

THE NORTH CAROLINA STATE BAR

# JOURNAL

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2019

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## STATE BAR TO HOST OPIOID SUMMIT ON OCTOBER 4

The North Carolina State Bar is hosting an Opioid Summit on October 4, 2019, at the State Bar Building in Raleigh. The event will be live-streamed and simulcast locally (for CLE credit) by many judicial district bars across the state.

Attendees will hear from experts on the state's response to the opioid epidemic and about the implementation of recovery courts, learn about the science of opioid misuse, and also hear individual stories from lawyers about the disease's impact on family members and clients. Attorney General Josh Stein will open with a keynote address.

This course is approved for 6 hours of CLE credit (4 general; 1 ethics; 1 substance abuse/mental health).

Additional information about the summit will be provided to State Bar members via email.

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Editor's Note: In the Summer 2019 edition of the *Journal*, Bill Powers, author of the article *I Lost a Client*, was incorrectly recognized as a former president of the North Carolina Bar Association. While the author acknowledges that this would be "really nice," he is actually a former president of the North Carolina Advocates for Justice.

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# No Laughing Matter

BY G. GRAY WILSON

The night I was installed into this august office, I remarked that we live in a time of division, where there seems to be no place left for anyone in the middle. I then copped a few lines from “The Middle,” that forgettable yet peppy, preppy android surfer pop tune by that diehard troupe of rock savants, Jimmy Eat World. That was not only a feeble attempt at humor, but also an olive branch to the younger generation, sometimes referred to, either with kudos or bemusement, as millennials. Then I heard a wannabe presidential candidate comment on moderates (i.e., political denizens of the middle) as undesirable losers, about which she had nothing more to offer than, “Meh?” As a proud, prepossessing, card-carrying member of the midway, such derogation leaves me in high dudgeon when it comes to straddling the middle of the road. I believe the compass needs to be reset for the entire profession so that it points magnetic south every time someone takes offense to nearly everything, for no better reason than that he or she can.

But how to restructure the cultural universe? We all struggle with the proper mode of expression in a society ruled by polarity. Is humor a possibility? Internationally syndicated comic strip writer Sandra Bell-Lundy thinks so: “Comics can be an extremely powerful way to express a message.” But on that count, one must first consider historical perspective.

Don Rickles, AKA “Mr. Warmth,” was an insult comedian nonpareil. Bald, Jewish, rotund, he could work a crowd in Vegas like a samurai ronin wielding a ceremonial sword, only the blade was his biting, acerbic, searing wit. He motored around an audience of all classes, races, and genders, spewing all man-

ner of hilarious, riotous characterizations, but always in jest and always received in that vein. The only ones who might be offended were those he inadvertently overlooked. Mind you, he was not into racial epithets or vulgarity, but short of those limitations he was in overdrive from the minute he hit the stage. How did he get away with this stream of invective? I suggest it was because his humanity showed brightly as he hurled abuse around a room full of people desperate to laugh at themselves. No one was spared his sword. Shock comic Andrew Dice Clay could not hold a candle to him, and Clay really is offensive. He is currently touring with Roseanne Barr. I rest my case.

Take a more cerebral stand-up comedian like Lenny Bruce, also a social critic and satirist. His critical spiel was redolent with politics, religion, sex, and vulgarity. He once dressed in drag for yucks, and his onstage sexual fantasies earned him a conviction for obscenity in New York (he was later pardoned). I realize there are outrageous counterculture comedians all over Sirius XM these days, but shock jocks aside, the question is: What chance would Rickles or Bruce have with a diverse audience in 2019?

The answer is, not much. We live in an age of political rectitude, where every perceived or manufactured slight must triumph over levity. The only acceptable middle ground is an anomaly called reality TV, where every media jackass with an attitude gets full play in that great nightly drama, “The Dumbing Down of America to its Lowest Common Denominator.” A host of channels are waiting to take you to a poverty of character and class. So, does that mean that only voicing an opinion blessed by the *New York Times* is the solu-

tion? That might work if courage and integrity took a back seat to the roar of the rabble. But standing silent about a position firmly held is only a delayed recipe for future conflict, not to mention that stifling a viewpoint can be unsettling to the viewer and downright boring to everyone else who might be interested in hearing something bold and wet (apologies to Ferris Bueller).

Enter diplomacy at this point, the wit that parries the sword of conflict with self-effacing tact and compromise. Lawyers do this every day in the courtroom, trying to make chicken salad out of chicken guano, fashioning settlements out of whole cloth, tamping down tempers into reasoned resolution. “The wheels of justice grind slowly, but exceedingly fine” (apologies to Sun Tzu). But cases get disposed of with fire and thunder as well, and every trial lawyer knows what it feels like to be abused or baited by opposing counsel, and perhaps even an occasional judge.

That leaves civility. It is instructive that the Rules of Professional Conduct are essentially silent about this animal. Rule 1.2(a)(2) provides that while it is not a violation of the duty to represent a client zealously by being courteous to others involved in the legal process, it does not mandate such decent behavior. “Adversarial” means what it says—go for the jugular, Carthage must be destroyed, “*vae victis*.” Rule 12 of the General Rules of Practice for the Superior and District Courts at least touches on the subject, limited to courtroom demeanor, admonishing counsel not to engage in “personalities,” which I suppose means you cannot call out the other attorney in open court as a “scrofulous larrikin,” much less a “whey-faced cur,” “foaming, moonstruck octopus,” or “slithy tove.” The rule states, “Counsel are at all times to conduct themselves with dignity and propriety.” It is noteworthy that “abusive language or offensive personal references are prohibited,” but only when dealing with “adverse wit-



nesses and suitors.” Certainly incivility often accompanies and can lead to all manner of ethical breaches that run afoul of the RPCs, but by itself, a certain level of rude behavior is tolerated in a judicial (and social) system based on the constitutional principle of free speech, which continues to be sanctioned everywhere except on college campuses. So we circle back to the specter of political correctness in its most strident form, that one may only opine per the opinion of the daily gazette; to do otherwise is to be shunned, stoned, or worse—endorsed by the Aryan Brotherhood. This is not a novel problem. Albert Camus railed against those who mouthed the screed of the morning journal, boldly proclaiming, “J’ai l’opinion du monde” (I have the opinion of the world).

Camus ought to know. Having survived the Nazi tyranny as a member of the resistance in World War II, he was well familiar with the thought police. But even before the war, he had to look no farther than the Popular Front in the ‘30s, or to the lessons of the French Revolution, during which ideological extremists paid little homage to life, liberty, property, or the rule of law. Separation of powers disappeared as the executive, legislative, and judicial branches were blurred according to the whims of Talleyrand. There was simply no room for those in the middle; they got the guillotine for failing to embrace the madness.

Our fourth Chief Justice of the United States Supreme Court, John Marshall, the veritable “expounder of the Constitution,” was a master of moderation, bridging the political divide on that tribunal, and by extension the nation, by sheer force of personality honed over a lifetime of pragmatism. Over his 34 years on that bench, there were 1,129 decisions, and all but 87 were unanimous. The problems this country faced in its infancy were no less daunting than those we confront today. He was not without his faults (he was an outspoken opponent of slavery, yet owned slaves) or his detractors, which included his cousin Thomas Jefferson. After presiding over the trial of Aaron Burr, a traitor who could not be convicted only because there was no competent evidence against him, Marshall got the blame for the acquittal. In late 1807, he was burned in effigy in Baltimore by an angry mob. Driven by courage and conviction, Marshall soldiered on in his meteoric career, sowing the common ground that would forge a mature

nation. Incidentally, he despised the press.

Fast forward to December 2017. According to the BBC, political correctness is alive and well in the northwestern region of Xinjiang, China, where it is estimated that almost one million Muslims and other questionable or undesirable characters have been sent to schools, AKA “thought transformation camps,” not for criminals, but “pre-criminals,” those citizens who have yet to violate any law, but who are just not in tune with China’s mainstream values and ideologies. The government actually claims to have the ability to identify and determine guilt before a crime is committed, which certainly beats all that due process garbage we are saddled with in the United States of A (apologies to George Bush). These “students” are locked up in high security facilities for months or more, until their cultural impurities can be redirected into government dogma. They wear uniforms, they sing, they dance, they do whatever they are told, or they get sent to a place much worse, where reeducation gets ratcheted up to a higher voltage. Arguments over tariffs pale in comparison.

The Chinese foreign minister tells western reporters that he has never heard of such schools. They are the product of President Xi Jinping’s increasing centralization of power over political, economic, military, educational, and cultural policies. How do they identify those with unacceptable thoughts? We are informed that through the miracle of modern technology, the government is able to monitor the citizenry through cell phone conversations, emails, texts, tweets, and the download of subversive programs like “What’s App.” This cutting-edge surveillance extends to the computer model as well, where emails, chats, and social media are fair game for the minders of acceptable thought, AKA, the brain police. Hitler and Stalin, not to mention the atavistic Mao Zedong, could only have dreamed of such authoritarian efficiency.

So where does that leave the State Bar, or the rest of the unreconstructed in our midst, especially those with law degrees? We could start with the Ethics Committee; not the business that it conducts, but the way it does it. Picture a large room in the State Bar building, ringed with chairs and packed with councilors and advisory members pulled from all elements of the practicing bar. Add those in attendance from the public and you have over 50 present for a long morning of deliberation. The agenda is long, and some of

those present have their own long agendas. But I recently spoke with a former president of a large bar group in this state who shall remain nameless, who informed me that this group was the perfect model for our country. There is intelligent and occasionally heated debate about weighty issues that have a direct impact on what is permissible in the practice of law. The parliamentary jockeying is often torturous, and subcommittees abound. Councilor David Allen from Charlotte presides over this chaos affably and ably, not only because he is a big guy, but because he patiently herds this tangled mass toward a conclusion. And at the end of the day, without the yahoos declaring their truth with a lot of weeping and wailing, the committee makes decisions that everyone agrees to live with, not because everyone endorses the collective result, but because it is a product of politesse, a civil process in which all have had their say. The message is not about carrying the day, but about respect. It is not perfect, but Congress should be sent, a la the breakfast club, to observe how in the Ethics Committee, procedure can be every bit as important as substance. We could just call it a “school” for the politically inept.

Last June, PETA asked the mayor of Caldwell, Idaho, to change the name of Chicken Dinner Road by removing the word “Dinner,” because it was deemed offensive to poultry. First, I absolutely recognize the right of this well-intentioned organization to exercise its First Amendment franchise, and also acknowledge the sincerity of the opinion voiced. But there may be a contrary view about whether or not the sign is patently offensive and needs to be changed. It is not necessarily a matter for mob rule. I don’t know what the mayor did, or whether or how the issue has been resolved, but I think that if this subject fell within its regulatory wheelhouse (which it doesn’t), the Ethics Committee could work it out in a civilized and orderly fashion. As President Thomas Jefferson (himself a shameless Francophile, see above) nevertheless observed in his inaugural address, “Every difference of opinion is not a difference of principle.”

For those whose legal career is forged in the crucible of conflict, most of us become tamed cynics in the end, and along the way, there is even a modicum of enjoyment, riding herd over triumph and failure. Pragmatic

CONTINUED ON PAGE 9

# More Powerful: A Path to Ending the Opioid Crisis

BY JOSH STEIN

Over the last two years that I've been serving as North Carolina's attorney general, I've come to know a number of people with tragic stories about the opioid epidemic. I've met parents like Mike and Becky who lost their son Jonathan to addiction and overdose when he was in his early 20s. Mike and Becky now travel North Carolina to help other people access the treatment resources Jonathan so desperately needed.

I've also met people like Ethan, a young man from Greenville, who experimented with extra pain pills his mother had in the medicine cabinet after her knee surgery. Ethan, once a promising high school student, became helpless to opioid addiction and found himself homeless and living in a Walmart parking lot. Through determination and commitment to treatment, Ethan is now in recovery, has finished an undergraduate degree, and is applying to law school.

It doesn't matter if you live in a rural community or a big city, if you are old or young, if you're rich or poor, or if you are a Democrat or Republican—opioids are leaving a trail of dead and sick people in their wake all across North Carolina. Tens of thousands of our neighbors are struggling, con-

sumed by their dependence on the morphine molecule. Every day, on average, five of them die from an opioid overdose. Since 1999, drug poisoning deaths from opioids in North Carolina increased by 472% from 363 to more than 2,000 in 2017. Drug overdoses are now the number one source of accidental deaths in North Carolina, even more than automobile crashes.

## Economic Cost

There is no way to put a number on the years of pain and suffering a person with addiction or their family endures. Although the human cost of this crisis is incalculable, the President's Council of Economic Advisors estimates that the economic impact of the opioid crisis was more than \$500 bil-



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lion dollars in 2015—a cost that has only grown in subsequent years. There are four main areas in which dependence on opioids is imposing costs: health care, social services, criminal justice, and work productivity.

## Health Care

Much of the health care cost comes through emergency response. Emergency departments are seeing more and more patients for overdose treatment. For every overdose death, there are 16 emergency department visits to treat nonfatal overdoses. Earlier this year, the North Carolina Hospital Association reported that 30% to 80% of emergency beds are used for boarding—a practice in which patients spend days in the emergency department waiting for space to open up in treatment facilities. Some hospi-

als have estimated the average wait time for boarding patients is four days. Emergency departments are an expensive and ineffective alternative for substance misuse treatment, resulting in higher health care costs for all.

Not only are there far too many lives ending due to opioid dependence, there are also too many lives beginning in this same tragic condition. More than one out of every 100 babies born in our state experiences symptoms of drug withdrawal. Those symptoms include difficulty feeding, difficulty sleeping, irritability, and sustained high-pitched crying for weeks. When I visited the NICU at WakeMed to better understand this issue, I was saddened to hear that of the 38 babies in their census that day, eight were suffering from symptoms of withdrawal. The average length of stay for these infants is 19 days at a cost of \$4,000 a day—that is \$75,000. According to the CDC, the national total cost of neonatal abstinence syndrome-related health care was \$1.5 billion in 2012. As the number of babies born drug dependent has risen in recent years, so has the cost.

Other medical expenses include the cost of the massive number of prescription painkillers prescribed—hundreds of millions—and the cost of the other drugs necessary to counter the opioid crisis. This includes anti-constipation medication to combat the side effects of opioids, naloxone which saves lives by countering overdoses, and medication assisted therapies such as buprenorphine, methadone, and vivatrol/naltrexone.

#### *Social Services*

The babies I mentioned who are born with withdrawal symptoms often end up in foster care, as do older children whose parents are struggling with substance abuse disorders. In the fiscal year 2016-2017, parental substance use was a contributing factor in 39% of children entering the foster care system. It has been estimated that for every one child in the system, there are 20 more children living with relatives outside of the system. Many of these relatives are understandably receiving support from government entities and nonprofit organizations. The surge in foster care costs has led to the need for additional social workers and increased child support enforcement. All of these costs are borne by taxpayers.

#### *Criminal Justice*

Likewise, our criminal justice system is straining under the burden of the opioid crisis. Our courts are clogged with criminal

matters involving both drug crimes and property crimes that feed someone's addiction. People and especially retailers are experiencing massive losses due to theft by people struggling with an addiction. Sheriffs tell me that as many as 75% of their jail inmates are struggling with substance abuse disorders. The percentage of prison inmates is similar. It costs North Carolina approximately \$32,000 a year to imprison each inmate. The concerns about the burden of the opioid crisis on law enforcement agencies is real, and it is especially troubling when considering the shortage of law enforcement officers in North Carolina.

#### *Work Productivity*

The largest cost of the opioid crisis is borne by the private sector in lost productivity. When one considers factors of excess sick days, excess disability, diminished job productivity, lost productivity due to incarceration, and lost productivity due to premature death, the impact of the opioid crisis on work productivity is clear. A common complaint I have heard while traveling North Carolina is the jobs are there but the workforce is not. Counties are struggling to retain employers and employees are struggling to retain employees.

#### **Solutions**

Our imperative as a state must be to enable more Ethans and prevent any more Jonathans. It took us a couple of decades to get to this point in the crisis, and we will not get it out of it overnight. Solving the opioid crisis will not be easy, and it will take all of us working together. But with a comprehensive approach that hinges on three legs—prevention, treatment and recovery, and enforcement—we can turn the tide and save lives.

#### *Prevention*

In the 1990s there were two major developments in health care. First, drug manufacturers began advertising pain killers that were effective without the risk of addiction. Second, pain became the fifth vital sign. Doctors and hospitals began to be evaluated by how well they eliminated pain as opposed to managing pain. This led to an increase in the societal demand for prescription painkillers.

Society has paid a steep price. In 2017, over 500 million opioid pills were prescribed and dispensed here in North Carolina. That is more than 50 pills for every man, woman, and child in this state. For some, all it takes

is one prescription to become addicted. The CDC reports that for every day past the fifth day of a prescription, the odds increase dramatically that the patient will still be taking a prescription painkiller a year later. For those who only use a few pills of a large prescription, the rest sit on a bathroom shelf becoming a magnet to a person with addiction or a young person looking to mess around. Nearly two-thirds of young people using opioids get them from family and friends.

In 2017, my office and the legislature took an important first step with the STOP Act (Strengthen Opioid Misuse Prevention Act). The STOP Act reduces the number of unneeded pills in circulation by limiting the number of days for which a doctor can prescribe opioid painkillers. It also requires doctors to (i) check a database before issuing a prescription to reduce doctor shopping and (ii) e-prescribe to reduce prescription pad forgery and theft.

Today there is something each one of us can do to also help with this effort. We can remove dangerous prescription painkillers from our medicine cabinets. My office participates in "Prescription Drug Take-Back" events throughout the year, which are often publicized in local news and on social media. Many law enforcement agencies also hold special collection events for prescription medications. But every day is drug takeback day—every county in North Carolina has a number of permanent drop boxes where prescriptions and over-the-counter medications can be placed for safe disposal year-round. You can find more information on permanent drop boxes and special events at [morepowerfulnc.org](http://morepowerfulnc.org).

In addition to changing the way opioids are prescribed and removing unneeded pills from circulation, prevention should also include educating people who might misuse prescription drugs. In particular, we need programs aimed at young people. More than 20% of North Carolina's 11th graders reported taking a prescription drug last year without a doctor's prescription. They believe prescription drugs are safer for experimentation because a doctor prescribed them and the FDA approved them.

We have to find creative ways to educate and engage our young people, and we need to start in middle school or even elementary school. It takes time, resources, and effective messaging, but we have seen successes in the past in changing young people's behavior

with regards to teen smoking, drunk driving, and using a seatbelt. Now we need to see the same success regarding opioid misuse.

### *More Powerful NC Campaign*

With all of this in mind, North Carolina's Department of Health and Human Services Secretary Mandy Cohen and I worked to create the More Powerful NC campaign. Along with other state agencies, including the Department of Public Instruction and the Department of Insurance, and a public/private partnership with some of North Carolina's leading healthcare companies, we are working to educate people about the opioid epidemic. We hope that these advertisements will lead more people to safely dispose of unneeded medication and talk to their doctors about the risks associated with these drugs.

### *Treatment and Recovery*

Prevention is about turning off the spigot so fewer people become addicted in the first place. But because addiction can happen so quickly and has become so common, effective treatment is critical. There are tens of thousands of people suffering from substance use disorders who need help reclaiming their lives, but only one out of six receive any kind of treatment. We would not accept a health care system where 84% of patients with heart disease or diabetes can't get treatment. Yet this is precisely what is happening today with substance use disorder.

The lack of resources to meet the need is tragic. Research shows that medication-assisted treatments have proven to be effective in addressing addiction and promote recovery, especially when paired with effective therapy and community support. More people today live in stable recovery than live with addiction. Unfortunately, right now there simply aren't enough treatment programs around the state. Funding for these programs is wholly inadequate. Treatment is something we simply must value more. Studies have shown that states with expanded Medicaid coverage under the Affordable Care Act are able to provide more resources for treatment programs than those without Medicaid expansion.

### *Enforcement*

The third leg of the stool, enforcement, looks at effectively enforcing our criminal laws on this issue. We must aggressively go after the drug traffickers and dealers. People who profit off others' misery and death must be punished. My office convened a task force of key

federal, state, and local law enforcement representatives to make sure they have the tools and resources needed to reduce the diversion of prescription drugs into the drug trade and to stem the flow of heroin, illicit fentanyl, and other dangerous drugs into our state.

In 2018, in partnership with our task force, my office helped draft and pass the HOPE Act (Heroin and Opioid Prevention and Enforcement Act), which became law last June. This legislation gives law enforcement officers and agencies additional resources to investigate and prosecute opioid-related crimes and hold opioid dealers and traffickers accountable. Another piece of legislation we supported, the Synthetic Opioid Control Act of 2017, also helps law enforcement officers and agencies by allowing them to go after fentanyl traffickers no matter which derivative of this drug they are selling.

