bloomington, IN	<b>Travis Barrett</b> Charlotte, NC	<b>Jessica Boney</b> Winston-Salem, NC	<b>Christopher Bryant</b> Charlotte, NC
<b>Andrew Adams</b> Winston-Salem, NC	<b>Ashlee Aragon</b> Winston-Salem, NC	<b>Julia Bartz</b> Durham, NC	<b>Joshua Bonney</b> Greensboro, NC	<b>John Bryson</b> Raleigh, NC
<b>Jacquelyn Adcock</b> Durham, NC	<b>Kerry-ann Archer</b> Hickory, NC	<b>Omar Bashi</b> Raleigh, NC	<b>Sarah Borns</b> Huntersville, NC	<b>Mollie Buglisi</b> Cape Carteret, NC
<b>David Addison</b> Mebane, NC	<b>Scott Armstrong</b> Waxhaw, NC	<b>Caroline Bassett</b> Arlington, VA	<b>Olivia Bouffard</b> Raleigh, NC	<b>Christopher Bullard</b> Wade, NC
<b>April Adeeyo</b> Durham, NC	<b>Nana Asante</b> Durham, NC	<b>Sara Beauvalot</b> Chapel Hill, NC	<b>Michael Bowlin</b> Charlotte, NC	<b>Jone Bullett</b> Pittsboro, NC
<b>Rafiyat Adegbuyi</b> Silver Spring, MD	<b>Michael Atkins</b> Pikeville, NC	<b>Michael Becker</b> Charlotte, NC	<b>Meghan Boyd</b> Durham, NC	<b>Marcos Bullock</b> Asheville, NC
<b>Shayan Ahmed</b> Kenner, LA	<b>Dana Atkinson</b> Fuquay Varina, NC	<b>Brett Becker</b> Cedar Knolls, NJ	<b>Josiah Bragg</b> Washington, DC	<b>Jonathan Bunker</b> Greensboro, NC
<b>Natia Akins</b> Durham, NC	<b>Kelly Austin</b> Stafford, VA	<b>Latrea Bellamy</b> Charlotte, NC	<b>Matthew Bream</b> Raleigh, NC	<b>Brittney Burch</b> Greensboro, NC
<b>Travis Albea</b> Greenville, NC	<b>Taylor Auten</b> Cary, NC	<b>Victoria Bennett</b> Raleigh, NC	<b>Danielle Brent</b> Greensboro, NC	<b>Christopher Burgher</b> Hillsborough, NC
<b>Lee Albertson</b> Raleigh, NC	<b>Andrew Avram</b> Atlanta, GA	<b>Jordan Bentz</b> Charlotte, NC	<b>Devin Briggs</b> Charlotte, NC	<b>Daniel Burke</b> Chapel Hill, NC
<b>Kelsey Alcide</b> Raleigh, NC	<b>Taimoor Aziz</b> Bunnlevel, NC	<b>Danielle Bernard</b> Chapel Hill, NC	<b>Jeremy Briggs</b> Burnsville, NC	<b>Kirstyn Burleson</b> Charlotte, NC
<b>Kimberly Alderson Tobler</b> Fayetteville, NC	<b>Hurshell Baggett</b> Raleigh, NC	<b>Brett Berne</b> Winston-Salem, NC	<b>Ryan Briggs</b> Mt. Holly, NC	<b>Sherea Burnett</b> Graham, NC
<b>Anna Allen</b> Sneads Ferry, NC	<b>Christopher Bagley</b> Carrboro, NC	<b>ShaKeta Berrie</b> Greensboro, NC	<b>Amanda Brigman</b> Huntersville, NC	<b>Jared Burtner</b> Millersville, MD
<b>Allison Allen</b> Charlotte, NC	<b>Delsie-Anne Bailey</b> Carrboro, NC	<b>Michael Berry</b> Cornelius, NC	<b>Ava Britt</b> Raleigh, NC	<b>Brian Burtram</b> Stem, NC
<b>Caroline Allen</b> Raleigh, NC	<b>Melissa Bailey</b> Austin, TX	<b>Perrell Bess</b> Charlotte, NC	<b>Amanda Brookie</b> Cary, NC	<b>Noal Butler</b> Charlotte, NC
<b>Matthew Allen</b> Asheville, NC	<b>Kaitlyn Bailey</b> Burlington, NC	<b>Kimberley Beyer</b> Glenville, NC	<b>Calvin Brooks</b> Durham, NC	<b>Matthew Butler</b> Chattanooga, TN
<b>Jackeline Ambrose-Muzyl</b> Mint Hill, NC	<b>David Bain</b> Oceanside, CA	<b>Kinnari Bhojani</b> Chapel Hill, NC	<b>Charles Brooks III</b> Waxhaw, NC	<b>Justin Byrd</b> Greensboro, NC
<b>Zeeba Anarwala</b> Raleigh, NC	<b>Erin Ball</b> Chapel Hill, NC	<b>Peter Bigham</b> Charlotte, NC	<b>Jared Brown</b> Chapel Hill, NC	<b>Christopher Byrd</b> Carrboro, NC
<b>Charles Anderson</b> Fuquay Varina, NC	<b>Jordan Ballard</b> Winston-Salem, NC	<b>Brandye Birdsall</b> Elizabeth City, NC	<b>Ryan Brown</b> Greensboro, NC	<b>Mallary Byrd</b> Candler, NC
<b>Danielle Anderson</b> Washington, DC	<b>Thanasis Ballas</b> Clemmons, NC	<b>Joseph Bishop</b> Hope Mills, NC	<b>Blakeney Brown</b> Gastonia, NC	<b>Alana Byrnes</b> Winston-Salem, NC
<b>Howard Anderson</b> Pendleton, SC	<b>Mark Barber</b> Stanley, NC	<b>Milton Blackmon</b> Dayton, OH	<b>Adam Brown</b> Charlotte, NC	<b>Laura Campbell</b> Chapel Hill, NC
<b>Sharlene Anderson</b> Pinehurst, NC	<b>Joshua Barefoot</b> Greenboro, NC	<b>Jennifer Blakeney</b> Charlotte, NC	<b>Kenyada Brown</b> Charlotte, NC	<b>Nicole Cangcuesta</b> Columbia, SC

**Natashia Cannedy**  
 Kings Mountain, NC  
**Rocco Carbone**  
 St. Augustine, FL  
**Emily Carico**  
 Winston-Salem, NC  
**Kyle Carlson**  
 Durham, NC  
**Michael Carpenter**  
 Greensboro, NC  
**Cari Carson**  
 Ann Arbor, MI  
**William Carter**  
 St. Louis, MO  
**Christa Carter**  
 Jamestown, NC  
**Brooks Carter**  
 Garner, NC  
**James Cartner**  
 Statesville, NC  
**Ashlea Carver**  
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**Tyler Chriscoe**  
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**Kirsten Clancy**  
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**John Clark**  
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**Victoria Clarkson**  