There is a difference, however, between someone who pushes opioids on people and someone who has substance use disorder. Jail time is usually not the best way to treat addiction, and at four times the cost, prison is certainly less cost-effective than treatment. Plus, helping someone treat their addiction so they get well is better not only for the individual, but also their family and the community.

A growing number of law enforcement agencies are telling me we cannot arrest ourselves out of this crisis. Instead, they are developing innovative programs to divert people into treatment. In Fayetteville they have LEAD, in Nashville they have the HOPE Initiative, and in Orange County they have the CORE program. I am sharing these models across the state, encouraging other law enforcement agencies to innovate and develop their own program. I am hopeful that we will see more programs that move people out of the criminal justice system and into the health care system.

Additionally, I am working with law enforcement to make sure police departments and sheriffs' offices have access to naloxone. Naloxone is a miracle drug that reverses an overdose without any side effects and it is not addictive. It has been administered 6,000 times by community members and first responders to save lives. For the past two years, North Carolina saw more overdose reversals due to this drug than deaths from opioid overdoses—a cause to celebrate.

### **Conclusion**

I'd like to close with one more story. Last

year I met a woman named Gina. In her early 20s, she suffered a sports injury for which she was prescribed opioid painkillers. After that initial prescription, Gina struggled for years with an addiction to prescription opioids and eventually heroin. During that period, Gina overdosed a number of times and was brought back by naloxone each time. At 31, Gina began working with a peer outreach counselor who encouraged her to seek treatment. Eventually she did. Today, Gina is in long-term recovery and serves as a peer outreach counselor herself, helping others to get the treatment she did.

Gina, Ethan, Mike, Becky, and so many others are the inspiration that drives us to prevent people from becoming addicted in the first place and to help those who are to find hope in recovery. Even as the crisis grows, we are making progress. As your attorney general, I'm committed to continuing to do my part alongside you. Together we can make North Carolina safer and stronger, because together we are more powerful than opioids. ■

*Josh Stein was sworn in as North Carolina's 50th attorney general in 2017. As attorney general, he is focused on protecting North Carolina families from crime and consumer fraud. Stein previously served as a state senator and as senior deputy attorney general in the North Carolina Department of Justice. Stein grew up in Chapel Hill, is a graduate of Dartmouth College, and earned law and public policy degrees from Harvard University.*

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## **President's Message (cont.)**

compromise is not synonymous with weakness or failure of principle, but the myopic pursuit of ideology regardless of the long-term consequences can spell disaster. Respect is the engine of enlightened human behavior, as well as jurisprudence. It is the recognition and acceptance that lawyer jokes are not nearly as important as the gospel of fair play, and that in the final analysis, beyond humor and political sanctimony, there is only the law. Even Don Rickles knew that. ■

*G. Gray Wilson is a partner with the Winston-Salem firm of Nelson Mullins Riley & Scarborough LLP.*

# IDS Offers Important Resources for Public Defense

BY THOMAS MAHER, TUCKER CHARNS, SARAH OLSON, ERIC ZOGRY, & ROBERT SHARPE

A robust public defense system is an important part of criminal justice. Many people, including working people, cannot afford to hire an attorney if they are brought into the criminal justice system, whether they face minor charges for a first offense or more serious charges that can result in significant punishment. In North Carolina we rely on private attorneys and full time public defenders to provide effective representation. The role of the Office of Indigent Defense Services (IDS) and our IDS Commission is reflected in our mission statement: Safeguarding individual liberty and the Constitution by equipping the North Carolina public defense community with the resources it needs to achieve fair and just outcomes for clients.



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At IDS we not only advocate that the General Assembly provide the financial investment needed to provide a sustainable rate of compensation and manageable workloads for the attorneys, investigators, paralegals, and other support staff who work for clients, we also work to provide important resources that enhance the experience and skills of those professionals. Those resources include an online system for obtaining expert immigration advice about the consequences of a conviction

(which is available at [bit.ly/2X47zHP](http://bit.ly/2X47zHP)), extensive brief and motions banks, and practical training offered by the defender educators at the School of Government. This education increases the skill level of attorneys representing children in the delinquency system, parents in child welfare cases, and adults through all stages of the criminal justice system. This article will explore some of the specialized resources available for those working in public defense.

## Regional Defenders

IDS contracts directly with private attorneys in a number of counties, and regional defenders provide resources to those attorneys to assist them in defending their clients. Regional defenders are experienced attorneys who work full time to support the defenders working in the contract system. This support includes providing written materials, working with the local courts, handling client and family concerns, trainings, and one-on-one consults.

Perhaps the best resource a regional defender can provide is one-on-one consults with the contracting attorneys. A great number of contracting attorneys are solo practitioners and do not have another lawyer with whom they can brainstorm or even just ask a procedural or legal question. Regional defenders can provide a quick response or have a day-long consult. This has been done with charges as varied as DWIs, assaults, child sex cases, trafficking, habitual felon, and first degree murder cases in which the client was under the age of 18 at the time of the alleged offense. Regional defenders can assist attorneys in triaging their cases. They can identify when an attorney is overwhelmed and may need to take a break from being assigned new cases. They can also evaluate when a newer attorney is ready to take on more serious work, and so help bring up the next generation of trained lawyers.

Regional defenders also work to support the contract defenders as a whole. The UNC School of Government produces manuals that provide important information for defenders, and every year IDS distributes those manuals and other publications to the contract attorneys. The most recent ones are *Probation Violations* (Markham), *The NC Sentencing Chart*, *The NC Sentencing Handbook* (Markham and Denning), *In Prison: Serving a Felony Sentence in North Carolina* (Markham), *Pulled Over: The Law of Traffic Stops and Offenses in North Carolina* (Denning, Tyner, Welty), and *Defense Motions and Notices in Superior Court* (Dixon).

Because IDS regional defenders are regularly in the local courthouses they cover, they can assist the courts, clerk offices, and district attorneys with any issues that arise with the contracting attorneys and with scheduling. For example, one district had the contract attorneys complete the affidavits of indigency for defendants applying for court-appointed counsel. Sometimes the hours could not be billed. The regional defender met with the court and the clerks and explained that this was not the best practice as it was an unnecessary burden on the attorneys, and could also make them witnesses against a client. The practice ended.

Clients in counties covered by regional defenders are now able to reach out to someone besides a judge when they have concerns about an attorney. The local regional defender does not discuss any of the facts with the

client, but does explain some processes and can reach out to the attorney without the danger of any court or prosecutor getting involved in the attorney-client relationship. Additionally, family members can relay concerns as well as praise about a lawyer, again absent of any contact with the court or the prosecutor.

Also in conjunction with the UNC School of Government, IDS regional defenders have a day-long CLE every year in June for the contracting attorneys. These programs have included topics about trial skills, client-centered representation, sentencing issues, bond advocacy, defending accusations of sex crimes, DWIs, use of experts, and race issues in the criminal justice system. This time also allows for the contracting attorneys to meet their counterparts from other districts and discuss their challenges and successes. The regional defenders have also conducted local, small trainings in the counties they cover.

#### Forensic Resource Counsel

The Office of Indigent Defense Services provides assistance to attorneys litigating complex scientific evidence issues through its forensic resource counsel, Sarah Rackley Olson. Faced with evidence ranging from cell phone geolocation data to partial fingerprints to complex mixtures of DNA, new and seasoned defenders frequently encounter scientific evidence that is unfamiliar to them. According to the NAS Report, “[l]awyers and judges often have insufficient training and background in scientific methods, and they often fail to fully comprehend the approaches employed by different forensic science disciplines and the strengths and vulnerabilities of forensic science evidence offered during trials.” Nat’l Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, 238 (2009).

The defense community needs resources to efficiently assess evidence and effectively advocate for their clients in order to ensure fair and just outcomes in cases. Without defenders who understand scientific evidence, the risk of unreliable evidence being presented in court increases. In a study of DNA exonerations, over half of innocent people were convicted based on flawed, overstated, or unreliable forensic evidence. See generally Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful*

*Convictions*, 95 VA. L. REV. 1 (2009).

Sarah works with public defenders, private appointed counsel, investigators, mitigation specialists, experts, and other members of the defense team to improve understanding of forensic science evidence and achieve better case outcomes. Sarah provides forensic consultations at no cost to members of the public defense community on cases in district and superior court and North Carolina’s appellate courts. She consults on hundreds of cases each year. A consultation may be a quick phone call to identify appropriate experts in a case, where Sarah walks counsel through a database with information about over 500 forensic experts (available at [ncids.com/forensic](http://ncids.com/forensic)). Other consults are more in-depth and involve a review of laboratory reports or other evidence, working with the attorney to answer questions about methods used, to provide assistance with litigating challenges to unreliable forensic evidence, and to review of transcripts of expert testimony.

Sarah has received over 1,000 hours of continuing education training on forensic evidence, which is an asset to attorneys who may not have taken even one course on scientific evidence in law school. Sarah works to make scientific concepts accessible to attorneys, investigators, judges, and jurors who may not have a scientific background, yet are tasked with making important decisions about the reliability of scientific evidence. Sarah is a regular speaker at continuing legal education programs, and develops live and online content to keep the defense community up to date on the latest information related to scientific evidence.

Members of the defense community confronting complex scientific evidence should reach out to IDS for assistance. The forensic resource counsel is equipped to meet the needs of the defense community with respect to scientific evidence so that defenders are prepared to litigate issues and obtain more fair and just outcomes for their clients. The value of forensic resource counsel was recently recognized in the Albany Law Review, which saw this position as a “progressive model” for assisting counsel:

Forensic resource counsel has been proposed in other contexts and even exists in North Carolina. There, the Office of Indigent Services created a model “to assist North Carolina public defenders and private appointed counsel in understanding and if appropriate, challenging

the forensic science evidence in their cases.” North Carolina’s forensic resource counsel offers an extensive website with resources, publications, practice tips; an expert database; sample motions; and even case consultation.

### Juvenile Defender

The Office of the Juvenile Defender (OJD) was formed in 2005 as a result of a study by the American Bar Association highlighting severe deficiencies in the quality of juvenile defense counsel statewide. OJD addresses these deficiencies in four parts: by providing services and support to defense attorneys, evaluating the current system of representation and making recommendations as needed, elevating the stature of juvenile delinquency representation, and working with other juvenile justice actors to promote positive change in the juvenile justice system.

The bulk of OJD’s work focuses on providing training and technical support to juvenile defenders. Every year OJD collaborates with the UNC School of Government to offer a day long juvenile defender training, as well as a biannual intensive juvenile defender training. OJD also works with other entities such as the North Carolina Advocates for Justice to provide live and virtual educational opportunities, as well as local bar associations and other state, regional, and national attorney organizations.

OJD provides support to attorneys by regularly consulting on trial, appellate, and post-disposition matters. Juvenile defenders contact the office on matters ranging from procedural issues to substantive law and policy questions. OJD co-authored the first *School of Government’s Juvenile Defense Manual* and assisted with the 2017 update. OJD manages a blog and listserv to provide materials and advice to juvenile defenders, as well as hosts a website, a Facebook page, and creates podcasts on issues pertinent to juvenile defense. OJD maintains a clearinghouse of written and electronic materials, and has produced several practical guides on improving the representation of juveniles. Additionally, OJD strives to demonstrate best practices through direct representation by Assistant Juvenile Defender Kim Howes. Ms. Howes carries a small caseload in Wake County.

On December 1, 2019, juveniles aged 16 and 17 at the time of their offense will be processed in juvenile court for the first time since 1919. Due to the increase in caseloads,

and the changes and additions to the law, OJD will be preparing for implementation in three ways. As a result of a federal grant awarded to IDS, OJD has hired a project attorney to manage a leadership and training network to prepare attorneys for the change and build a stronger community. OJD is also reviewing the delivery of services in the state and recommending changes to accommodate for the increased population. Lastly, OJD is working with stakeholders to consider policy changes to adapt to the new laws and procedures.

OJD is staffed by the juvenile defender, the assistant juvenile defender, a communications and office manager, and a grant-funded project attorney.

### Office of the Capital Defender

The Office of the Capital Defender (OCD) provides direct client representation to defendants charged with first-degree murder, with the exception of those who are too young to face the death penalty. In addition, OCD manages the roster of private counsel who accept appointment to these cases. OCD recruits qualified counsel to join the capital roster, and monitors the counsel on the roster to ensure that they have manageable caseloads and are able to provide effective representation in these cases, in which all of the clients face the possibility of a sentence of life without parole, and a significant number of the clients face the possibility of a death sentence. OCD handles a significant volume of appointments, appointing qualified counsel in over 500 cases every year in which the death penalty is a possible punishment. OCD also reviews a high volume of requests for funding for experts, including mitigation specialists and investigators, and works to control the cost of these difficult and complex cases by screening requests to have cases designated as exceptional and consulting with the defense team in cases in which a pre-trial budget is set by IDS.

While most people may be aware of OCD’s role in providing direct representation and in managing the capital roster, few are aware of the services provided to private attorneys by the OCD. These services are designed to further Indigent Defense Service’s mission in a fair and economical manner.

One such service is case consultation. First degree murder cases, particularly those for which the state may seek the death penalty, require specialized skills and training to

avoid the numerous pitfalls of ineffective assistance of counsel. The OCD offers telephonic and in-person consultations with experienced staff members for all private bar attorneys handling such cases. Indeed, such a consultation is required in every case in which the attorney or certain key experts are approaching spending limitations as well as for every case in which the state has announced its intention to seek the death penalty. OCD staff will also meet with defense counsel shortly before the start of any capital trial and work with counsel on their preparation for jury selection and other issues in the case.

In addition to the direct support offered by OCD to defense counsel on individual cases, OCD works to create and provide effective and meaningful training on the issues faced in capital litigation. OCD has presented training on the specific issues that counsel face in selecting jurors in capital cases, issues that only arise in trials in which the state is seeking a death sentence. OCD also creates and provides training designed to help lawyers who have significant experience in serious felony representation to begin to take on potentially capital cases, and also provides an annual training to capital defense attorneys. As a further effort to provide resources to the capital bar, OCD maintains a website that includes important forms, representation guidelines, and other resources. The website can be found at [ncids.org/CapitalDefender](http://ncids.org/CapitalDefender).

### Conclusion

This article has highlighted some of the specialized resources available to lawyers who provide public defense. For additional information, contact IDS. ■

*Thomas Maher is the executive director of the Office of Indigent Defense Services and works with IDS staff to provide needed resources to the public defense community. Tucker Charms is the chief regional defender for IDS and works in the field with attorneys to assist them in providing effective representation to their clients. Sarah Olson is the forensic resource counsel for IDS and works to help attorneys master forensic science issues in their cases. Eric Zogry is the juvenile defender and works with other staff in the Office of the Juvenile Defender to provide resources to the juvenile defense community. Robert Sharpe is the capital defender and works with the staff of the Office of the Capital Defender to support the capital defense community.*

# Murder on Birchleaf Drive: A Book Review

BY JUSTICE ROBERT EDMUNDS JR.

Steve Epstein is known as a speedy runner (frequently winning the Bar Association's run at its annual convention) and as a talented litigator. He can now add "accomplished writer" to his resume.

The broad outline of the story he tells in *Murder on Birchleaf Drive* is familiar to most North Carolina lawyers, especially those in the Triangle, where it was front-page news for the years it took the case to wend its way through the legal system. While Jason Young was away on a business trip, his pregnant wife Michelle Young was savagely beaten to death in their home. Their two-year old daughter, Cassidy, was discovered unharmed, nestled beside her mother's body. "She's got boo boos everywhere," Cassidy said when found.

Circumstantial evidence pointed toward Jason as the perpetrator. Investigators theorized that he had checked into a Hampton Inn in western Virginia, propped open one of the hotel's side doors so he could slip in and out unseen, disabled the security camera, drove back to Raleigh, killed Michelle, then returned to the hotel in time for his scheduled meetings the next day. In light of Jason's volcanic temper, his dalliances with other women, and his potential gain from a large double-indemnity insurance policy on Michelle's life, the evidence detailed in Epstein's recitation looked strong.

But the case was hardly airtight. Despite extensive searching, no blood was found in Jason's car and no fibers from the hotel car-

peting were found at the murder scene. Though Michelle had been struck numerous times with something like a baseball bat or a pipe, no murder weapon was ever recovered. Michelle's body bore unmistakable signs of resistance, but no marks were found on Jason other than a bruise on his toe.

DNA from cigarettes found in the Young home matched no one, and witnesses claimed to have seen unidentified vehicles at the scene around the time of the crime.

The portions of Epstein's narrative relating to the legal proceedings will be catnip for North Carolina lawyers. Jason was charged with first-degree non-capital murder. Veteran Wake County Judge Don Stephens presided. Jason was represented by then-Public Defender Bryan Collins along

with veteran criminal attorney Mike Klinkosum. The prosecutors were Wake County Assistant District Attorneys Becky Holt and David Saacks. Other familiar names involved at various points in the case were Alice Stubbs, Roger Smith Jr., Sheriff Donnie Harrison, Joe Zeszotarski, and Judge Paul Ridgeway.

The trial unfolded predictably until the end, when, to the surprise of the prosecutors, Jason testified on his own behalf. He proved to be an effective witness as he denied any part in the crime. Caught off guard and given little time to prepare, the prosecution's cross examination was ineffective. In closing arguments, defense counsel hammered on the loose ends in the state's circumstantial case. The jury hung 8-4 in favor of acquittal.

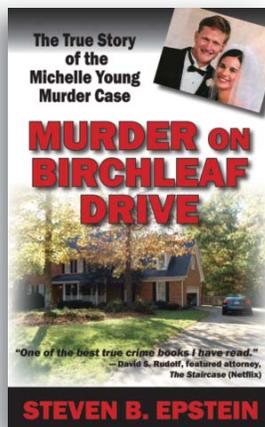
Judge Stephens presided over the retrial. The state's lead counsel for the retrial was veteran Assistant District Attorney Howard Cummings, teamed with Becky Holt. Bryan Collins and Mike Klinkosum again represented Jason. New evidence was presented. Though Jason did not testify in the retrial, the prosecution played to the jury a video of his testimony at the first trial, then systematically demolished several of the claims he made.

Perhaps most sensationally, the state presented for the first time evidence of a parallel wrongful death case Michelle's mother had brought pursuant to the "slayer statute" to preclude Jason from recovering over \$4 million in life insurance proceeds. The jury heard that Jason had defaulted and that Judge Stephens, also presiding over that civil matter, had entered a judgment declaring that Jason killed Michelle.

The second jury found Jason guilty. On appeal, Jason's new counsel cited for the first time an 1868 statute apparently limiting the use of civil pleadings in a criminal case. The court of appeals ordered a third trial. The Supreme Court of North Carolina, however, allowed discretionary review and reversed the court of appeals. Judge Paul Ridgeway heard and denied Jason's claims of ineffective assistance of counsel. Jason is now serving his life sentence.

In this maiden effort, Epstein brings a litigator's sensibilities to one of the state's most notorious murder cases. We see through his eyes the strengths and weaknesses of the case with which both the prosecutors and the defense attorneys had to contend. Though a trial is designed to be a search for truth,

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# Employment Screening for Paralegals, Office Staff, and Other Nonlawyer Assistants

BY JOHN WINN AND KEVIN GOVERN

**P**aralegals, law clerks, and nonlawyer office assistants assume responsibilities not generally encountered in most workplaces except for perhaps clinical healthcare employees.<sup>1</sup> Nonattorney law firm employees must be profession-



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al and discreet when interacting with clients, witnesses, outside counsel, police, judges, and many others.

Under Rule 5.3(b) of the North Carolina Rules of Professional Conduct (RPC), “a lawyer having direct supervisory authority over a nonlawyer staff member is obligated to ensure that the conduct of the nonlawyer is compatible with the professional obligations of the lawyer.”<sup>2</sup> As extensions of the firm itself,<sup>3</sup> office staff have access to privileged and confidential information<sup>4</sup> and may engage in limited administrative services for clients.<sup>5</sup>

Under N.C. Gen. Stat. § 84-4,<sup>6</sup> it is unlawful for anyone but a licensed North Carolina attorney to practice law.<sup>7</sup> Therefore, supervising counsel must ensure nonlawyer employees do not engage in unauthorized legal practice<sup>8</sup> and perform responsibilities within applicable limits. As a practical matter, the trustworthiness and reliability of non-

lawyer paralegals, secretaries, law-student interns, investigators, and others should be comparable with that of attorneys themselves.

The intrinsic risks associated with law office employee misconduct or negligence includes possible bar discipline,<sup>9</sup> reputational harm, adverse judicial rulings,<sup>10</sup> criminal charges,<sup>11</sup> and even tort liability.<sup>12</sup> In order to mitigate risks, due diligence begins well before a hiring decision is made. While predicting future malfeasance by any single employee is impossible, effective “backgrounding” significantly decreases the risks of a “bad hire.” At the same time, employee backgrounding must comply with federal, state, and local laws as well as industry or government standards for some corporate counsel or government contractors.<sup>13</sup> It is there-

fore not difficult to see why supervising counsel (or sole-practitioners) engaged in the hiring process need a solid working knowledge of laws and regulations affecting background screening and investigation.

## Background

Generally, the greater the potential harm from a breach of trust or negligence, the greater the depth of inquiry needed to screen prospective employees. Responsible people accept rules and regulations, respect authority, and deal honestly with others. They exercise sound judgment and think before acting. They avoid alcohol abuse and illicit drugs, criminal activity, and financial irresponsibility. Effective screening not only narrows the liability gap from negligent, incompetent, or mali-



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cious hires,<sup>14</sup> it also yields indirect advantages from reduced administrative and staff costs including absenteeism, theft, and turnover. Comprehensive employment screening should provide a “whole-person” assessment of both positive candidate attributes and potentially disqualifying behaviors. Unfortunately, there is no specific threshold at which point one may categorically approve or disapprove any single candidate.

When evaluating applicant files, single instances of prior misconduct may be obvious aberrations or highlight long-term unreliability. Patterns and combinations across multiple perspectives of character and conduct equate to more than the sum of the whole. Law firms should always bear in mind that trustworthiness and competence are of equal importance in filling critical positions. Expedience must never overcome careful deliberation in evaluating candidate suitability. Human resources professionals often caveat the risk of “halo effects”<sup>15</sup> by which certain candidate traits lead to either jaundiced or overly optimistic assessments. Applicants with positive personality traits such as friendliness or physical

attractiveness are often granted greater tolerance for derogatory information than better qualified candidates perceived as unfriendly or unattractive.<sup>16</sup> This type of subconscious bias should never result in denial of employment.

### **Criminal History and Arrests**

Sources estimate that US businesses affected by employee theft lost an average of \$1.13 million in 2016.<sup>17</sup> A 2017 survey of human resource professionals found that nine of ten employers run criminal background checks on applicants as part of the hiring process.<sup>18</sup> According to the Bureau of Justice Statistics, about 30% (92 million people in America) have criminal histories.<sup>19</sup> Within the human resources community, the generally accepted consensus is that “past behavior is the best predictor of future behavior.”<sup>20</sup> Previous misconduct is in fact the only clinically accepted predictor of future criminal behavior, recidivism, or violence.<sup>21</sup> This holds true whether prior offenders are mentally disordered or free of psychosis.<sup>22</sup> No satisfactory research suggests what time lapse (in years) is sufficient in assessing when a previous offender no longer represents a threat for recidivism.<sup>23</sup>

Although North Carolina, like many states, imposes no statutory duty upon employers to check the criminal records of potential employees,<sup>24</sup> it is folly not to do so. However, precluding every applicant who made a rash decision or youthful mistake is unnecessary (and probably unlawful).<sup>25</sup> Focus should remain upon “conduct” and not “the record.”<sup>26</sup> For example, an otherwise qualified applicant with a prior conviction for driving while intoxicated (DWI) may be acceptable, even exceptional for an unfilled position.<sup>27</sup> On the other hand, a candidate listed as a sex offender may be given consideration but will probably always carry some downstream burden of third-party liability risk.<sup>28</sup> Despite (federal) EEOC guidance<sup>29</sup> discouraging consideration of arrests (as opposed to convictions), no federal statute or agency regulation categorically prohibits consideration of previous arrests for employment purposes.<sup>30</sup> Nor is there any controlling state or federal case law to this effect.<sup>31</sup> While caution is counseled when doing so, applicant arrests records, in particular *multiple* arrests, is a valid reason for concern. If not otherwise prohibited by state law, repeated arrests for antisocial behaviors

(e.g. disorderly conduct, public intoxication, affrays, etc.) occurring within the previous five or ten years should, at minimum, be the basis for further inquiry or discussion.<sup>32</sup>

Employers should also bear in mind that state and federal crime databases are never up to date. Even the FBI admits that final disposition information for approximately 50% of records are missing.<sup>33</sup> State records are also often incomplete as many jurisdictions rely upon data sourced from correctional agencies. Sex offender registries are also problematic.<sup>34</sup> If an applicant was convicted of a criminal offense but never incarcerated, “no records found” reports are common. Also important, many third party background investigative screening services limit criminal records searches to state databases or restrict inquiries to the previous seven, ten, or 15 years. Comprehensive criminal screening includes cross checking federal, state, and county databases using full names (including middle name), Social Security numbers, birthdates, prior addresses, as well as driver’s license information.<sup>35</sup>

### **Licit and Illegal Drugs and Drug Testing**

The nexus between drug use and compromised workplace safety, reduced productivity, absenteeism, theft, and higher medical costs has been recognized for decades.<sup>36</sup> Use of legal and illegal drugs may affect work performance even when drug use occurs outside of work.<sup>37</sup> Postal workers who tested positive for marijuana had 55% more accidents, 85% more injuries, and 75% greater absenteeism.<sup>38</sup> THC,<sup>39</sup> the active chemical component in marijuana, creates sensory distortion and impairs complex task performance.<sup>40</sup> Illicit drug use, including marijuana, is incompatible with the strict attention to detail generally expected in law office settings. In the private sector, well over 80% of applicants are tested for illegal drugs<sup>41</sup> even when there is no reason to believe the prospective employee has ever used illegal drugs. Another 50% of employers conduct post-accident testing and about a third conduct random testing.<sup>42</sup>

Nearly 30 years of standardized (non-forensic) drug testing makes it virtually impossible today for otherwise “innocent” applicants to be excluded from employment because of a false positive from a certified drug testing facility.<sup>43</sup> Notwithstanding the legalization of marijuana in various states, or the possibility that the North Carolina legislature may consider marijuana legalization,<sup>44</sup>

employers retain the ability to maintain drug-free workplaces. This is important because illegal drug use, especially of opioids and marijuana, is at record levels in America.<sup>45</sup>

Notwithstanding the legalization of medicinal and recreational marijuana in various states, in the vast majority of jurisdictions employers retain the right to maintain drug-free workplaces. Although laws regarding medicinal marijuana are rapidly evolving, with few exceptions,<sup>46</sup> most state courts follow the ruling in *Ross v. Ragingwire Telecommunications, Inc.*,<sup>47</sup> a 2005 decision from the California Supreme Court. *Ross* holds that “employers are not required to accommodate employees who use medical marijuana and that employees may lawfully be terminated for testing positive for medical marijuana in a workplace drug test.” Employee drug testing for THC and other illicit drug use still matters. Marijuana remains unlawful under federal law and courts have generally held, even in states with medicinal or recreational cannabis laws, that employers have the absolute right to enforce drug use policies restricting employment, or terminating those failing to comply.<sup>48</sup> State medical marijuana laws provide only limited state-law immunity for those engaging in state-compliant marijuana use. While some employers may consider relaxing pre-employment drug standards, there remain compelling reasons not to do so.<sup>49</sup>

### **Credit History Screening**

Review of applicant credit histories has been an accepted practice for more than six decades.<sup>50</sup> About 50% of employers perform credit checks on some or all job candidates.<sup>51</sup> This applies in particular to banking, property management, hospitality, and healthcare. Common sense informs us of correlations between incautious, financially irresponsible people and future risk-taking behavior. Consider that before the federal government grants even the lowest level of security clearance (i.e. “Confidential”) to an employee (or contractor), a credit history screening is mandated.<sup>52</sup> The Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 (FCRA)<sup>53</sup> regulates the accuracy, fairness, and privacy of consumer information gathered by consumer reporting agencies.

The FCRA also regulates background investigations prepared by third-party entities on behalf of private employers if they include any financial information.<sup>54</sup> The FCRA

applies to professional screening companies, credit bureaus, licensed private investigators, and certain attorneys.<sup>55</sup> The FCRA does not, however, apply to employers who perform screening functions in-house (or, generally, for jobs with annual salaries above \$75,000).<sup>56</sup> When used for employment screening, the FCRA requires employers to provide job candidates with an opportunity to refute, explain, or correct negative information. Obviously, employers should be ready to correlate the need for a credit check with a specific job-related risk. Remember also that negative information honestly disclosed should be weighed differently than undisclosed information. High quality applicants may have experienced financial setbacks from layoffs, divorce, or medical bills leading to excessive reliance upon credit. Credit information should normally not even be considered until all other information has been evaluated. In other words, never “pre-screen” based upon credit information.

### **Resume Fraud**

Resume fraud is at epidemic levels in America across all job markets.<sup>57</sup> This type of fraud encompasses fictitious, exaggerated, or misleading information found on applications or resumes. A 2012 study by the Society of Human Resources Management (SHRM) reported that 53% of resumes or applications contained falsifications.<sup>58</sup> Educational degrees in particular may be entirely fictitious or awarded by non-accredited programs requiring little or no academic work. The Council for Higher Education Accreditation estimates that more than 200,000 fake college degrees are sold annually in the United States.<sup>59</sup> Applicants also misrepresent personal accomplishments, prior job responsibilities, and even professional licensing.<sup>60</sup> While some applicants omit information because they genuinely believe it is not relevant, in most instances omissions are based upon well-grounded fears that disclosure will result in automatic denial for a job for which they assume they are fully qualified. Motives for misrepresentation are important, but deliberate misrepresentation in a resume means the applicant carries the present burden of dishonesty.<sup>61</sup>

### **Social Media Screening**

Online behavior reflects upon the employee and may impute the employer. Social media activity may also presage workplace behavior. Because of the unique nature of law

offices with relatively easy access to highly confidential information, client secrets, and financial information, social media screening is essential. Employers bear the risk of negligent hiring or retention when they fail to access readily available public profile information, especially when online content is associated with violence, abuse, discrimination, or bullying.<sup>62</sup> Employer screening should include reviewing online and social media activity in LinkedIn, Facebook, Twitter, Snapchat, and other platforms.<sup>63</sup> Depending upon privacy settings, reviewing social networking activity is neither difficult nor time consuming. Social media information may also prove useful in verifying (or disproving) other information provided by candidates.<sup>64</sup> Negative content may include recreational drug use, discriminatory or extremist views, negative comments about previous employers, bullying,<sup>65</sup> or even poor grammar. Even casual associations (e.g. Facebook “likes”) with others engaged in undesirable behaviors may predict criminality and rule-breaking attitudes.<sup>66</sup> Firms conducting social media screening should, however, ensure applicants are advised in writing that screening may take place and be provided with a reasonable opportunity to respond, explain, or deny worrisome content.<sup>67</sup>

### Military Records and Experience

Veterans typically bring superior personal and professional attributes to any employment. They work well under stress and are rarely intimidated by short timelines. They are team players, well-organized, and dependable. Also, most veterans leave active or reserve service with current national security clearances.<sup>68</sup> While security clearance procedures fall outside the scope of this article, secret and top-secret clearance status represent a depth and breadth of background vetting that would be impossible to duplicate in the civilian sector. Nevertheless, an active security clearance is no green light to forgo normal screening. Surprisingly, perhaps because they may be unfamiliar with the military, many employers simply accept “on faith” that an applicant is honest when they claim (1) they *are* a veteran, and (2) that they were awarded an honorable discharge.

Hiring officials may not be aware of the differences between an “Honorable Discharge” and a “General Discharge under Honorable Conditions” (a.k.a. “General Discharge”). A General Discharge character-

izes a former member’s performance as “satisfactory” but not meeting all expectations of conduct.<sup>69</sup> Although the terminologies are similar, they are vastly different. There are in fact six “grades” of discharge: (1) Honorable; (2) General (aka Under Honorable Conditions); (3) Other Than Honorable (OTH); (4) Bad Conduct Discharge (BCD); (5) Dishonorable Discharge (DD); and (6) Dismissal (for commissioned officers only following trial by court martial). The first three grades of discharge are administrative in determination. The latter three reflect criminal convictions (usually felony equivalent crimes) in military courts. The key to evaluating service, training, and discharge is the DD (Department of Defense) Form 214, Certificate of Release or Discharge from Active Duty.<sup>70</sup>

Employers should only accept certified copies of the DD-214 (also referred to as a “Long Form DD214”). The long form specifies the exact administrative reason why an applicant was separated from the military (often expressed as a numerical “SPN-Code”). Without checking the SPN Code, managers may inadvertently hire a veteran who was involuntarily discharged for “general unfitness” (SPN #258), “apathy” (SPN #46C), “paranoid personality” (SPN #463), or “pattern of misconduct” (SPN #280).<sup>71</sup> If the DD-214 reflects total service length of less than 28 months (e.g. 11 months active service), or a discharge date different than the “anniversary” month or date of the original enlistment, the reason for earlier discharge may be important. Another relevant data point is the “RE Code” (Reenlistment Eligibility). The RE Code specifies under what conditions veterans who have not retired from longevity or medical reasons may reenlist. While each branch of the armed forces establishes its own reenlistment criteria, as a general rule, an RE Code preceded by the number “1” allows for reenlistment while “2,” “3,” and “4” code numbers carry restrictions or even complete bars. Finally, all military services were recently cited for lapses<sup>72</sup> in reporting felony equivalent court-martial convictions and finger-print data to the FBI’s National Instant Criminal Background Check System (NCIC) as required by law.<sup>73</sup>

### Conflicts of Interest

The possibility of disqualifying candidates for a potential conflict of interest is unique to the legal field. Although conflicts involving

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nonlawyer staff<sup>74</sup> rarely result in a complete bar to employment,<sup>75</sup> there are circumstances in which firms may be disqualified or be required to withdraw from representation after hiring nonlawyers employed by another firm.<sup>76</sup> Care must be taken that privileged information about adverse parties is not disclosed. Firms should make reasonable inquiries during interviews or in written applications regarding candidate (or law clerk) prior employment including prior clients, opposing firms, and relationships with other counsel. Of note also is the independent duty of paralegals to recognize and avoid conflicts of interest.<sup>77</sup> Obviously, if the interview or application indicates a possible conflict of interest, then the firm should follow up to

assess possible temporary disqualification or other measures (such as restricting access to files, securing files, and other effective screening measures).<sup>78</sup>

### Suggested Best Practices

Law firms should consider only lawful and relevant information when evaluating office managers, clerks, paralegals, or administrative staff. An ideal end state is an expeditious selection of best candidates after full disclosure in a process free of discrimination. The following best practices are suggested:

- Job descriptions should highlight the necessity for credit and criminal background screening. For example: “Applicant has a demonstrated ability to be trustworthy, reliable, and fiscally responsible.”<sup>79</sup>

- Pay close attention to the applicant’s previous two employers (or five preceding work years). Unexplained time gaps should be carefully assessed.<sup>80</sup>

- Most law firms do not have the resources to conduct comprehensive background checks. Third party verification services offer legally compliant and effective investigations.<sup>81</sup> Higher quality firms such as Lexis-Nexis may be more expensive, but may be more thorough than other agencies or services.

- Check all assertions made by applicants including educational degrees, employment histories, previous job titles, job responsibilities, salary, and reason(s) for leaving previous positions. Every “red flag” needs to be investigated and resolved.

- Review credit reports, relevant arrest records, bankruptcy filings, civil judgments, and lawsuit filings. Do not forget tax liens or older account charge-offs.<sup>82</sup>

- Establish a “no tolerance” policy for resume or application fraud. Candidates who knowingly provide false or misleading information should usually be rejected. Employment contracts should include termination clauses for post-hire discovery of resume fraud.<sup>83</sup>

- Cross check credit histories against resumes. Question unexplained employment gaps. If doubts arise, request previous W2 forms to verify previous employment.<sup>84</sup>

- Always check (using full and/or maiden names) the National Sex Offender registry database and state sex offender databases.<sup>85</sup>

- Encourage veteran hiring, but carefully review “long-form” DD-214s. Verify applicable discharge and reenlistment codes.<sup>86</sup>

- Never play favorites. All applicants (including attorney hires) should undergo the same screening process (including drug screening).

- Never use any single backgrounding tool or third-party agency as a “gatekeeper.” Every candidate deserves a fair, “whole person” review.<sup>87</sup>

- Ensure office-wide sensitivity to possible conflicts of interest. Screen for conflicts well before any new employees engages in firm work. ■

*John Winn, JD, LL.M. is a professor of business law at the Harry F. Byrd Jr. School of Business at Shenandoah University in Winchester, Virginia. Mr. Winn is a graduate of Campbell University School of Law (84) and served in the army, Judge Advocate General's Corps (JAG), from 1985 through 2005. Mr. Winn was an associate professor at the United States Military Academy, West Point, as well as assistant professor in the Criminal Law Department of the Army Judge Advocate General's Legal Center and School, Charlottesville, Virginia.*

*Kevin Govern, JD, LL.M. is a professor of law at the Ave Maria School of Law in Naples, Florida. Mr. Govern graduated from Marquette University Law School (87). Professor Govern also served in the army, Judge Advocate General's Corps (JAG) from 1987 through 2007. Mr. Govern was an assistant professor of law on the law faculty at the United States Military Academy, West Point, and has been an instructor for John Jay College of Criminal Justice and California University of Pennsylvania.*

### Endnotes

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4. See *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 804-805 (Ky. 2000), holding that the attorney-client privilege applied with equal force to paralegals.
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6. N.C. Gen. Stat. § 84-4, Persons other than members of State Bar prohibited from practicing law, bit.ly/2Fmfmun.
7. See, e.g., 27 N.C.A.C. Chapter 1C – Section .0204 Certification as Legal Intern.

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9. See *ABA Stds. for Imposing Lawyer Sanctions*, 7.0-7.4 (1992).
10. In *VLT, Inc. v. Lucent Technologies, Inc.*, 2003 US Dist. LEXIS 723 (D. Mass. 2003) the court found that the “gross negligence” of a paralegal in mistaken production of privileged documents to an opposing party resulted in a subject matter waiver under the applicable “non-waiver” clause of the discovery protective order.
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# Penn State and the Perils of Unintended Joint Representations

BY CHRISTOPHER B. McLAUGHLIN

“ I represent the organization. I don’t represent you individually. To the extent that your interests align with those of the organization, I can provide you with counsel. If those interests do not align, you might need to find your own counsel.”



This was the message that Penn State University (PSU) general counsel Cynthia Baldwin and her deputies delivered to three senior PSU executives after they received subpoenas to testify in the criminal investigation concerning former PSU assistant football coach Jerry Sandusky in late 2010. Sandusky was later convicted on 45 counts of child sexual abuse.

Attorneys who routinely represent corporations and other organizations will recognize Baldwin’s message as a form of an *Upjohn* warning. Also known as a corporate *Miranda* warning, it is used to protect the organization’s attorney-client privilege and to remind employees that the attorney represents the organization and not its employees individually.<sup>1</sup>

Experienced organizational attorneys will also recognize that Baldwin’s message falls far

short of an ideal *Upjohn* warning. The language is dangerously ambiguous. It first states that the attorney does not represent the individual employee, but then states that the attorney can do so if the interests of the individual and the organization align. It does not indicate the current status of those potentially competing interests. Nor does it say anything about who controls the confidentiality and privilege that might attach to the ensuing conversations between the organization’s attorney and employee.<sup>2</sup>

The PSU executives could have reasonably interpreted Baldwin’s message in two very different ways. It could have meant that PSU’s attorneys were not representing the executives individually at that point but might agree to do so in the future. Or it could have meant that PSU’s attorneys were agreeing to represent the executives individually but could ter-

minate that representation in the future if they determined that the interests of PSU and the executives no longer aligned. The difference between those two interpretations is vast and tremendously impactful on confidentiality, privilege, and disqualification concerns.

Ambiguity is rarely a friend to attorneys and their clients. In the PSU case, the ambiguous *Upjohn* warning led to the dismissal of perjury and obstruction of justice charges against the three PSU executives and legal ethics charges against Baldwin.