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**Zachary Clouser**  
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**Michael Cohen**  
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**Jasmine Colquitt**  
 Durham, NC  
**Paul Comer**  
 Chapel Hill, NC  
**Meghan Coniglione**  
 Charlotte, NC  
**Ian Conn**  
 Birmingham, AL  
**Michael Conners**  
 Hillsborough, NC  
**James Cook**  
 Knoxville, TN  
**Aneshia Cooper**  
 Durham, NC  
**Lacey Coppage**  
 Williamsburg, VA  
**Kellie Corbett**  
 Chapel Hill, NC  
**Catherine Corser**  
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**Jennifer Cotner**  
 San Francisco, CA  
**Carly Couch**  
 Chapel Hill, NC  
**Blake Coulson**  
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**Caitlin Counts**  
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**Alexander Covington**  
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 Winston-Salem, NC  
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**Connor Crews**  
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**Benjamin Cross**  
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**Sabrina Cuadrado**  
 Winston-Salem, NC  
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 Williamsburg, VA  
**Andrea Curley**  
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**John Curtis**  
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**Michael D'Addesi Jr**  
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**Shelvia Dancy**  
 New Bern, NC  
**Mollie Daniel**  
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**Caroline Daniel**  
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**David Darr**  
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**Nicholas D'Auria**  
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**Ashleigh Davis**  
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**Charlotte Davis**  
 Chapel Hill, NC  
**Brandy Davis**  
 Winston-Salem, NC  
**Manuel Davis**  
 Rocky Mount, NC  
**Jason Davis**  
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**Jarrett Davis**  
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**Alicia Davis**  
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**James Davis**  
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**John DeMasi**  
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**Cara Dempster**  
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**Robert Dewese**  
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**Iris DeWitt**  
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**Jaren Dickerson**  
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**Adam Dillard**  
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**Peter Dillard**  
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**Joshua Dingle**  
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**Courtney Dinkins**  
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**Christopher DiSanto**  
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**Cynthia Dixon**  
 Clinton, NC  
**Cristine Dixon**  
 Winston-Salem, NC  
**Bertha Dixon**  
 Browns Summit, NC  
**Lindsay Dobner**  
 Indian Trail, NC  
**Christopher Dodson**  
 Matthews, NC  
**Jonathan Doerr**  
 Charlottesville, VA  
**Patrick Doerr**  
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**Julie Dogan**  
 Bermuda Run, NC  
**Preston Dole**  
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**Eric Dolenti**  
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**Peter Donohue**  
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**Camille Doom**  
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**Jon Douglas**  
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**JoLisa Drayton**  
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**Mary Dudley**  
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**Kathleen Dunn**  
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**Sterling Dunn**  
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**Keith Dunsmore**  
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**Cassandra Duran**  
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**Patricia Duret**  
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**LaFarran Durman**  
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**Kimberleigh Dyess**  
 Fredericksburg, VA  
**John Earnhardt**  
 Raleigh, NC  
**Carlosa Easton**  
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**James Eatman**  
 Raleigh, NC  
**Justin Edge**  
 Bloomington, IN  