It has been five years since I first wrote in the NC State Bar *Journal* about the PSU scandal,<sup>3</sup> but it continues to make headlines today. In March 2019, former PSU president Graham Spanier ended all appeals of his conviction on child endangerment charges relating to his failure to properly report allegations of child abuse against Sandusky in 2001. He

soon will report to prison.<sup>4</sup> Tim Curley and Gary Schultz, two former senior PSU executives who pleaded guilty to similar charges, already served time in prison and will remain on probation until mid 2019.<sup>5</sup>

From a legal ethics perspective, the most important recent development was the issuance of dueling ethics reports concerning Baldwin and her role in the PSU scandal. The first was an October 2018 Pennsylvania Supreme Court Disciplinary Board hearing committee recommendation and report (the Hearing Committee Report) that exonerated Baldwin.<sup>6</sup> The second was a March 2019 report and recommendation of the Disciplinary Board itself (the Board Report), which rejected the Hearing Committee Report findings.<sup>7</sup> The Board Report concluded that Baldwin's testimony before the grand jury violated the executives' attorney-client privilege and recommended that Baldwin receive a public censure.

Baldwin's legal ethics fate will not be known until the Pennsylvania Supreme Court reviews the contradictory reports and issues a final ruling. But even if that court concludes that Baldwin did not technically violate any legal ethics rules, the fact is both reports paint a troubling picture. Baldwin clearly allowed her loyalty to her organizational client to become tainted by her relationships with that organization's senior employees. She failed to explain her role to those employees. And she accompanied those employees into a criminal grand jury proceeding for which she was entirely unprepared.

In my earlier article, I raised two basic questions about Baldwin's conduct. First, did she appropriately keep her client—the PSU Board of Trustees—informed about the scandal and its potential impact on the university? Second, did she inadvertently lead three senior Penn State executives—Spanier, Schultz, and Curley—to believe that she was representing them individually while also representing the university?

The Pennsylvania legal ethics inquiry ignored the first question, a failing I address below. Instead, the inquiry focused exclusively on the second question: Did Baldwin create attorney-client relationships with the three executives and, if so, did she violate the duties of competence and confidentiality that she owed them?

Baldwin originally denied that she represented the executives individually or led them to believe that she did. She first claimed that

when the executives were subpoenaed, all she said about a potential joint representation was that she represented PSU and that each of them “could get their own lawyer” if they wanted to. During the ethics inquiry, evidence showed that Baldwin and her staff also provided the executives with the lukewarm *Upjohn* warnings described above. She later accompanied all three into the grand jury room and allowed herself to be identified as their attorney during their testimony.

The three executives argued that Baldwin's conduct led them to believe that she was representing each of them individually, and that her subsequent grand jury testimony against them violated their attorney-client privilege and Baldwin's duty of confidentiality. In 2016, a Pennsylvania appellate court agreed and dismissed charges of perjury and obstruction of justice that were based on Baldwin's testimony.<sup>8</sup>

Both of the recent ethics reports agreed with the appellate court that Baldwin created individual attorney-client relationships with the executives in addition to her representation of PSU. They based this conclusion on the ambiguous *Upjohn* warnings as well as her conduct at the executives' grand jury appearances. The duty of confidentiality arising from those individual attorney-client relationships under Rule of Professional Conduct 1.6 normally would have precluded Baldwin from testifying against the executives before the grand jury.

However, the 2018 Hearing Committee Report concluded that Baldwin's testimony against the three executives whom she was jointly representing was permitted under two exceptions to the duty of confidentiality in Rule 1.6. That rule permits an attorney to violate her duty of confidentiality owed to a client in order “to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used” (Rule 1.6(a)(4)) or “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.” (Rule 1.6(a)(6))

According to Baldwin, after three executives testified to the grand jury about what they allegedly knew of the 2001 child abuse allegations, Baldwin came to believe that they had perjured themselves. Baldwin also believed that they had committed obstruction of justice when they failed to produce documents concerning those allegations in

response to a grand jury subpoena. The Hearing Committee Report concluded that this belief justified the decision to breach her duty of confidentiality owed to the individuals and testify against them. In the view of the Hearing Committee Report, it was reasonable for Baldwin to assume that her legal services had been used as part of the executives' criminal and fraudulent conduct (Rule 1.6(a)(4)) and that she herself might face criminal or ethical charges as a result (Rule 1.6(a)(6)). This conclusion contradicts the PA Court of Appeals' finding in the criminal case against the three PSU executives.

But the subsequent Board Report rejected the Hearing Committee Report conclusion, instead siding with the PA Court of Appeals and concluding that Baldwin's testimony before the grand jury violated her duty of confidentiality owed to the executives. In sum, three deliberative bodies have reviewed Baldwin's conduct and two of them have concluded that she violated her legal ethics obligations.

How did the Hearing Committee explain its contradictory result? Not very well, in my view.

The Hearing Committee Report first attempted to distinguish its finding from the PA appellate court by observing that Baldwin was not a party to the criminal case. That is true, but the facts were the same. It is not clear why a change in parties should change the result. The Hearing Committee Report then claimed that the questions at issue in the ethics inquiry were very different from those in the criminal proceeding. According to the Hearing Committee Report, the court in the criminal case was charged with determining if the criminal defendants “were entitled to have the information [Baldwin] disclosed in her grand jury testimony maintained in confidence.” The Hearing Committee Report said its charge was very different, as it was required to determine whether Baldwin's testimony against the three executives violated the duty of confidentiality she owed them. I believe these two questions are simply different sides of the same coin, both focusing on the same basic issue of attorney-client confidentiality.

Given the Hearing Committee's unpersuasive defense of its finding in favor Baldwin, I side with the contradictory conclusion reached by the PA appellate court and the Disciplinary Board. I believe Baldwin failed to honor the professional obligations she owed the individual executives after (perhaps inad-

vertently) creating individual attorney-client relationships with them.

Baldwin's grand jury testimony against the individuals was one example of this failure. The Disciplinary Board identified an even more basic failure. Baldwin lacked the experience necessary to competently protect the executives' interests when they were called to testify before the Sandusky grand jury. In the words of the Disciplinary Board, "Our review of the competence of [Baldwin's] representation evidences that it was abysmally lacking in study, thoroughness, and preparation. . . [I]t is incomprehensible that she did so little to prepare. . . . Her lack of competence essentially left her clients unrepresented in their grand jury testimony, which ultimately had significant personal consequences for these clients."

As mentioned above, the Pennsylvania Supreme Court will make the final determination of whether Baldwin's professional conduct was lacking. But unfortunately that determination will not address another serious concern about Baldwin's role in the scandal. In addition to her failure to protect the interests of her individual clients, Baldwin also failed to honor her original client, Penn State University. The ethics inquiry did not address this issue, apparently because it was not included in the initial charges levied against Baldwin. But the fact that Baldwin will escape sanctions for her disregard of PSU's interests does not make this part of the saga any less important for other organizational attorneys to consider.

Baldwin's apparently unintended joint representation of the individual executives had material consequences for PSU. By creating attorney-client relationships with the individual employees, Baldwin ended PSU's unilateral control of confidential and privileged information. The employees, not just PSU, would have the right to determine when and how confidential information could be shared with third parties.<sup>9</sup> The joint client relationships also raised the possibility that the executives could disqualify Baldwin from representing PSU if a conflict later arose.<sup>10</sup>

Baldwin's failure to obtain PSU's informed consent for this joint relationship seems to be an obvious violation of her professional obligations under Rule 1.2 (allocation of authority between client and lawyer) and Rule 1.4 (communication).

What's more, ample evidence suggests that Baldwin failed to satisfy her obligations

under Rule 1.13 to keep the Penn State Board informed about the scandal. Baldwin repeatedly deferred to the Penn State president as the scandal expanded and permitted him to control the timing and the substance of the information about the scandal shared with the board. When the president finally agreed to update the board about the impact of the scandal on Penn State, he ordered Baldwin out of the room. She complied, completely abdicating her responsibility to ensure that her client had the information needed to make important legal decisions.

Regardless of how Baldwin's ethics inquiry concludes, her conduct should be viewed as a cautionary tale offering three important legal ethics lessons for organizational attorneys.

The first lesson: Beware of ambiguous *Upjohn* warnings. Most organizational attorneys use *Upjohn* warnings to terminate any reasonable belief by employees that they are being represented individually by the attorney. Baldwin's warnings had the opposite effect. The ambiguous *Upjohn* warnings given to the three PSU executives *confirmed* that Baldwin could represent the individuals jointly with the university. Based on Baldwin's repeated denials of any client relationships with the individual executives, this result appears to have been unintended, with negative results for all involved.

This fact pattern should get the attention of every organizational attorney who ever has the need to issue *Upjohn* warnings—which is to say, every organizational attorney. Baldwin's unintentional joint representation of both the organization and the organization's employees provides substantial motivation for organizational attorneys to tighten up the language of their *Upjohn* warnings. It should be crystal clear whether the message of the *Upjohn* warning is, "I am *not* representing you and the organization jointly" or, "I *am* representing you and the organization jointly unless and until a conflict arises." If the attorney intends to send the second message and create a client relationship with an individual employee, that attorney must first get consent from the organization after explaining the ramifications of such a joint relationship.

The second lesson: Know your legal and professional limitations. If there is a reasonable possibility of individual criminal or civil liability for your organization's employees, make sure those employees are aware of those risks and receive competent representation to protect against them. If the employees are

called before a grand jury and you do not have grand jury experience, then consult with an attorney who does or get those employees separate representation.

The third lesson: Do not get so focused on the individuals running the organization that you forget about the organization itself. Regardless of how closely an organizational attorney works with the organization's president or executive director or board chair, those individuals are not the attorney's client. It is the organization, which in most cases acts through its governing board. The attorney must keep that board adequately informed about developing legal issues and not rely on others to do so.

It is not enough to keep only senior executives up to speed because, as the PSU case demonstrates, those executives may not always be acting in the best interests of the organization. The criminal convictions of PSU's president and other senior executives proved that they were thinking more about their personal interests than those of PSU. Baldwin had a duty to make sure the PSU Board knew the full scope and the potential legal ramifications of the scandal. She failed to do so. Other organizational attorneys should make sure they do not make the same mistake. ■

*Chris McLaughlin is a professor of public law and government at the University of North Carolina-Chapel Hill's School of Government.*

## Endnotes

1. In 2009 the American Bar Association issued an excellent summary of the history, purpose, and best practices concerning *Upjohn* warnings in this white paper: [bit.ly/2JWqu3E](https://bit.ly/2JWqu3E).
2. For a judicial discussion of the dangers of ambiguous *Upjohn* warnings, see *US v. Merida*, 828 F.3d 1203 (10th Cir. 2016) (corporate attorney informed executive that conversations between the two were privileged, but did not explain that the corporation and not the employee controlled that privilege).
3. NC State Bar *Journal*, Winter 2014.
4. Spanier was convicted in 2017 and sentenced to two months in prison and two months of house arrest. [bit.ly/2yfpam0](https://bit.ly/2yfpam0).
5. Both men spent several months in prison and under house arrest during the summer and fall of 2017. [bit.ly/32U7Y3y](https://bit.ly/32U7Y3y).
6. *Office of Disciplinary Counsel v. Baldwin*, 151 DB 2017 (Oct. 26, 2018), available here: [bit.ly/2MgdK9z](https://bit.ly/2MgdK9z).
7. The Disciplinary Board Report, issued on March 8, 2019, is not yet available online, but has been summarized in at least one newspaper article: [bit.ly/2uUguzB](https://bit.ly/2uUguzB).
8. *Commonwealth v. Spanier*, 132 A.3d 481 (Pa. Sup. Ct. 2016) and *Commonwealth v. Schultz*, 133 A.3d 294 (Pa.

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# The Fine Art of Learning to Say No

BY MIKE WELLS SR.

“What part of no don’t you understand?” go the words to a country song that was popular a number of years ago.

The difficulty with the “no” word is not the understanding of it. The difficulty is in the saying of it.

The answer to the question is as important today as it was many years ago when I took a leap and started my own firm as a young lawyer. The lesson is one I learned the hard way.

I had finally reached the point in my career that I had a little rainy day money in the bank. I had received a couple of decent fees toward the end of the year, and I was feeling better about my progress, limited though it was, and my growing financial stability.

A couple came in with a matter that had the markings of a good case. It also had some weaknesses, which I saw clearly enough, or so I thought. But my competitive ego told me I could overcome them. I was, after all, on a little bit of a roll in my practice. (A totally unrelated fact, but a development which made me less cautious.) And the couple talked up my (purported) skills pretty well. Unfortunately, I believed them.

The weaknesses in the case, which were every bit the weaknesses I had seen initially, were exacerbated by other factors, too: the stubbornness of the clients (standing on the high ground of principle, but mostly on my contingent fee nickel, of course), the aggressiveness of the other lawyer, and the backpedaling of a key witness.

If you get easily frustrated with uncooperative clients, aggressive opposing counsel, and unpredictable witnesses, you better get out of the law business. It is an unusual case that does not have one or all of these issues in play, as all lawyers who try cases know.

I could have dealt with all of that. What I could not deal with was the recurring recognition that I saw most of this coming, and I chose to proceed anyway. If I had just said no, as my instincts were trying to tell me, I could have avoided all of this.

And as important as all of that was, the case took up an inordinate amount of time. As a young lawyer building a new enterprise, time was what I did not have. What I could have done with that time to advance more important efforts would have been very helpful to my practice.

But of course, I squandered all of that because I chose not to say no.

My pride and vanity clouded my judgment, and I made a bad choice when I took that case. That pride and vanity carried me to a place well past the known facts and problems which I mostly saw coming at the time. And in the process, I handed over one of my most precious assets: my always too little time as a busy lawyer.

Sound familiar?

There are few absolutes in life, but this is one of them: we all have a finite amount of time each day. We cannot simply throw more on the already consuming pile of work and expect it all to get resolved.

It should come as no surprise that the largest category by far of complaints about lawyers to the State Bar is that lawyers do not return phone calls. And professional insurance companies will tell you a large category of claims against lawyers could be

avoided if lawyers did not get jammed on their time and make bad decisions which are hastily made because they run out of time before a legal deadline. Many of these matters could be avoided if lawyers were spending little or no time on matters to which maybe they ought to have said no in the first place.

The next time that stretch case comes in that you know will consume time you don’t have, and there is a small chance of achieving any corresponding benefit, let it be the best case you NEVER took. The result will never get you listed in the Biggest Verdicts of the Year in *Lawyers Weekly*, but over time you will reap more benefit from the discipline.

The takeaway lesson is this: A busy lawyer simply has to guard his time carefully and make good choices about how to spend his time. Which means he cannot do everything. He cannot will his way past serious weaknesses in a case, and the disruption of the very time-consuming efforts to try to cure those weaknesses. Or invest in a worthwhile community project in which he is too busy to help. Or allow all the other inordinate consumers to take up his valuable time in between. The smart lawyer has to send some callers on their way.

“Learn to say no. It will be more valuable to you than reading Latin,” said Charles Haddon Spurgeon.

Most of us do not have much occasion to read Latin these days, so stick with Mr. Spurgeon’s central advice and learn to say no. This one discipline may be the most important one of all for the busy lawyer building a meaningful body of work in a

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# Grievance Committee and DHC Actions

*NOTE: More than 29,000 people are eligible to practice law in North Carolina. Some share the same or similar names. All discipline reports may be checked on the State Bar's website at [ncbar.gov/dhccorders](http://ncbar.gov/dhccorders).*

## Disbarments

**Edward F. Dunnivant** of Wilmington surrendered his law license and was disbarred by the Wake County Superior Court. Dunnivant admitted that he misappropriated funds entrusted to him for payment of court costs and fines totaling at least \$764 and that he failed to promptly pay third parties or clients amounts totaling an additional \$7,113.87, a portion of which he utilized for his own benefit and the rest of which he intended to use for his own benefit.

**Dennis H. Sullivan Jr.** of Wilmington was suspended for three years in 12 DHC 1. The suspension was stayed for five years. When the stay was lifted and the suspension was activated because Sullivan did not comply with conditions of the stay, he abandoned two clients, did not return unearned fees, did not respond to the Grievance Committee, and did not participate in mandatory fee dispute resolution. He was disbarred by the DHC.

## Suspensions & Stayed Suspensions

While **Jerry Braswell** of Goldsboro was serving a five-year suspension imposed by the DHC in 16 DHC 27, he submitted false information to a federal court on a petition for admission pro hac vice and did not notify his clients that his law license was suspended. The DHC imposed a second five-year suspension which will run consecutively to the suspension in 16 DHC 27.

**Giles Cameron Byrd** of Lake Waccamaw was convicted of misdemeanor obstruction of justice for providing false information on a client's application for a limited driving privilege. Byrd also altered a plea agreement after the prosecutor signed it, and attempted to have a civil litigant held in contempt of court for failing to comply with an order that

was no longer valid and had not been served on the litigant. The DHC suspended him for four years. After serving two years of active suspension, he may petition for a stay of the balance upon showing compliance with enumerated conditions.

**Frank Cassiano** of Greenville took advantage of a client in a prohibited business transaction, made false statements to his client, and made false statements to the court in the lawsuit his client filed against him. He was suspended by the DHC for five years. The suspension is deemed to have begun on April 19, 2017, the date his petition for reinstatement from administrative suspension, which was never granted, was first considered.

**Charles Coppage** of Kill Devil Hills violated trust accounting rules, including failing to reconcile his trust accounts. He was suspended by the DHC for two years. The suspension is stayed for two years upon Coppage's compliance with enumerated conditions.

**Bernell Daniel-Weeks** of Durham advised a client to violate a court order; did not communicate with, neglected, and abandoned multiple clients; did not refund unearned fees; and did not respond to the Grievance Committee. She was suspended by the DHC for five years. After serving two years of active suspension, she may petition for a stay of the balance upon showing compliance with enumerated conditions.

**Travis Simpson** of Winston-Salem did not communicate adequately with and neglected multiple clients, dismissed a case without the client's consent, attempted to settle a potential claim that he committed malpractice without advising the former client to obtain independent legal advice, and did not respond to the Grievance Committee. The DHC suspended him for three years. After serving 18 months of active suspension, he may petition for a stay of the balance upon showing compliance with enumerated conditions.

## Interim Suspensions

**J. Brandon Graham** of Gaston County

## Wire Fraud Alert

In 2015, the State Bar began receiving reports of criminals hacking into the email accounts of lawyers and real estate brokers, altering wiring instructions, and diverting loan payoffs and other disbursements from real estate transactions. Since then, the State Bar has written extensively about this danger in its *Journal* and on its social media accounts, and has spoken extensively about this danger in continuing legal education programs. Because lawyers had not always taken appropriate precautions to protect entrusted funds, the Grievance Committee opened many grievance files. Initially, the Grievance Committee issued dismissals accompanied by letters of warning, warning respondent lawyers of their professional obligation to protect entrusted funds. After nearly three years of extensive education on this topic, members of the State Bar should now be fully aware of the dangers posed by these email scams. Accordingly, at its July 2019 meeting, the Grievance Committee issued permanent discipline to three lawyers who failed to adequately protect entrusted funds from email scams. One admonition, which is private discipline, and two reprimands, which are public discipline, were issued.

pled guilty to felony possession of methamphetamine in October 2018 in Union County. On April 22, 2019, the chair of the DHC entered an order of interim suspension of his law license.

## Censures

**Craig Asbill** of Charlotte was censured by the Grievance Committee. He neglected his client's case, did not communicate with his

client, and did not respond to the Grievance Committee.

New Orleans lawyer **David Capasso** was censured by the Grievance Committee. Capasso falsely represented on a motion for admission to a federal court pro hac vice that he had never been the subject of any formal suspension or disbarment proceedings.

### Reprimands

After the DHC suspended him for five years in 16 DHC 10, China Grove lawyer **Keith Booker** did not promptly refund an unearned fee and did not respond to the Grievance Committee. He was reprimanded by the DHC.

**Darren Haley** of Greenville, South Carolina, is licensed in Virginia and South Carolina. Haley did not disclose his full disciplinary history in a motion to be admitted pro hac vice to a North Carolina court. He was reprimanded by the Grievance Committee.

The Grievance Committee reprimanded **Gregory A. Newman** of Hendersonville. While he was in private practice in 2007, Newman represented a criminal defendant who entered a guilty plea on drug charges. In 2016, while he was the elected district attorney for Prosecutorial District 29B, Newman consented to his former client's motion for appropriate relief, consented to strike the guilty plea, and dismissed the criminal charges. Newman also made a material misrepresentation to the Grievance Committee.

**Andy Roberts** of Raleigh undertook criminal representation he was not competent to provide. He advised his client to accept a plea agreement requiring forfeiture of her home without reasonably consulting with her about the terms of her plea and any potential defenses to forfeiture. He was reprimanded by the Grievance Committee.

**J. Eric Skager** of High Point was reprimanded by the Grievance Committee. Skager did not appear in court for his client's traffic case. As a result, an order was entered suspending his client's license and the client incurred substantial unnecessary expenses. Skager represented to the Grievance Committee that he would file a motion for appropriate relief and refund the client's resulting expenses, but did not do so. Skager also did not respond fully to the Grievance Committee.

The State Bar alleged that **Venus Yvette Springs**, formerly of Charlotte and currently

of New York, published material obtained in discovery on YouTube for no substantial purpose other than to embarrass a third party and maintained the publication after the court ordered her to take it down. She was reprimanded by the DHC.

**Jeffrey Weber** of Greensboro engaged in a variety of misconduct including violation of Bankruptcy Court rules, inadequate communication with a client, disclosing a client's confidential information, and failing to respond timely to the Grievance Committee. The Grievance Committee found that Weber's personal and health circumstances were significantly mitigating and imposed a reprimand.

The Grievance Committee reprimanded **Alton Williams** of Raleigh. Williams did not resolve his client's traffic cases for several years, did not timely communicate with the client, and did not promptly respond to the Grievance Committee.

### Reinstatements from Disbarment

**David Shawn Clark** of Hickory was dis-

barred in 2013 for having sex with a client, making false statements to a tribunal and to the Grievance Committee, attempting to suborn perjury, being convicted of several criminal charges including communicating threats and obstruction of justice, intentionally disclosing client confidences, and engaging in a conflict of interest. The DHC denied his petition for reinstatement.

In 2013, **Alexander Lapinski** of Durham surrendered his law license and was disbarred by the Wake County Superior Court after he pled guilty to one felony count of aiding and abetting the unlawful procurement of citizenship or naturalization. He withdrew his petition for reinstatement.

### Reinstatements from Disability Inactive Status

In February 2018, the chair of the Grievance Committee transferred **Powell Glidewell** of Newland to disability inactive status. On May 9, 2019, the chair of the DHC reinstated his license to active status. ■

## Employment Screening (cont.)

- Touchstone Research Group, last accessed January 18, 2018, [dd214.us/reference/SPN\\_Codes.pdf](http://dd214.us/reference/SPN_Codes.pdf).
72. A February 1997 report by the Pentagon inspector general found that fingerprint cards were not submitted in more than 80% of cases in the army and navy and 38% in the air force. See Associated Press, *Pentagon has Known of Crime Reporting Lapses for 20 Years*, November 7, 2017.
73. 32 CFR part 635
74. See *Imputed Disqualification Arising from Change in Employment by Nonlawyer*, ABA Comm. on Ethics and Professional Responsibility, ABA Informal Op. 88-1526, June 22, 1988, regarding a general supervisory obligation to make reasonable efforts to ensure there are measures in effect to assure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. This includes the obligation to be alert to all legal matters, including lawsuits, in which any client of the former employer has an interest.
75. *Hodge v. Urfa-Sexton*, LP, 295 Ga. 136 (2014) notes that the screening of nonattorney staff who change employment with potential conflicts of interest "may be remedied, if the law firm employing that nonattorney uses effective and appropriate screening measures and promptly discloses the conflict."
76. *Williams v. Trans World Airlines Inc.*, 588 F. Supp. 1037 (W.D. Mo. 1984).
77. *ABA Model Guidelines for Utilization of Paralegal Services* (May 4, 2014); *And see In re Opinion No. 24* of the Committee on the Unauthorized Practice of

Law, 607 A.2d 962, 969 (N.J. 1992); *and see In re Moffett*, 263 B.R. 805 (W.D. Ky. 2001).

78. *But see Green v. Toledo Hosp.*, 94 Ohio St.3d 480, 485 (2002) in which screening was approved and the Ohio Supreme Court held that imposing the presumptive disqualification of a secretary who worked for opposing counsel that had shared in client confidences would "unfairly taint" her and result in unreasonable difficulty for nonlawyer personnel in small towns to obtain suitable employment.
79. Suggested by M.W. Berry & K. Fitzgerald, *Legal Challenges to Applicant Credit Checks*, 06.03.11, [dwt.com](http://dwt.com).
80. Sabrina Lu, *Employment Verification, A Crucial Check*, updated March 9, 2015, [HireRight, hireright.com](http://HireRight.com).
81. *Recruitment Process Outsourcing, Help ensure candidates you choose meet your expectations with background screening*, [adp.com](http://adp.com).
82. See, e.g., Joel Greenwald, *Legal Issues with Background Checks*, Forbes, July 10, 2015, [forbes.com](http://forbes.com).
83. See, e.g., King & Wood Mallesons, *Could false resume lead to unilateral termination*, Lexology, October 10, 2015, [lexology.com](http://lexology.com).
84. John Feldman, *What Should Employers Be Aware Of When Requesting W-2 Forms from Job Applicants?* Forbes, June 6, 2017, [forbes.com](http://forbes.com).
85. National Sex Offender Public Website (NSOPW), [nsopw.gov/Core/Portal.aspx](http://nsopw.gov/Core/Portal.aspx).
86. Instruction sheet, supra note 75.
87. Alison Doyle, *Job Applicant Pre-Employment Screening*, The Balance, updated September 19, 2017, [thebalance.com](http://thebalance.com).

# It Can't Hurt to Ask (and it Might Even Help)

BY SUZANNE LEVER

It has come to my attention that some North Carolina lawyers are unaware of (or apprehensive about) the North Carolina State Bar's "ethics hotline." This is entirely unacceptable.

There are three lawyers on the staff who answer ethics questions: Nichole McLaughlin, Suzanne Lever, and Brian Oten. (I only list Brian's name last because, in addition to serving as ethics counsel, he also serves as director of legal specialization and director of paralegal certification—he gets busy).

Any member of the Bar can seek informal ethics advice on his or her own contemplated professional conduct from State Bar ethics counsel. Lawyers may email inquiries to [ethicsadvice@ncbar.gov](mailto:ethicsadvice@ncbar.gov) or call the Bar and tell the receptionist that they have an ethics question. It's as easy as that.

Almost every jurisdiction has a service that provides informal ethics advisories to inquiring lawyers. Interestingly, some of these Bar programs are staffed entirely, or in part, by lawyers who also work on discipline cases. That is not the case in North Carolina. Our program for providing informal ethics advisories to lawyers is a designated lawyers' assistance program staffed only by lawyers who work in the ethics department. Information received by ethics counsel from a lawyer seeking an informal ethics advisory is confidential information pursuant to Rule 1.6(c) of the Rules of Professional Conduct. Such information may only be disclosed as allowed by Rule 1.6(b), or if a lawyer's response to a grievance proceeding relies upon the receipt of an informal ethics advisory. See 27 N.C.A.C. 1D, .0103(b). Because the communication is confidential, lawyers do not have to present the inquiry to the ethics lawyer in a hypothetical or to otherwise attempt to obscure client information: just present the facts in a manner that is clear, concise, and identifies the ethical dilemma.

Informal ethics opinions are intended to

provide feedback and guidance to lawyers who are trying to deal with difficult ethical dilemmas in their own practices. The advice is considered an informal, or unofficial, opinion of the State Bar because it is not reviewed or approved by the Ethics Committee. An opinion of a State Bar ethics lawyer is not binding upon the Grievance Committee if a grievance is subsequently filed. Nevertheless, if a grievance is subsequently filed against you, the fact that you sought and followed the advice of a State Bar ethics lawyer will be evidence of your good faith effort to comply with the Rules.

## Don't be Shy

Last year ethics counsel responded to over 4,000 ethics inquiries. In some years we answered more than 5,000. We answer questions pertaining to every Rule of Professional Conduct. However, some topics get more attention than others. Here are the top ten topics (in descending order) from last year: Conflicts (by a wide margin), Advertising, Trust Accounting, Confidentiality, Unauthorized Practice of Law, Fees, Withdrawal, Firm Dissolution, Client Files, and Communication with Represented Person. Honorable mentions go to Candor to the Tribunal, Duty to Report Misconduct, and Client with Diminished Capacity. We answer these calls in the order in which they are received, and some seasons are busier than others. Still, whether by email or return phone call, we will get back to you as quickly as possible.

## Don't be Intimidated

There are no stupid questions. There are some days when I just wish someone would ask me if they can have sex with a current client. (Spoiler alert: the answer is "no.") Honestly, if the question pertains to the Rules of Professional Conduct, ask away.

Keep in mind, however, that there are questions to which ethics counsel cannot

provide informal ethics advice. If the inquiry relates to the conduct of another lawyer, the inquiring lawyer must write to the State Bar for a response and send a copy of the communication to the lawyer whose conduct is at issue. This will give the other lawyer an opportunity to comment upon the inquiry.

Also, inquiries that involve novel or controversial questions of legal ethics will not be answered with informal ethics advice. The lawyer will be asked to put the question in writing and submit it to the Ethics Committee for its consideration at its next quarterly meeting. Unlike information received by ethics counsel from a lawyer seeking informal ethics advice, the records of the Ethics Committee are public. Therefore, the inquiring lawyer may need to express the ethics question in a hypothetical format.

In addition, there are questions to which ethics counsel cannot provide informal or formal ethics advice. Ethics advice will not be provided if the inquiry requires an interpretation of law rather than legal ethics (attorney-client privilege, statutory interpretation, rules of procedure). An opinion will not be provided if the material facts of the inquiry are in dispute. Also, inquiries relative to a conflict of interest that is the subject of a motion to disqualify pending before a tribunal will not be answered unless the tribunal requests the opinion of the Bar.

If you are unsure whether your question is one that ethics counsel can answer, ask it anyway.

## Do Educate your Employees

Every summer I receive inquiries from legal interns on behalf of their employer. I think this is a great way for new lawyers to become comfortable with the Bar's ethics hotline. I encourage every firm to give their legal interns and new associates at least one project that requires them to contact the

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# Two Cy Pres Awards Add to Positive 2019 Outlook

## Participant Income

Participant income exceeded \$400,000 each month in March, April, and May of 2019, representing three of IOLTA's best months in recent history. IOLTA income so far this year has increased 137% compared to the same period last year. If current levels continue through 2019, additional funds will be available to support 2020 grantmaking and other priorities.

Banks eligible to hold IOLTA accounts in North Carolina offer rates on the accounts ranging from .01% to 1.88% with an average rate of .43%. Among other attributes, IOLTA urges all attorneys to consider their banks' policies related to IOLTA to help us maximize our support of civil legal aid and administration of justice projects. The Eligible Bank list, found on IOLTA's website at [nciolta.org](http://nciolta.org), prominently displays Prime Partners, banks that go above and beyond the eligibility requirements of the IOLTA rule to support the mission of the IOLTA program by paying 75% of the Federal Funds Target Rate and waiving allowable service charges. The list also indicates Benchmark Banks that pay 65% of the Federal Funds Target Rate as

well as banks that waive allowable service charges.

## Cy Pres

North Carolina's cy pres statute, N.C.G.S. §1-267.10, directs unpaid residuals in class action litigation to be divided evenly and directed to the North Carolina State Bar for the provision of civil legal aid for the indigent and to the Indigent Person's Attorneys Fund at Indigent Defense Services (IDS) for the provision of criminal defense for the indigent. As a statewide entity that funds civil legal aid for low-income individuals in all 100 counties, NC IOLTA presents an ideal nexus for the effective distribution of residual funds in class action litigation.

Since the statute was enacted in 2005, NC IOLTA has received \$2.3 million in cy pres and other court awards. So far this year, NC IOLTA has received two substantial cy pres awards totaling \$193,513.

The North Carolina Equal Access to Justice Commission produced a manual in 2012 (updated in 2015) to provide information about cy pres and settlement awards in support of legal aid and resources for judges and counsel. The manual is available on

IOLTA's website at [nciolta.org/for-lawyers/court-awards-cy-pres](http://nciolta.org/for-lawyers/court-awards-cy-pres).

## Grants

IOLTA will begin accepting grant applications for the 2020 regular grant cycle in early August. Applications are due on October 1. The Board of Trustees will review applications and approve 2020 grants at their meeting in early December.

More information about IOLTA's grantmaking purposes can be found at [nciolta.org](http://nciolta.org). Organizations interested in applying should contact the IOLTA office.

## State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid under the Domestic Violence Victim Assistance Act on behalf of the North Carolina State Bar. During the 2018-2019 year, NC IOLTA administered \$1,048,713 in domestic violence state funds to Legal Aid of North Carolina and Pisgah Legal Services. NC IOLTA also administered appropriated funding of \$100,000 to Pisgah Legal Services for support of their veterans' legal services project in 2018-2019. ■

Are your IOLTA funds held at a Prime Partner bank?

If your bank is listed, thank them! If not, ask them to join the program.

NC IOLTA funding provides critical civil legal aid to low-income North Carolinians and works to improve access to justice. Prime Partner banks help us do more.



### Many thanks to our Prime Partners

**BANK OF OAK RIDGE**  
**CAROLINA STATE BANK**  
**PINNACLE FINANCIAL PARTNERS**  
**PREMIER FEDERAL CREDIT UNION**

**PROVIDENCE BANK**  
**ROXBORO SAVINGS BANK**  
**UNION BANK**  
**CONGRESSIONAL BANK**  
*(settlement agent accounts only)*

For a list of other banks eligible to hold NC IOLTA accounts, visit [www.nciolta.org](http://www.nciolta.org)

# Sweet Dreams

BY ROBYNN MORAITES

*Lawyers Weekly* called me requesting a quick one-to-two sentence quote as to how I would advise a lawyer having difficulty with sleeping. Finding myself unable to succinctly summarize what I know about lawyers and sleep, a few paragraphs later, I realized I had the beginnings of this column for the *Journal*. I alerted Laura Mahr, of Conscious Legal Minds, and asked her to coordinate her Pathways to Wellbeing column with this article. So, in this edition of the *Journal*, we hope to provide some solid resources and tips for getting a good night's sleep.

We all have heard suggestions about good sleep hygiene: limiting screen time in the hours before bed, going to sleep and waking up at regular times, etc. The *Lawyers Weekly* article contained some excellent suggestions on this front. Following the mechanics and recommendations of good sleep hygiene certainly is important and helps foster an easier ability to sleep. For most lawyers, however, the issue of inability to sleep usually centers around the inability to turn off one's thinking; whether it be frantic or compulsive thinking about a case, anxiety about possibly overlooking some as-yet-unknown-and-surely-missed aspect of the case, having previously undisclosed facts surface unexpectedly, suppressing anger at the unprofessional behavior of opposing counsel, hashing over procedural maneuvers, etc. The list goes on ad nauseum. Many of us equate this never ending, frantic cycle of thoughts to a hamster running on a wheel.

Lawyers we work with at LAP often either report an inability to fall asleep or falling asleep easily enough but waking at three o'clock in the morning by the hamster running on the wheel. These occurrences happen far more frequently to far more lawyers than anyone realizes. The first thing we tell lawyers is that they are not the only one experiencing this issue. It's prevalent across the profession. It seems to settle down a bit the more experienced a lawyer becomes in a certain practice area, but experience and even true confidence

in one's skills does not necessarily eliminate this problem. Highly successful and seasoned lawyers can have sleep disturbances surface again when they are triggered by particular types of stress.

There are four stages of sleep: non-REM (NREM) sleep (stages 1, 2, & 3) and REM sleep. Periods of wakefulness occur before and intermittently throughout the various sleep stages or as one shifts sleeping position. The first sleep cycle takes about 90 minutes. After that, they average between 100 to 120 minutes. Typically, an individual will go through four to five sleep cycles a night.

Stage 3 is known as deep NREM sleep, and it is the most restorative stage of sleep ("deep sleep"). Brain waves during deep sleep are called delta waves due to the slow speed and large amplitude. Of all the sleep stages, stage 3 is the most restorative and the sleep stage least likely to be affected by external stimuli. It is difficult to awaken someone in stage 3 sleep. For anyone who has ever been a parent, stage 3 sleep is much higher in duration for children and adolescents, hence their ability to literally sleep through anything.

Getting enough deep sleep reduces one's overall sleep drive and sleep needs. This is why if you take a short nap during the day, you're still able to fall asleep at night. But if you take a nap long enough to fall into deep sleep, you have more difficulty falling asleep at night because you reduced your need for sleep. Conversely, not getting enough deep sleep creates a sense of fatigue and exhaustion during the day. And if we are consistently waking in stages 1 or 2 and not able to fall back asleep, we are obviously missing the critical restorative stage of deep sleep.

The reason deep sleep is restorative is that our bodies are busy doing all kinds of clean up and maintenance physiologically during this stage. During deep sleep, human growth hormone is released, restoring cellular tissue and muscles from the stresses of the day. The immune system is also reset and restored dur-



ing deep sleep. Researchers are discovering that during deep sleep the brain refreshes itself by flushing out toxins and free radicals that are produced daily. People with autoimmune or neurological disorders that effect one's ability to think clearly attest to the fact that good restorative sleep is essential. Often, symptoms are barely noticeable after a good night's sleep, whereas symptoms flare the morning after a bad night's sleep. We are biochemical creatures, and researchers are only now beginning to understand the neurological and cognitive impacts of restorative sleep, mindfulness, and meditation.

As lawyers, our most valuable commodity is our ability to think. We can attach a dozen adverbs to that last sentence. We need to think clearly, quickly, efficiently, correctly, strategically, etc. Deep sleep is essential for maintaining those crisp thinking skills.

Many lawyers turn to substances for immediate sleep relief. Why? Because substances work in the immediate short term. Different substances, like alcohol, Ambien, Xanax, opiates, even over the counter drugs like Tylenol PM or Advil PM, are effective in temporarily turning off thinking and allowing or promoting sleep to varying degrees. Of course, regular use of substances often results in collateral consequences ranging from ran-

dom, bizarre blackout behavior, or mental and physical sluggishness the following morning, to long-term addiction. Because our brains adapt over time to regular chemical changes (called neuroplasticity), these substances all eventually lose their effectiveness, resulting in lawyers taking higher doses in an attempt to obtain the effect felt in the earlier days of use. And often, we see lawyers using substances like Adderall or cocaine to counteract the sluggish thinking aftereffects of the substances used to promote sleep. Substances are not a viable, long-term solution.

Because we cycle through the sleep stages, we all encounter times where we are more easily awoken by external stimuli or our own thoughts. So the goal in maintaining a minimally interrupted sleeping state is to minimize or standardize the external stimuli, and/or find a way to distract and calm the thought process.

Some of the suggestions may seem counterintuitive. The strategies employed are as unique as the individuals who employ them. Take what you like and leave the rest.

#### *TV*

One of the most counterintuitive suggestions for those who have trouble falling asleep is to watch TV (on a TV, not on your phone or iPad due to the screen light). The key, however, is to watch something that is engaging enough to keep your mind occupied so that it doesn't drift back to the hamster on the wheel, yet boring enough that it will not hold your interest and keep you awake. For this suggestion to work we are targeting content that you don't really care about. We don't want to be invested in the story line, the characters, or the plot twists. With the proliferation of streaming services, it is easy to find a television show that you have already watched and are completely familiar with. Some lawyers find shows like *Seinfeld*, *30 Rock*, *The Office*, and *Friends* helpful. Other lawyers put on documentaries from a history or nature channel that they have seen before, so it is not new information. The key is to know yourself and find the sweet spot between distracting enough to the mind, but boring/uninteresting enough to doze off. With smart TVs these days, often you can set a timer so that the TV will automatically turn off at the time you indicate so that the background noise does not wake you later. For those who don't have a TV in their bedroom...

#### *Podcasts*

Like TV, this may seem a counterintuitive

suggestion. And like TV, the key is to find content that hits that sweet spot between boring and engaging. There is a podcast called *Sleep with Me* designed specifically to help people fall asleep. The narrator takes a relatively distracting or engaging topic—say, an old, well-known episode of *Star Trek*—and then rambles on about it for an hour, speaking in long, droning, winding sentences that circle back around on each other. An alert listener would be driven mad within a few minutes of listening. But for those seeking sleep, it is a perfect recipe. Many report falling asleep within the first ten minutes of the podcast.

There are many podcasts that are not designed for this purpose, but may work just as well if the host or guest has a soothing enough tone of voice. We've had lawyers describe very interesting and engaging podcasts that, once the content is familiar, work wonders to help the person fall asleep. It is interesting enough to initially catch their attention, but because they've listened to it so many times, they quickly drift off to sleep. We've also had lawyers take their iPad to bed with them, and if the hamster wakes them at three in the morning, they hit play on that podcast again and fall back to sleep immediately. It is recommended to use the same podcast over and over again.

#### *Ambient Noise*

For some lawyers even old TV shows or podcasts would be too engaging and would keep them awake, commanding their attention. Some have found the use of a white noise machine helpful. There are apps available that create background noise of waves in the ocean, rain on a tarp, or quietly chirping tree frogs in a rain forest. For some people, this kind of noise would keep them awake and irritate them. But for those who report that this strategy works, it works very well.