**Ashley Edwards**  
 Durham, NC  
**Emily Edwards**  
 Charlotte, NC  
**Lauren Ehlke**  
 Charlotte, NC  
**Adam El-halim**  
 Charlotte, NC  
**Adam Elkins**  
 Troy, NC  
**Samantha Elliott**  
 Fayetteville, NC  
**Joseph Ellis**  
 Fuquay Varina, NC  
**Joseph Ellis**  
 Raleigh, NC  
**Christina Ellison**  
 Washington, NC  
**Samy Elsherbini**  
 Harrisburg, NC  
**Hannah Emory**  
 Durham, NC  
**Olivia Ensign**  
 New York, NY  
**Erin Epley**  
 Lewisville, NC  
**Ashley Escoe**  
 Winston-Salem, NC  
**Ryan Evans**  
 Charlottesville, VA  
**Matthew Everhart**  
 Charlotte, NC  
**Rebecca Ewing**  
 Durham, NC  
**Taylor Ey**  
 Winston-Salem, NC  
**Joseph Ezzell**  
 Mount Olive, NC  
**Anastasia Fanning**  
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**Elena Faria**  
 Charlottesville, VA  
**Bushra Farooqui**  
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**Matthew Farr**  
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**Jennifer Farrell**  
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**Carla Fassbender**  
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**Jennifer Feinstein**  
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**Paige Feldmann**  
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**Danielle Feller**  
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**Sean Fernandes**  
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**Alma Fernandez**  
 Charlotte, NC  
**Raquel Fernandez**  
 Charlotte, NC  
**Joseph Ficarrotta**  
 Chapel Hill, NC  
**Joshua Finney**  
 Huntersville, NC  
**Maggie Fishell**  
 Gastonia, NC  
**Darrilyn Fisher**  
 Durham, NC  
**Amanda Fisher**  
 Lexington, VA  
**Meredith FitzGibbon**  
 Winston-Salem, NC  
**Ashley Flaherty**  
 Charlotte, NC  
**Sidney Fligel**  
 Oxford, MS  
**Macy Flinchum**  
 Chapel Hill, NC  
**Patricia Flood**  
 Chapel Hill, NC  
**Chelsea Flynt**  
 Raleigh, NC  
**Wilson Fong**  
 Climax, NC  
**Sumner Fontaine**  
 New Orleans, LA  
**Catherine Forneris**  
 Mebane, NC  
**Mason Forrest**  
 Louisville, KY  
**Rebecca Forte**  
 Greensboro, NC

**JoAnna Fox**  
Greensboro, NC  
**Brett Fox**  
Huntersville, NC  
**Kayla Frederickson**  
Winston-Salem, NC  
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**Denisha Gatling**  
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**Justin Goforth**  
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**Jeremy Gonzalez**  
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**Rachel Goodling**  
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**Molly-Catherine Goodson**  
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**Dawnielle Grace**  
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**Michael Harrington**  
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**Molly Harris**  
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**Precious Harrison-Cobb**  
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**Paige Harroff**  
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Raleigh, NC  
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**Kimberly Hicks**  
Seaboard, NC  
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**Maryellen Hill**  
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**Laura Holland**  
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**Lily Jenkins**  
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**Symone Knox**  
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**Cameron Lambe**  
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**Rebecca Lawrence**  
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**Wayne Lear**  
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 Washington, NC  
**Benjamin Leighton**  
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**Breeann Mackenize**  
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**Tyson Leonhardt**  
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**Joel Levy**  
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**Gary Lewis**  
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**Ernest Lewis**  
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**Kadija Lewis**  
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**Kaylee Lewis**  
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**Ryan Lifland**  
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**Jasmine Little**  
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**Michele Livingstone**  
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**Anthony Locklear**  