#### *Read*

Just like the TV and podcast suggestions, it can be helpful to read something that keeps your mind fairly occupied at first, but will not ultimately hold your attention. We don't want a page turner here. A reading light by the bed is optimal and easy to click off. Or, if you don't have a reading light, it helps if you have the ceiling bedroom light on a remote control so that as you drift off to sleep (or if you fall asleep and wake up a little later), you can hit the remote control to turn the light off.

#### *Early Morning Exercise*

One of the most reliable ways to ensure we will be exhausted at the end of the day, and

have better focus during the workday, is to work out (hard) in the morning. We're not talking about a leisurely walk around the block or a deep stretch yoga class. We're talking about high intensity interval training. Running. Spin class. Kickboxing. It needs to be something to get your heart rate up and keep it up for 45 minutes to an hour. Some do not want to exercise in the morning but would rather exercise after work. That can work; however, during high intensity interval training where we keep our heart rates up, certain hormones and endorphins are released that can actually keep us awake. That's why it's recommended to exercise in the morning.

#### *Body Scan*

This is a technique that is often used in meditation. It helps focus the mind and relax the body. When lying in bed, turn your attention to the very top of your head. See if you can notice any feeling in your scalp or the weight of your head on your pillow. Move your attention to the front of your head to your forehead. Tense your forehead muscles by raising your eye brows or furrowing your brow. Hold that tension for three to five seconds and then release and relax your forehead completely. Then move down to your cheeks and mouth. Do the same thing. Slowly move down your whole body, noticing each muscle group, tensing the muscles of that area for three to five seconds, and then releasing. The goal is to hopefully fall asleep before you get to your feet. If you get to your feet, curl your toes, hold for three to five seconds, then release. See if you are relaxed enough to fall asleep at that time.

#### *Journal*

When the hamster is really active, it can be helpful to keep a journal and a pen next to the bed. Whether having trouble falling asleep or waking up at three in the morning, when your mind starts to race with a list of all the things you need to do, or all the things you need to think about and follow up on, or strategies you must employ, or whatever it is... instead of ruminating on it, pick up the journal and jot down all of your ideas. And then leave them there and let them go. The idea is to take reassurance from the fact that they are recorded and can command your full attention the next workday. Think of the metaphor that you're putting them up on a shelf and can take them down the next day. As with any of the strategies, if journaling wakes you up and

CONTINUED ON PAGE 33

# Getting Down to Business about Sleep in the Legal Profession

BY LAURA MAHR

## Sleep and Our Profession

In the past four years of providing resilience coaching and stress reduction training for lawyers, judges, and law school students, one thing is abundantly clear to me: Our profession rates high on stress and low on quality sleep. When I ask my coaching clients and mindfulness students about their sleep habits, many share that they struggle to get a good night's sleep. Some can't fall asleep, others don't stay asleep, others struggle to wake up in the morning. The more neuroscience research proves the benefits of quality of sleep and reveals the connection between physical, mental, and emotional ailments related to sleeplessness, the more the high rates of stress, burnout, depression, anxiety, and addiction in our profession add up.

Sleep fuels our bodies and brains; law demands too much of us to continuously practice on a drained fuel tank. Working chronically tired can lead to ineffective lawyering resulting from making mistakes, missing solutions to problems, forgetting, and acting out emotionally. Bottom line: Bad sleep is bad for our business, even if what is preventing a good night's sleep is a good intention to do well at work.

## A Lawyer's Experience

A recently retired lawyer who practiced for 40 years shared that he never slept more than three or four hours at a time. He worked late after his family went to bed and then went to sleep. After a few hours, he awakened with a start, his mind racing through his cases and his to-do list. The only strategy he had to calm his mind was to get up, go to the office, and start his work day at 3:30 AM.

I asked him in retrospect what would have been helpful for him during those many years of sleepless nights. He replied, "I

wish someone had taught me the kinds of tools I'm learning now...like how to calm down with mindfulness." "For most of my career, nobody was talking about sleep or stress or what to do about it...I didn't get the correlation between sleep and productivity. I certainly didn't talk about my sleep problems at work. I didn't want my colleagues or my clients to think that I didn't have what it takes to get my job done right."

## The Connection between Restorative Sleep and Effective Client Services

It's useful for us to connect the dots between getting restorative sleep and effective client services. Quality sleep helps us to learn more quickly and retain what we learn; when we are rested, we think and problem solve more effectively and more creatively, and we feel more motivated. In addition, there's a strong connection between effective leadership and getting enough sleep (*see* [bit.ly/1XvbWX1](http://bit.ly/1XvbWX1)).

It's easy to comprehend the logic that follows: We lawyer and preside over courtrooms better when we learn quickly, retain what we learn, think creatively, and are motivated.

## The Downside of Poor Sleep

Conversely, our cognitive functioning declines rapidly with sleep deprivation (*see* *Neurocognitive Consequences of Sleep Deprivation*, Semin Neurol. 2009 Sep.;



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29(4): 320–339, available online at [bit.ly/2zfpeG](http://bit.ly/2zfpeG)). It's compelling for our profession to understand that this neuroscience research shows that while certain parts of our brains can function fairly well on little sleep, the prefrontal cortex—the “executive functioning” part of our brain that does our lawyering (reasoning, organizing, planning, and problem solving)—struggles greatly with sleep deprivation. The article summarizes these eye-opening cognitive performance effects of sleep deprivation:

- Involuntary microsleeps (falling asleep).
- Attention-intensive performance is unstable with increased errors of omission (lapses) and commission (wrong responses).
- Psychomotor response time slows.
- Both short-term recall and working memory performances decline.
- Reduced learning (acquisition) of cognitive tasks occurs.
- Performance requiring divergent thinking deteriorates.
- Response suppression errors increase in tasks primarily subserved by the prefrontal cortex.

- Response perseveration on ineffective solutions is more likely to occur.
- Increased compensatory effort is required to remain behaviorally effective.
- Tasks may begin well, but performance deteriorates as task duration increases.
- Growing neglect of activities judged to be nonessential (loss of situational awareness) occurs.

When we work when we are tired, we are less efficient and make more mistakes, and we ultimately become further exhausted as we push the neocortex to function when it would rather be restoring its energy through sleep. In addition, when we work when we are sleepy, we are more prone to distraction, such as surfing the web or checking our phones (*see* [bit.ly/2Y54bBq](http://bit.ly/2Y54bBq)). Therefore, tasks that would otherwise take only a few minutes may drag on because we lose our focus.

In addition, an interesting study on sleep and leadership, *You wouldn't like me when I'm sleepy: Leader sleep, daily abusive supervision, and work unit engagement*, available online at [bit.ly/2JWtSvo](http://bit.ly/2JWtSvo), found that the quality of sleep of a workplace leader plays a role in the supervisor's abusive behavior. The study also makes the connection between abusive behavior by leaders and employee disengagement and lowered job performance. The study's authors recommend that leaders "attempt to delay important interactions or decisions on days when they have had a poor night of sleep the night before." Another interesting study found that employees who experience high amounts of workplace telepressure from their employers—the preoccupation and urge to immediately respond to email or text messages—tend to have poor sleep quality and high rates of work exhaustion (Barber & Santuzzi, 2015, [bit.ly/2Zglueq](http://bit.ly/2Zglueq)).

### The Upside of Quality Sleep

Quality sleep, on the other hand, helps us to feel good. It reduces stress and inflammation, and supports a healthy immune system and heart (*see* [bit.ly/2DNqQbS](http://bit.ly/2DNqQbS)). Getting quality sleep is one way to uplevel our physical health and our work-life satisfaction. Neuroscience research shows that quality sleep helps us to stabilize our moods, and decrease irritation and emotional volatility (*Overnight Therapy? The Role of Sleep in Emotional Brain Processing*, [bit.ly/2Y6Aosn](http://bit.ly/2Y6Aosn)). As attorneys and judges,

we want to feel emotionally stable at work. It's desirable for effective client services, in-house teamwork, professional collegiality, and decision making to be able to think and act calmly, without getting emotionally triggered. Additionally, most clients and courtrooms respond well to a calm, emotionally stable demeanor. When our mood is regulated, things tend to work out better all around—for our clients, our cases, and ourselves.

### Ideas for Improving our Profession's Relationship with Sleep

We need sleep. We know it. Yet most of us aren't getting the sleep we need, in part because of our anxiousness about doing well, and in part because we are members of a profession that is still learning about well-being. Circling back to the retired attorney and his hesitancy to talk about his sleep challenges at work, he's correct in pointing out that our current legal culture isn't accustomed to talking about the toll practicing law or sitting on the bench takes on us, including our ability to sleep peacefully. For most lawyers and judges, it is uncomfortable and feels foreign to talk about our need for greater wellbeing, or our need for help. What would happen if we acknowledged our discomfort, and then set it aside and turned toward productive ways to address our profession's lack of sleep and its impact on our wellbeing and performance?

If you would like to begin the conversation at your place of employment or improve your own sleep hygiene, here are a few places to start:

#### Ways legal employers can cultivate an office culture that supports good sleep habits:

1. Host a CLE/training for the entire organization on sleep hygiene that includes sleep theory and practical tools that promote restful sleep.
2. Create sleep-supportive policies and practices regarding staying "plugged in" after normal business hours. Talk about the communication policies with teams. Leaders can share their expectations for staff regarding returning emails, phone calls, and texts to clients and other team members after hours. It may be helpful to hire a professional to facilitate the conversation.
3. Come up with "blackout times" after which no one at the firm is expected to check any kind of work communication,

unless it's an emergency.

#### Ways we can help ourselves to sleep, perform, and feel better:

1. Review the article *Sweet Dreams* on page 28 that the NC Lawyer Assistance Program Director Robynn Moraites contributed to the *Journal* this month. Read her list of suggestions for improved sleep. Pick one suggestion from the list and incorporate it into your life for the next month.

2. Look again at the list above from the *Neurocognitive Consequences of Sleep Deprivation* article. Print it out and put it on your desk. When you have an impulse to work when you are tired, look at the list as a gentle reminder of the benefits of taking a restful break. Then take a break, get some restful sleep, and return to work with your prefrontal cortex back on line.

3. Set "blackout times" for yourself after which you won't check any kind of work communication, unless it's an emergency.

Enjoy trying out some new positive sleeping habits and initiating new conversations with your colleagues about sleep and wellbeing. To all a good night! ■

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

*If you would like to connect with other lawyers and judges interested in learning about mindfulness and resilience in the practice of law, join Laura as she presents at these upcoming events:*

*"Love Your Work. Love Your Life." and "Bouncing Back from Burnout." NCLAP Annual Conference, Greensboro, November 2, 2019.*

*Lawyer Wellness Retreat: Restoring Your Inner Resilience With Mindfulness, Asheville, NC, Oct. 18-19, 2019. For more information: [consciouslegalminds.com/retreat](http://consciouslegalminds.com/retreat) or contact [support@consciouslegalminds.com](mailto:support@consciouslegalminds.com)*

*"Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness, Meditation, and Neuroscience" (online, on demand CLE), [consciouslegalminds.com/register](http://consciouslegalminds.com/register). ■*

# Deonte' Thomas, Board Certified Specialist in State Criminal Law

BY DENISE E. MULLEN, ASSISTANT DIRECTOR FOR THE BOARD OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Deonte' Thomas, a board certified specialist in state criminal law, who practices as a public defender in Wake County. Deonte' began his education as a criminal justice major at Fayetteville State University, later completing his law degree at the University of North Carolina at Chapel Hill. While in law school he was a member of the Student Bar Association, served as chief justice of the Honor Court, and found inspiration in the content and challenge of his evidence classes.



Thomas

Following his second year in law school, Deonte' worked at the Orange County Public Defender's Office in Chapel Hill. He developed a sincere appreciation and admiration for the attorneys working there, and the experience sparked a strong interest in pursuing a career as a public defender. After graduation, Deonte' worked at the Fair Trial Initiative in Durham assisting with death penalty cases. His comments on his legal career and specialty certification follow below.

**Q: Why did you pursue board certification in state criminal law?**

This is the work that I do every day. It's the only kind of law that I envision myself doing, so [pursuing board certification] was an easy decision as the next logical step in my legal career.

**Q: How did the option for a North Carolina Legal Education Assistance Foundation (NC LEAF) scholarship\* impact your decision?**

I doubt I would have applied for board certification and taken the test without the scholarship. At least not at that time. As a public interest attorney, even with years of experience, every dollar I made was immedi-

ately accounted for as soon as I got paid. Receiving the scholarship took that burden off of my shoulders, and it also made me appreciate and respect the test more out of appreciation for those contributing to the scholarship.

*\*The North Carolina Legal Education Assistance Foundation works with the Board of Legal Specialization to offer certification application scholarships for public interest attorneys. The scholarships are completely funded by donations and 100% of contributions are used in scholarship funding. For additional information or to make a tax-deductible donation, visit [www.ncleaf.org](http://www.ncleaf.org).*

**Q: How did you prepare for the examination?**

There were outlines passed around by colleagues, just like we had back in our 1L days. In addition, I borrowed a few of the Bar Prep books from one of my interns. These provided good umbrella topics that I needed to refresh my study outline.

**Q: Has certification been helpful to your work as a public defender? In what ways?**

Being a public defender doesn't typically generate a ton of respect right out of the gate, and I fight against that perception daily. My certification gives me another tool to continue that fight. I tell my clients within the first minute that I meet them that I am a specialist and that I'm going to fight for them. I think that gives them some amount of confidence in my abilities, especially when they have to put their life decisions in the hands of a person they've just met. I'm sure it's a harrowing position to be in, and hopefully knowing that I care enough to take the added steps to be a specialist provides added comfort.

**Q: What do your clients say about your certification?**

"I heard you're a good lawyer." When I first meet a client, that is the type of comment I generally hear. This information is typically coming from the jail pods or from their family doing a google search. Having the certification certainly makes initial meetings run more smoothly and be more productive.

**Q: How does your certification benefit your clients?**

Trust is the most important thing in an attorney client relationship. Having the certification is another stamp, showing that I work hard and that I am prepared, and that the advice I am providing is accurate, to the best of my ability.

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

The legalization of hemp and its effect on probable cause searches for marijuana is a topic to watch. As a criminal defense attorney, I am definitely biased on that outcome.

**Q: How do you stay current in your field?**

The UNC School of Government Law blog is a part of my daily routine. I also learn something every time I take cases to trial.

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

It's hard to be a master at all forms of law. I think criminal law specialization is especially important because of the quick pace of the court, and because of the real-life, serious consequences of this area of law.

**Q: How does specialization benefit the public and the profession?**

As lawyers, we are accountable to the profession to maintain high personal standards, both for ourselves and other attorneys. Being a specialist helps you stand out to the public and gives them a way to easily find a person that is dedicated to their needed area of law.

**Q: What would you say to encourage other**

## lawyers to pursue certification?

You can do it! Yes, it is a challenge. A serious one. However, I was elated when I passed the test and am proud of it every day. Lawyers are used to the challenges of life and facing them head on. This is just another challenge. And don't be afraid to defer the test if the time comes and you aren't quite ready. I had to, and other lawyers I talked to

have as well.

## Q: How do you see the future of specialization?

With the abundance of attorneys, especially in Wake County, I think specialization will be important to help us stand apart. ■

*For more information on how to become certified, visit our website at [nclawspecialists.gov](http://nclawspecialists.gov).*

## Lawyer Assistance Program (cont.)

activates your thinking too much, this is not a strategy for you.

### *ABCs and The Nutcracker*

This category covers a range of exercises. One technique is to create a gratitude list in your mind following the ABCs. Don't just think of words like apples, bananas, carrots, etc. Begin a list of things you're grateful for that start with each letter of the alphabet, beginning at A. Most people fall asleep somewhere between H and P. And feeling gratitude is a nice way to fall asleep.

Similarly, think of something long that you know all the words to and recite it. One lawyer performed in the *Nutcracker* many times as a child. She knew the entire score. When having trouble falling asleep, she started at the beginning of the ballet and began playing the music, reciting words and lyrics in her mind until she fell asleep.

### *Get Up and Out of Bed*

The standard recommendation if one cannot sleep is to get up if you have been lying awake for more than 20 minutes. Rest assured, if you have a relatively sleepless night, you will more than likely be pretty exhausted the next day and will fall asleep easily.

### *Smartphone Restriction*

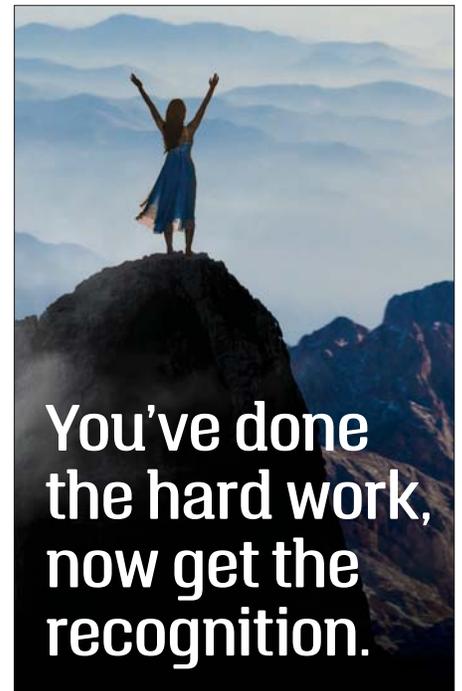
This final suggestion probably falls into the category of good sleep hygiene habits. We have found it to be imperative for lawyers. Part of the way we avoid the hamster on the wheel is to not throw the hamster on the wheel. Rarely in the law is there a time sensitive emergency. Most urgency is created in our own minds with internal, artificial deadlines and expectations of ourselves. If you step back and look at it objectively, there are very few real late night emergencies that need to be tended to. Almost everything can wait until tomorrow. Many lawyers admit we have had

times where we are feeling relaxed in the evening, we are starting to wind down for bed, and then we make the dreaded mistake of glancing at our phones at 10:30 at night. BAM! We get a shot of adrenaline because there's an aggressive email from opposing counsel or a client feels like they have a life threatening emergency (but they really don't). Regardless of the message content, the adrenaline kicks in and now we are wide awake for several hours. Set a curfew. Make yourself a promise and set a boundary. Do not check your phone after say 7:00 or 8:00 at night. Even better, turn it off while it sits in the charger overnight. Our nervous systems are not built to handle the perpetual stress that the profession heaps upon us. We have to make room for restorative deep sleep to remain effective as lawyers.

This also may be a way to set a good example for children and teenagers in your family. Set a curfew for all smart phones in the house, collect them in a basket, and put them up on top of a dresser in your room. This way everyone is in it together and trying to practice healthy habits as a family.

All of the above suggestions are things that have worked in real life with real lawyers. Figure out what works for you. If you have a suggestion that was not mentioned but has worked for you, I'd love to hear what it is so that I can add it to our list of suggestions. ■

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



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# The Race to Report

BY LEANOR BAILEY HODGE, TRUST ACCOUNT COMPLIANCE COUNSEL

**T**iming is everything...really, it is. Timing dictates when something should be done. One might say that the timing of doing a thing can be more important than the actual thing that is being done. If a chef prepares a delectable meal for guests but fails to deliver it until after everyone has gone to bed for the night, the meal's delectability matters little. If the Philadelphia Eagles have the best game of their season after they have already failed to make the playoffs, trust me, for the Eagles fans, it means nothing. If a lawyer works for months on a brief and generates a final product that is persuasive and eloquent but fails to file the brief until a week after the deadline, it won't be of any benefit to the client. Timing is important.

Rule 1.15-2(p) requires that "[a] lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall *promptly* inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC *immediately*." (Emphasis added.) This rule requires reporting in the situations described, but it also specifies the time within which these actions must be taken. Rule 1.15-1 does not include definitions for "immediately" or "promptly."

"Immediately," an adverb, means something that is done "without interval of time."<sup>1</sup> In plain language, to do something immediately means to do it right away, without passage of time, DO IT NOW! If your tire blows out while you are driving, you pull over IMMEDIATELY. If the sauce you are cooking catches fire, you grab the fire extinguisher and put the fire out IMMEDIATELY. If you put your hand on a hot stove, you pull it away IMMEDIATELY. There are certainly many more examples of circumstances that would require

you to respond or act immediately, but you get the idea. All of these events have a few things in common: (1) the catastrophe can be mitigated if dealt with right away; (2) a delay in action will foreclose some options that would remain available if more swift action were taken; and (3) they do not get better with time if not addressed. These things are also true in cases of intentional theft from and fraud against the trust account. If these situations are attended to right away, there are possible actions one can take that may yield restorative results. Unlike fine wine, issues of theft and fraud in the trust account do not get better with time, nor do they get better when they are ignored. Timely making the required report of intentional theft or fraud ensures that you receive the benefit of the latest information at the State Bar's disposal about available responsive measures.

Distinguish "immediately" from "promptly," also an adverb, which *Merriam-Webster's* online dictionary defines as "in a prompt manner: without delay: very quickly or immediately." By definition, all actions taken immediately also qualify as prompt actions. However, the reverse is not true. One may take a prompt action that is not necessarily also an immediate one. Immediately always communicates the highest sense of urgency, whereas promptly does not. However, promptly still expresses that there is an important situation that requires both attention and action. Plainly put, although immediately and promptly both connote swift action, promptly will always come in second in the race against immediately. For example, when your car's oil change indicator illuminates, you certainly will get your oil changed PROMPTLY, though it is not a situation that requires you to act immediately. If your tire blows out, you will certainly pull over immediately and then PROMPTLY change the tire. If the sauce you are cooking catches fire, you

grab the fire extinguisher and put the fire out immediately and then PROMPTLY contact your insurer to report the damage to your home. If you put your hand on a hot stove, you pull it away immediately and then PROMPTLY treat the burn. When 911 receives an emergency call, they respond immediately to the call and then PROMPTLY arrive at the scene.

As this article demonstrates, the timing prescribed for the two categories of reports required by Rule 1.15-2(p) is similar but not the same. The urgency associated with instances of intentional theft and fraud dictates that reports of these occurrences be made with all deliberate speed and certainly, more quickly than a report of misapplication of entrusted funds. However, misappropriation or misapplication of entrusted funds are also issues of importance that are only *slightly* less urgent, and therefore these reports must also be made swiftly and without delay. ■

## Endnote

1. "immediately." Merriam-Webster.com *Merriam-Webster*, 2019. Web. July 25, 2019.

## The Fine Art of Learning to Say No (cont.)

career at the Bar.

I learned a lot from the case on which I should have said no, and I paid a high price for the instruction. Hopefully this story will save you some tuition. ■

*Mike Wells is a senior partner with the Wells Law Firm in Winston-Salem. He served on the State Bar Ethics Committee from 1994-2000, and he was president of the North Carolina Bar Association from 2012-2013.*

# Opinions Proposed on Virtual Currency, Advertising Inclusion in Self-Laudatory Groups, and Offering Incentives for Social Media “Likes”

## Council Actions

At its meeting on July 19, 2019, the State Bar Council adopted the ethics opinion and ethics decisions summarized below:

### 2018 Formal Ethics Opinion 5

#### *Accessing Social Network Presence of Represented or Unrepresented Persons*

Opinion reviews a lawyer’s professional responsibilities when seeking access to a person’s profile, pages, and posts on a social network to investigate a client’s legal matter.

## Ethics Committee Actions

The Ethics Committee considered a total of eight inquiries at its meeting on July 18, 2019. Two of those inquiries were returned to subcommittee for further study, including an inquiry on the use of attorney’s eyes only discovery agreements and the previously published Proposed 2019 Formal Ethics Opinion 4 addressing the permissibility of certain communications with judges. Lastly, the committee approved for publication a revised version of Proposed 2018 Formal Ethics Opinion 8 and two new opinions, which appear below.

### Proposed 2018 Formal Ethics Opinion 8 Advertising Inclusion in Self-Laudatory List or Organization July 18, 2019

*Proposed opinion rules that a lawyer may advertise the lawyer’s inclusion in a list or membership in an organization that bestows a laudatory designation on the lawyer subject to certain conditions.*

**Editor’s note:** 2007 FEO 14 was adopted by the State Bar Council on January 25, 2008. The opinion below incorporates the substance of that opinion’s analysis, and serves as a replacement of 2007 FEO 14. 2007 FEO 14 was withdrawn by the State

Bar Council on \_\_\_\_\_ upon adoption by the council of the opinion below.

## Inquiry:

Numerous companies and organizations provide lawyers with the opportunity to be included in a list or to become members of a group that describes itself with self-laudatory terms and/or bestows self-provided accolades to its members. Examples of such lists or groups are those that describe their included lawyers as “best,” “super,” and “distinction.” Lawyers then advertise their inclusion in these groups or lists to consumers.

Do the Rules of Professional Conduct permit a lawyer to advertise their inclusion in such self-laudatory groups or lists?

## Opinion:

Yes, subject to certain conditions.

Rule 7.1(a) prohibits a lawyer from making false or misleading communications about himself or his services. The rule defines a false or misleading communication as a communication that contains a material misrepresentation of fact or law, or omits a necessary fact; one that is likely to create an unjustified expectation about results the lawyer can achieve; or one that compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated.

Rule 7.1 derives from a long line of Supreme Court cases holding that lawyer advertising is commercial speech that is protected by the First Amendment and subject to limited state regulation. In *Bates v. State Bar of Arizona*, 433 US 350 (1977), the Supreme Court first declared that First Amendment protection extends to lawyer advertising as a form of commercial speech. The Court held that a state may not constitutionally prohibit a lawyer’s advertisement for fees for routine

## *Rules, Procedure, Comments*

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at the next quarterly meeting. Any comment or request should be directed to the Ethics Committee c/o Lanice Heidbrink at lheidbrink@ncbar.gov no later than October 4, 2019.

## *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.

legal services, although it may prohibit commercial expression that is false, deceptive, or misleading and may impose reasonable restrictions as to time, place, and manner. *Id.*

at 383-84. Subsequent Supreme Court opinions clarified that the commercial speech doctrine set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of NY*, 447 US 557 (1980), is applicable to lawyer advertising. See *In re R.M.J.*, 455 US 191 (1982). Specifically, a state may absolutely prohibit inherently misleading speech or speech that has been proven to be misleading; however, other restrictions are appropriate only where they serve a substantial state interest, directly advance that interest, and are no more restrictive than reasonably necessary to serve that interest. *Id.* at 200-04.

Thirteen years after *Bates*, in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 US 91 (1990), a plurality of the Supreme Court concluded that a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The Court found NBTA to be a “bona fide organization,” with “objectively clear” standards, which had made inquiry into Peel’s fitness for certification and which had not “issued certificates indiscriminately for a price.” *Id.* at 102, 110. If a state is concerned that a lawyer’s claim to certification may be a sham, the state can require the lawyer “to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law.” *Id.* at 109. In concluding that the NBTA certification advertised by Peel in his letterhead was neither actually nor potentially misleading, the Court emphasized “the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information.” *Id.* at 108.

*Ibanez v. Florida Department of Business and Professional Regulation, Board of*

*Accountancy*, 512 US 136 (1994), similarly held that a state may not prohibit a CPA from advertising her credential as a “Certified Financial Planner” (CFP) where that designation was obtained from a private organization. As in *Peel*, the Court found that a state may not ban statements that are not actually or inherently misleading such as a statement of certification, including the CFP designation, by a “bona fide organization.” *Id.* at 145. The Court dismissed concerns that a consumer will be misled because he or she cannot verify the accuracy or value of the designation by observing that a consumer may call the CFP Board of Standards to obtain this information. *Id.*

The question here is whether advertising one’s membership in a group, or inclusion on a list of lawyers that implies that the lawyer is, for example, “best,” or “super,” or “distinguished,” is misleading because the term creates the unjustified expectation that the lawyer can achieve results that an ordinary lawyer cannot or compares the lawyer’s services with the services of other lawyers without factual substantiation. When a potential consumer of legal services sees the words “super” or “distinguished” associated with a lawyer by way of a bestowed award or accolade purporting to pertain to legal services, the consumer may view these awards or accolades as evidence of a lawyer’s competence and achievement. Therefore, to avoid misleading consumers, a lawyer may advertise such accolades or inclusion in self-laudatory groups or lists only when certain conditions are met.

First, no compensation may be paid by the lawyer, or the lawyer’s firm, for the award or accolade being bestowed upon the lawyer or for inclusion in the group or listing. Although a lawyer may pay the reasonable costs of advertisements as a result of inclusion (see Rule 7.2(b) and 2018 FEO 1) marketing or advertising fees that must be paid prior to the lawyer’s inclusion in the group or listing or the lawyer’s receipt of the accolade or award effectively become compensation required from the lawyer for inclusion or for the accolade. As such, the accolade, award, or inclusion is misleading in violation of Rule 7.1(a) because it is bestowed, at least in part, because of a lawyer’s willingness and ability to pay, and not for reasons that are objective, verifiable, and bona fide. After the award, accolade, or inclusion has been granted, a lawyer may pay the reasonable costs of advertisements concerning the inclusion. However,

marketing or advertising fees charged by the self-laudatory group that serve as a barrier to the lawyer’s inclusion in the group or receipt of an accolade are not permissible.

Second, before advertising the inclusion or any award associated with inclusion, the lawyer must ascertain that the organization conferring the award is a bona fide organization that made adequate and individualized inquiry into the lawyer’s qualifications for the inclusion or award. The selection methodology must be based upon objective, verifiable, and consistently applied factors relating to a lawyer’s qualifications (including, but not limited to, a lawyer’s years of practice, types of experience, peer review, professional discipline record, publications and/or presentations, and client and other third-party testimonials) that would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership.

Third, any advertisement by the lawyer of his inclusion in a self-laudatory group or list must also contain an explanation of the standards for inclusion or provide the consumer with information on how to obtain the inclusion standards. See *Bates*, 433 US at 375. The explanation of the standards for inclusion—wherever located—must be such that a potential consumer of legal services can reasonably determine how much value to place in the lawyer’s inclusion in such group or list. Additionally, the advertisement must state only that the lawyer was included in the list, and not suggest that the lawyer has the attribute(s) conferred by the group or list. This requirement applies equally to groups or lists that contain a superlative in the name of the group or list itself, such as “super” or “best,” and groups or lists that do not contain superlatives in the name of the group or list, but bestow such superlatives on its included lawyers through the group’s or list’s marketing materials (including its online presence). When the group or list inclusion may create unjustified expectations, such as the expectation that a lawyer obtains a high-dollar verdict in every case, the advertisement must also include a disclaimer providing notice that similar results are not guaranteed, and that each case is different and must be evaluated separately. See 99 FEO 7, 2000 FEO 1, and 2003 FEO 3. Lastly, the advertisement must indicate the year(s) in which the lawyer received the award or was a member of the

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organization.

A lawyer must determine whether a particular group or list satisfies each of these requirements before advertising their inclusion in the group or list, and a lawyer has a continuing obligation to ensure the group or list remains compliant with the requirements of this opinion upon each renewal. If all requirements are met, the lawyer may advertise his inclusion in the group or list.

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**Proposed 2019 Formal Ethics  
Opinion 5  
Receipt of Virtual Currency in Law  
Practice  
July 18, 2019**

*Proposed opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied. A lawyer may not, however, accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.*

**Introduction:**

Virtual currency<sup>1</sup>—most notably, Bitcoin—is increasingly used for conducting business and service-related transactions.<sup>2</sup> Although advocates for and users of virtual currency treat these assets as actual currency, the Internal Revenue Service in 2014 classified virtual currency as property, not recognized currency. See IRS Notice 2014-21, [irs.gov/pub/irs-drop/n-14-21.pdf](http://irs.gov/pub/irs-drop/n-14-21.pdf). Accordingly, for the purpose of determining a lawyer's professional responsibility in conducting transactions related to her law practice using virtual currency, this opinion adopts the IRS's position and views virtual currencies as property, rather than actual currency.

**Inquiry #1:**

Client wants to retain Lawyer for representation in a pending matter. Lawyer charges Client a flat fee for the representation. Client wants to pay Lawyer using virtual currency. May Lawyer accept virtual currency from Client as a flat fee in exchange for legal services?

**Opinion #1:**

Yes, provided the fee is not clearly excessive and the lawyer complies with the requirements in Rule 1.8(a).

A flat fee is a "fee paid at the beginning of a representation for specified legal services on

a discrete legal task or isolated transaction to be completed within a reasonable amount of time[.]" 2008 FEO 10. With client consent, a flat fee is considered "earned immediately and paid to the lawyer or deposited in the firm operating account[.]" *Id.* Rule 1.5(a) prohibits a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee. Comment 4 to Rule 1.5 states that "a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client." Rule 1.8(a) prohibits a lawyer from entering into a business transaction with a client unless the following provisions are met:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Rule 1.8(a)(1)–(3).

As of the date of this opinion, the value of virtual currencies fluctuates significantly and unpredictably from day to day. Considering this extreme fluctuation, any transaction involving virtual currencies inherently involves a great deal of risk by the parties on the ultimate value of the services rendered. Without an express agreement between Lawyer and Client on when the valuation of the virtual currency is determined, Lawyer could receive an inappropriate windfall in the form of extreme overpayment for legal services. Accordingly, considering the nature of the property at issue in this exchange, Client's payment of virtual currency to Lawyer for legal services has "the essential qualities of a business transaction with the client." Rule 1.5, cmt. 4. As such, Lawyer must comply with the requirements of Rule 1.8(a) when conducting a transaction wherein legal services are exchanged for virtual currency. Therefore:

1. Lawyer must ensure the terms of the

transaction are fair and reasonable to Client, and Lawyer must fully disclose the terms in writing to Client in a manner that can be reasonably understood by Client. To ensure a flat fee, which is earned upon receipt (see 2008 FEO 10), is not clearly excessive under Rule 1.5, and for the purposes of any potential required refunds following withdrawal or termination from the representation, Lawyer and Client must reach a mutually agreed upon determination of the value of the virtual currency exchanged at the time of the transaction. That valuation must be included as part of the written terms of the transaction;

2. Lawyer must advise Client in writing of the desirability of seeking independent legal counsel on the transaction, and Lawyer must give Client a reasonable opportunity to obtain that counsel; and

3. Lawyer must obtain Client's written, informed consent to the essential terms of the transaction as well as Lawyer's role in the transaction. Although Rule 1.8(a)(3) contemplates that Lawyer could represent Client in this transaction, Lawyer's potentially significant monetary interest in acquiring the virtual currency suggests that Lawyer may not represent Client in the transaction.

This opinion does not reach the legal issues surrounding an individual's receipt of and transacting in virtual currency. Before transacting in virtual currency, lawyers should apprise themselves of the legal ramifications surrounding the use of virtual currency, including potential tax and criminal implications. As with other forms of payment, lawyers should take the appropriate steps to ensure any virtual currency received is not the product of or otherwise connected to illegal activity.

**Inquiry #2:**

May Lawyer accept virtual currency from a third party on behalf of Client as a flat fee in exchange for legal services rendered?

**Opinion #2:**

Yes. Lawyer may receive compensation from a third party for the benefit of Client provided that a) Client provides informed consent to Lawyer regarding the third party's virtual currency payment, b) there is no interference with Lawyer's independence of professional judgment, or with the client-lawyer relationship, and c) information obtained by Lawyer during the client-lawyer relationship remains confidential and protected in accor-

dance with Rule 1.6. See Rule 1.8(f). See also Opinion #1.

### **Inquiry #3:**

Client wants to retain Lawyer for representation in a pending matter. Lawyer plans to charge Client an hourly rate for the representation, and Lawyer wants Client to deposit a set amount of virtual currency with Lawyer to be billed against as work is completed by Lawyer. May Lawyer accept virtual currency from Client as an advance payment, against which Lawyer will bill Lawyer's hourly rate?

### **Opinion #3:**

No. An advance payment is “a deposit by the client of money that will be billed against, usually on an hourly basis, as legal services are provided[.]” 2008 FEO 10. The advance payment is “not earned until legal services are rendered,” and therefore must be deposited in the lawyer's trust account, with the unearned portion of the advance payment refunded to the client upon termination of the client-lawyer relationship. *Id.* Virtual currency is property and not actual currency; accordingly, virtual currency cannot be deposited in a lawyer trust account or fiduciary account in accordance with Rule 1.15-2. Instead, virtual currency—and all other non-currency property received as entrusted property—must be “promptly identified, labeled as property of the person or entity for whom it is to be held, and placed in a safe deposit box or other suitable place of safekeeping.” Rule 1.15-2(d).

Generally, virtual currency is received, held or maintained in, and distributed from an individual's computer (referred to as “cold storage”) or in a digital “wallet” typically maintained by an individual through a digital asset exchange. Deidre A. Liedel, *The Taxation of Bitcoin: How the IRS Views Cryptocurrencies*, 66 Drake L. Rev. 107, 111-12 (2018). Holders of virtual currency access and exchange their virtual currency through the use of the holder's public and private keys associated with their virtual currency activity. See generally Lisa Miller, *Getting Paid in Bitcoin*, 41 Los Angeles Lawyer 18, 19-20 (December 2018); Carol Goforth, *The Lawyer's Cryptionary: A Resource for Talking to Clients about Crypto-transactions*, 41 Campbell L. Rev. 47, 112-13 (2019). Due to the decentralized nature of virtual currency, exchanges of virtual currency from one account to another cannot be reversed, and a virtual currency holder cannot recover a lost private

key to access his or her virtual currency.

The methods in which virtual currency are held are not yet suitable places of safekeeping for the purpose of protecting entrusted client property under Rule 1.15-2(d). Rule 1.15-2(d)'s reference to “a safe deposit box or other suitable place of safekeeping” demonstrates that the “suitable place of safekeeping” referenced in the Rule is one that ensures confidentiality for the client and provides exclusive control for the lawyer charged with maintaining the property, as well as the ability of the client or lawyer to rely on institutional backing to access the safeguarded property through appropriate verification should the lawyer's ability to access the property disappear (be it through the lawyer's misplacement of a physical key, or the lawyer's unavailability due to death or disability). The environment in which virtual currency presently exists, however, does not afford similar features that allow clients to confidently place entrusted virtual currency in the hands of their lawyers. A February 2019 report found that even knowledgeable users of virtual currency experienced a variety of complications and concerning issues in exchanging virtual currency that threatened the execution of and confidence in the exchange, including sending virtual currency to the wrong individual by inputting the wrong public key, losing their own private key (thereby rendering the user's virtual currency permanently inaccessible), or being subject to phishing attacks or other attempted hacks to illegally access their digital wallets. See Foundation for Interwallet Operability, *Blockchain Usability Report* (February 2019), [fio.foundation/wp-content/themes/fio/dist/files/blockchain-usability-report-2019.pdf](https://www.fio.foundation/wp-content/themes/fio/dist/files/blockchain-usability-report-2019.pdf) (“While the blockchain industry has grown dramatically over the last year, usability is clearly still an ongoing struggle, and the use of blockchain in actual commerce and utility is still very limited. Blockchain transactions are, by definition, immutable. With immutable transactions, users must have extremely high confidence that transactions are occurring as intended, with the right counter party, for the right amount and for the right type of token. Today, blockchain is still far from achieving that high standard.”). Any virtual currency received from a client by a lawyer—including lawyers who are experienced in handling and exchanging virtual currency—is subject to being permanently lost with no recourse available to secure the client's property as a

result of a lawyer's private key becoming inaccessible, a lawyer's mistaken input of a public key destination for a transfer of virtual currency, or a sophisticated hack of the lawyer's virtual wallet.

This opinion does not preclude the possibility that, in time, digital wallets and other methods in which virtual currency may be held and exchanged could improve in terms of security and accessibility. Such improvements may warrant reconsideration of this opinion. This opinion also does not address the difficulty in reconciling the frequent and significant fluctuation in value of virtual currency while held by a lawyer during the representation, nor does the opinion address the need to segregate clients' virtual currency or the difficulty associated with investigating claims of lawyer misappropriation of a client's virtual currency. These concerns may present further barriers to a lawyer's ability under the Rules of Professional Conduct to handle virtual currency in an entrusted capacity. However, as of the date of this opinion, and with the primary interest of the State Bar being the protection of the public, the methods in which virtual currency are held and exchanged are not yet suitable places of safekeeping as required by Rule 1.15-2(d) for the proper safeguarding of virtual currency as entrusted client property. Accordingly, a lawyer may not receive, maintain, or disburse entrusted virtual currency.

### **Inquiry #4:**

Client has retained Lawyer for a pending matter. Client and opposing party settle their dispute. As part of the settlement, Client agrees to provide opposing party with a set amount of virtual currency. Client and opposing party ask Lawyer to hold Client's virtual currency in trust for the benefit of opposing party via Lawyer's digital wallet until all settlement terms are satisfied, at which point Lawyer will transfer Client's virtual currency to opposing party. May Lawyer accept virtual currency as entrusted property to be held for the benefit of a third party?