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**Lauren Logsdon**  
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 Garner, NC  
**Bobbie Long**  
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**Giancarlo Lookman**  
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**Aracely Lopez**  
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**Jordan Lowery**  
 Charleston, SC  
**Kyra Lowry**  
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**Holly Luther**  
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**Michael Lynch**  
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**Ta'Juanna Lyons**  
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**Sean Madden**  
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**Patricia Mallory**  
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**Michal Malyszko**  
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**Andria Marquez**  
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**Savanah Marr**  
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**Jessica Marsden**  
 New Haven, CT  
**edward Martin**  
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**Jovanna Mastro**  
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**Ashley McBride**  
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**Sharee McCall**  
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**Nicole McCluney**  
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**Andre' McCoy**  
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**Ryan McIntyre**  
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 Lewisville, NC  
**Chelsea McKay**  
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**Avery McKoy**  
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**Alison Melvin**  
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**Emily Mennel**  
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**Morgan Meyers**  
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**Chandler Michael**  
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**Sean Miles**  
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**Taittiona Miles**  
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**Amanda Miljenovic**  
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**Marcus Miller**  
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**Heather Miller**  
 Fuquay Varina, NC  
**Daniel Miller**  
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**David Miller**  
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**Dominique Mincey**  
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**Shana Moore**  
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**Michael Moore**  
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**Jonathan Morgan**  
 Garner, NC  
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**Cassandra Motley**  
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**Deborah Moy**  
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**Nicole Mueller**  
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**Lindsay Murphy**  
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**Alexander Myers**  
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**Meredith Nall**

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**Nolan Perry**  
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Charlotte, NC  
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**Katherine Reason**  
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**Alexander Rector**  
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**Vania Reyna**  
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**Meghan Rigney**  
Chicago, IL  
**Jeremy Rigsbee**  
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**Heidi Ritt**  
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**Holly Robertson**  
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**Patricia Robinson**  
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**Erica Rogers**  
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**Harvey Rouse**  
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**Angelique Ryan**  
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**Harun Saglik**  
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**Sammy Said**  
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**Miguel San Jose**  
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**Navdeep Sandhu**  
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**Gabriel Scott**  
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