### **Opinion #4:**

No, a lawyer may not receive, maintain, or disburse entrusted virtual currency. See Opinion #3.

### **Endnotes**

1. This opinion uses the Internal Revenue Service's term “virtual currency” in referring to cryptocurrency and

other financially-related digital assets.

2. In light of the abundance of information available on the topics of virtual currency and blockchain technology, this opinion will not recite a detailed overview of technological backgrounds or technical operations of these topics, but instead will presume a basic level of familiarity and understanding with the topic by the reader. For background information on these topics, consider the following resources:

1. Nebraska Ethics Advisory Opinion No. 17-03 (2017);
2. Deidre A. Liedel, *The Taxation of Bitcoin: How the IRS Views Cryptocurrencies*, 66 Drake L. Rev. 107, 111-12 (2018);
3. Lisa Miller, *Getting Paid in Bitcoin*, 41 Los Angeles Lawyer 18, 19-20 (December 2018); and
4. Carol Goforth, *The Lawyer's Cryptionary: A Resource for Talking to Clients about Crypto-transactions*, 41 Campbell L. Rev. 47, 112-13 (2019).

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## Proposed 2019 Formal Ethics Opinion 6 Offering Incentive to Engage with Law Practice's Social Networking Sites July 18, 2019

*Proposed opinion rules that, depending on the function of the social media platform, offering an incentive to engage with a law practice's social media account is misleading and constitutes an improper exchange for a recommendation of the law practice's services.*

### Inquiry:

Lawyer maintains an account for his law practice on various social media platforms. These platforms allow social media users to “connect” with other users, including both individuals and business-related entities, through the use of “likes,” “follows,” and “subscriptions.” Some platforms also allow users to comment on posted content or share posted content on their own social networks.

To increase his social media exposure, Lawyer wants to offer a prize incentive to anyone who connects or interacts with any of his social media platforms. All users who connect or interact with Lawyer's law practice social media account will be entered into a drawing for a prize. The giveaway is open to all users of the social media platform used by Lawyer.

May Lawyer offer an incentive to all social media users to connect or interact with Lawyer's law practice social media account?

### Opinion:

No. If a social media platform will broadcast or display a user's connection or interaction with Lawyer's law practice social media account to other users of the platform, Lawyer may not offer prize chances in

exchange for activity on or with his social media accounts.

Generally, lawyers may not give anything of value to a person for recommending the lawyer's services. Rule 7.2(b). Certain social media platforms, such as Facebook, allow users to connect with or otherwise follow a business or service entity's social media account by “liking” the entity on the social media platform. Similarly, users may also comment on or share social media posts made by the business or service entity's account. The user's decision to “like” or follow the entity, and the user's comments on the entity's posts, are then displayed not only within the user's social media feed, but can also be displayed on the feeds of other users who have previously connected with that user. Also, when an individual “likes” a business's social media page, that business's posts/advertisements may appear in the individual's social media feed and may appear in the news feeds of the individual's other “friends” or connections with a caption such as “Jane Smith likes No Name law firm.”

Without further context, other users could interpret an individual “liking” a law practice as a personal endorsement and recommendation of that law practice. If the social media platform broadcasts the user's “like” of the law practice on other users' social media feeds, Lawyer's offer of an entry in a giveaway for a prize to social media users in exchange for the user “liking” the law practice's social media account violates Rule 7.2(b).

Additionally, a lawyer may not make a false or misleading communication about the lawyer or the lawyer's services. Rule 7.1(a). 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. *Id.* The purpose behind Rule 7.2(b)'s prohibition on offering something of value in exchange for recommending services is to ensure that recommendations for a lawyer's services are based upon actual experiences or legitimate opinions of the lawyer's service, rather than financial incentive. The displayed “like” of a law practice may indicate some prior experience with the law practice or the personnel associated with the practice upon which the user's “liking” of the practice is based. Similarly, the credibility attributed to a particular social media account could be influenced by the number of account follow-

ers or subscribers. When the “like” or follow of a law practice's social media account is based upon the user's interest in a prize giveaway, the incentivized “like,” follow, or other interaction received by Lawyer and displayed on social media is misleading in violation of Rule 7.1(a).

This opinion does not prohibit a lawyer or law firm from having a social media presence, or encouraging or inviting other users to like, share, follow, or otherwise interact with the lawyer's or law firm's social media account. Non-incentivized social media interactions are not prohibited. ■

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## Murder on Birchleaf Drive (cont.)

Epstein shows the impact that skilled lawyering and sound trial strategy can have on that search. Cases and appellate opinions from the distant past cast long shadows.

Epstein proves to be a valuable and reliable guide through the many twists and turns of this case. The complex investigation and intertwined story lines are carefully and intelligibly presented. His discussions of the decisions that litigators on both sides had to make are even-handed. Lay readers and lawyers alike will find his analysis of non-intuitive evidentiary issues helpful. Epstein's respect and affection for his colleagues in the Wake County Bar as they work through this most difficult of cases is apparent throughout the book.

Most of all, though, the story Epstein relates is compelling, heartbreaking, and unforgettable. Don't start reading unless you anticipate a few uninterrupted hours. As with *Fatal Vision*, a similar book about a ghastly family murder in North Carolina, the story grabs and doesn't let go. Was Jason, a serial philanderer of volatile temperament and the apparent emotional development of an eighth grader, but with a scanty record of violence, responsible for beating his pregnant wife to death and leaving his beloved daughter to track blood around the house? Epstein concludes that the system worked. Do yourself a favor. Read this book. ■

*Judge Robert Edmunds is a former justice on the North Carolina Supreme Court.*

# Amendments Pending Supreme Court Approval

At its meetings on April 26, 2019, and July 19, 2019, the North Carolina State Bar Council voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval. (For the complete text of the proposed rule amendments, see the Spring 2019 and Summer 2019 editions of the *Journal* or visit the State Bar website.)

## Proposed Amendments to the Rules on Election, Succession and Duties of Officers

27 N.C.A.C. 1A, Section .0400, Election Succession and Duties of Officers

The proposed amendments expressly authorize the president to act in the name of the State Bar under emergent circumstances when it is not practicable or reasonable to convene a meeting of the council. Actions taken pursuant to this authority are subject to ratification at the next meeting of the council.

## Proposed Amendment to the Rule on Standing Committees and Boards of the State Bar

27 N.C.A.C. 1A, Section .0700, Standing Committees and Boards of the State Bar

The proposed amendment eliminates the requirement that the Grievance Committee establish and implement a disaster response plan to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers.

## Proposed Amendment to the Rules Governing the Organization of the North Carolina State Bar

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

The proposed amendments reflect the elimination of judicial district bar fee dispute programs.

## Proposed Amendments to the Rules on Discipline and Disability of Attorneys

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys; Section .0200, Rules Governing Judicial District Grievance Committees

The proposed amendments acknowledge the Grievance Committee's authority to operate the Attorney Client Assistance Program and the Fee Dispute Resolution Program. They also reflect the elimination of judicial district bar fee dispute programs.

## Proposed Amendments to the Rules Governing the Practical Training of Law Students

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

The proposed rule amendments facilitate compliance by North Carolina's law schools with the ABA accreditation standards for law schools by supporting the development and expansion of supervised practical training of varying kinds for law students including clinics, field placements, and *pro bono* activities. The proposed rule amendments will also ensure that the clinical legal education programs at the state's law schools satisfy the requirements for legal practice by law students in N.C. Gen. Stat. § 84-7.1.

## Proposed Amendments to the Rules on Standing Committees and Boards of the State Bar

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

The proposed amendments to numerous rules in Section .0700 accomplish the following: eliminate judicial district bar fee dispute programs; eliminate language that would allow a third-party payor of legal fees or expenses to file a fee dispute petition; state that the fee dispute program does not have jurisdiction over disputes regarding fees or expenses that are the subject of a pending Client Security Fund (CSF) claim or CSF claim that has been paid in full; provide that,

## Highlights

- Amendments to CLE rules that eliminate the annual 6.0 cap on online CLE credit hours were sent to the NC Supreme Court after the Council's July meeting. If approved by the Court, elimination of the cap will be effective for the 2020 CLE compliance year.

ordinarily, a fee dispute will be processed before a companion grievance; and modernize existing language of Section .0700.

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

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

Proposed amendments in both sections of the rules governing the administration of the CLE program eliminate the annual 6.0 cap on online CLE credit hours.

In addition, a proposed amendment to Rule .1518 of the CLE rules eliminates the requirement that all attendees of a Professionalism for New Admittees program must complete a course evaluation to receive CLE credit.

## Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rule 1.5, Fees

The proposed amendments to Rule 1.5 expand the information a lawyer must communicate to a client before the lawyer may initiate legal proceedings to collect a disputed fee.

# Proposed Amendments

At its meeting on July 19, 2019, the council voted to publish the following proposed rule amendments for comment from the members of the Bar:

## Proposed Amendment to the Rules Governing the Administrative Committee

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

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

## .0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedures for Enforcement of Obligations of Membership

...

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service. Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service. **A member who cannot, with reasonable diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed**

**served upon publication of the notice in the State Bar Journal.**

## Proposed Amendment to The Plan of Legal Specialization

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

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

## .1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state and the applicant's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency must support qualification in the specialty.

(b) ...

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination ~~and or of the minimum years of practice requirements set out in paragraph (a)(1) above be licensed to practice law in North Carolina for five years preceding the application.~~

## Proposed Amendment to Immigration Law Specialty Standards

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

Law Specialty

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

## .2605 Standards for Certification as a Specialist in Immigration Law

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

(a) Licensure and Practice ...

...

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given **either annually or every other year as the board deems appropriate.** The examination shall be administered and graded uniformly by the specialty committee. ■

## Penn State (cont.)

Sup. Ct. 2016).

9. Jointly represented parties are generally not permitted to keep information relating to the representation confidential from one another. See *Franklin v. Callum*, 804 A.2d 444, 447-48 (N.H. 2002); *Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997). Similarly, a corporation may not be permitted to waive the attorney-client privilege concerning communications between its employee and the corporation's attorney if the employee objects. See *In re Grand Jury Subpoena* (00-2H, 211 F. Supp. 2d 555, 559 (M.D. Pa. 2001).

10. See *Home Care Indus., Inc. v. Murray*, 154 F.Supp. 861 (D.N.J. 2001)(corporation's law firm disqualified from representing it in dispute over severance agreement with corporation's former CEO due to failure to clarify its loyalty to the corporation rather than the individual employee). An attorney might also face malpractice charges for her failure to satisfy her duties of loyalty and confidentiality to the individual employee. See *Yanez v. Plummer*, 221 Cal. App. 4th (Cal. App. Ct. 2013) (refusing to dismiss malpractice claims against corporate attorney who created attorney-client relationship with individual employee by representing him at deposition).

## Client Security Fund Reimburses Victims

At its July 18, 2019, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$18,304 to six applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$900 to a former client of Garey Ballance of Warrenton. The board determined that Ballance was retained to file a client's petition for restoration of competency. The client tried four times to get

Ballance to file the petition, but he failed to do so prior to his disbarment. Ballance was disbarred on November 13, 2015. The board previously reimbursed 16 other Ballance clients a total of \$21,901.

2. An award of \$900 to a former client of Paige C. Cabe of Sanford. The board determined that Cabe was retained by a client to handle an ongoing custody matter. Cabe failed to provide any meaningful legal services to the client for the fee paid. Cabe was disbarred on November 25, 2018. The

board previously reimbursed four other Cabe clients a total of \$42,416.48.

3. An award of \$6,004 to an applicant who suffered a loss caused by David H. Caffey of Winston-Salem. The board determined that Caffey received a mortgage payoff on behalf of a trust from a real estate closing attorney. Caffey made a partial disbursement to the trust and was instructed to hold the trust's remaining funds for future use. When Caffey attempted to disburse the remaining funds to the trust, the applicant failed to deposit the check prior to Caffey's trust account being frozen by the State Bar due to misappropriation. Caffey was disbarred on May 10, 2018. The board previously reimbursed one other Caffey client a total of \$518.

4. An award of \$6,500 to former clients of Bernell Daniel-Weeks of Durham. The board determined that Daniel-Weeks was retained to represent a couple in recovering for damages done to their home by a service company. After a long delay, Daniel-Weeks filed a complaint for the couple, but never attempted to get it served. Daniel-Weeks took a voluntary dismissal of the complaint without notifying the clients. After the clients discovered for themselves that the complaint had been dismissed, they retained other counsel to re-file the lawsuit. The court dismissed the re-filed lawsuit after ruling that Daniel-Weeks had not filed the original complaint until after the statute of limitations had run. The board determined that Daniel-Weeks filed the clients' lawsuit to attempt to protect herself from malpractice, and that her effort was of no meaningful benefit to the clients. Daniel-Weeks was suspended from the practice of law for five years on July 3, 2019, effective upon service of the order.

5. An award of \$2,000 to a former client of Van Johnson of Hertford. The board determined that Johnson was retained to file bankruptcy for a client. Johnson failed

### In Memoriam

**Henry Curtis Babb Jr.**  
Wilson, NC

**James Thomas Bowen III**  
Lincolnton, NC

**Willis Donald Brown**  
Wilmington, NC

**Debra J. Clark**  
Charlotte, NC

**Bruce T. Cunningham Jr.**  
Southern Pines, NC

**George Dalton Dove**  
Mount Vernon, OH

**Gaston Hemphill Gage Sr.**  
Charlotte, NC

**Kenneth Newton Glover**  
Swansboro, NC

**William Laurence Haigh**  
Raleigh, NC

**Benjamin S. Horack**  
Charlotte, NC

**Walter Brian Howell**  
Raleigh, NC

**Frederick Lee Johnson**  
Avon, NC

**Elbert Richard Jones Jr.**  
Raleigh, NC

**Thomas F. Loflin III**  
Durham, NC

**Carroll Reuben Lowder**  
Wingate, NC

**William Vann McPherson Jr.**  
Durham, NC

**Thomas Lloyd Norris Jr.**  
Raleigh, NC

**Horace William Palmer Sr.**  
Gastonia, NC

**Mitchell Joseph Rabil**  
Cherry Hill, NJ

**Konrad O'Donnell Schoen**  
Durham, NC

**Jacqueline B. Smith**  
Jacksonville, NC

**Charles Royal Tedder**  
Greensboro, NC

**Richard McKenzie Wiggins**  
Fayetteville, NC

**Samuel Pretlow Winborne**  
Atlantic, NC

CONTINUED ON PAGE 46

## Law School Briefs

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### Campbell University School of Law

Campbell Law School's *Pro Bono* Council Service Animal Project was honored on June 20, 2019, at the North Carolina Bar Association Annual Meeting at Biltmore, receiving the bar's prestigious 2019 Law School *Pro Bono* Service Award. Created in 2015, Campbell Law's Service Animal Project aims to help the community better understand the laws surrounding service animals and the proper etiquette to use around them, while also increasing access to facilities, services, and opportunities for persons with disabilities. Service animals play a critical role in their companion's daily life. Federal, state, and local laws protecting the rights of persons with disabilities who use service animals can be confusing or misinterpreted, and organizers say the Service Animal Project aims to put an end to that confusion. 2019 Project Coordinator Derek Dittmar '19, 2019 *Pro Bono* Council Director Brooks Barrett '19, and Project Founder Cody Davis '18, along with their service dogs and Dean J. Rich Leonard received the trophy during the awards dinner.

Campbell Law's Tatiana Terry '19 is the winner of "Top Gun X," Baylor Law School's 10th anniversary edition of the Top Gun National Mock Trial Competition. The Top Gun competition brings together the top 16 trial advocates in the country to crown a single law school trial advocacy champion. Terry's win is historic. She is the first African American to be named the country's Top Gun trial advocate and only the third female. Her win marks the second time a Campbell Law advocate has taken home the title, tying the law school with Yale as the only two schools to win the title twice. This year marks the fifth time Campbell Law has secured an invitation as one of the top advocacy law schools in the country. Professor Tilly has proudly coached all of Campbell Law's Top Gun advocates.

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### Duke Law School

William Van Alstyne Professor of Law and Professor of Public Policy Studies Curtis

Bradley is the editor of *The Oxford Handbook of Comparative Foreign Relations Law*, which lays the foundation for a new field of teaching and scholarship. Published in June, the book's 46 chapters are divided into sections that offer a mix of theory, comparative empirical analysis, and country-specific case studies on such topics as entering into and exiting treaties; using military force; extending or refusing immunity to foreign governments and their officials; the impact of federalism on foreign affairs; and the practices of non-nation, supranational bodies like the European Union. An introductory section examines the nature of foreign relations law as a field.

Duke Law School's Wrongful Convictions Clinic has secured the release and exoneration of Charles Ray Finch after 43 years in prison. A federal judge in Raleigh vacated Finch's murder conviction and ordered his release from Greene Correctional Institution on May 23, and in June, the Wilson County district attorney filed a notice with the court that he had dismissed all charges. The exoneration reflects the culmination of almost 17 years of work on the case by John S. Bradway Professor of the Practice of Law James Coleman Jr., the clinic's co-director, as well as faculty colleagues and clinic students.

Kate Evans has joined the Duke Law faculty as a clinical professor and director of a new clinic focused on immigration law and policy. A nationally recognized clinician and immigration advocate, Evans helped to launch immigration law clinics at the University of Idaho College of Law and University of Minnesota School of Law. She has also published immigration law scholarship in the *NYU Review of Law and Social Change*, *Minnesota Law Review*, *Brooklyn Law Review* (forthcoming), and several practitioner-oriented publications.

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### Elon University School of Law

*Former federal prosecutor to deliver Distinguished Leadership Lecture*—Former US attorney and current bestselling author Preet Bharara, whose work includes the pros-

ecution of dozens of Wall Street executives on charges of insider trading and a money laundering operation led by Russian oligarchs, visits October 10 to deliver Elon Law's 2019-20 Distinguished Leadership Lecture. The program takes place at 6:30 PM at the Carolina Theatre at 310 S. Greene Street in Greensboro. Tickets go on sale for \$15 each beginning Monday, August 19, at noon by calling the Carolina Theatre at 336-333-2605.

*Elon Law scholar co-authors textbook on information law*—Associate Professor David S. Levine, Elon Law's Jennings Professor and Emerging Scholar, joined with Sharon K. Sandeen of Mitchell Hamline School of Law to craft *Information Law, Governance, and Cybersecurity*, a 730-page textbook due out this fall by West Academic Publishing. Levine and Sandeen examine a wide range of information law topics, including information contracts, information torts, information privacy, government transparency, and cybersecurity, combining a discussion of applicable law with practical advice and a process orientation.

*Elon Law to assist with "People Not Property" Project*—Elon Law students with an interest in history, genealogy, and social justice have a new way to use their legal education to help the community better understand its past. Under the direction of Associate Professor Andy Haile, students have been invited to transcribe handwritten bills of sale for enslaved people archived by the Guilford County Register of Deeds as part of the statewide "People Not Property" Project, a collaborative endeavor between the UNCG University Libraries, the North Carolina Division of Archives and Records, and North Carolina Registers of Deeds, among others.

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### North Carolina Central School of Law

On April 3, 2019, North Carolina Central University School of Law presented a Spring Symposium hosted by *The Law Review*, *Environmental Law Review*, and *Science and Intellectual Property Law Review*.

The symposium featured guest speakers from across the nation discussing the evolution of hip hop music and culture, its role and influence on legal academia, its relationship to property law, and the use of rap lyrics as criminal evidence.

Hosted by the *NCCU Science & Intellectual Property Law Review*, the panelist discussed the advancements and contributions that are being made to the legal profession in the areas of genetics and the law (science) and intellectual property. Featured speakers included Rachelle H. Thompson, Morial Shah, and Charles E. Smith.

Professor Todd J. Clark, andre d.p. cummings, Alexandria Johnson, Charles E. Murphy, and Bria C. Riley led the panel discussions titled Teaching Social Justice Through “Hip Hop and the Law” and The Takeover: Hip Hop’s Evolution and Impact on the Law.

The *NCCU Environmental Law Review* hosted a panel discussion titled Notorious NC: Is North Carolina Really Leading the Way in Clean Energy? Panelist discussed North Carolina reaching new heights in solar energy and contemplated whether the achievements are enough. The segment highlighted progression and shortfalls, and what role legal advocates can play in accomplishing goals related to clean energy. The featured speaker was John D. Runkle.

North Carolina Central University School of Law’s Women’s Law Caucus hosted a Judges’ Forum in the law school’s Great Hall on April 5, 2019. The panelists included Justice Robin Hudson, Supreme Court of NC; Justice Anita Earls, Supreme Court of NC; Former Justice Patricia Timmons-Goodson, Supreme Court of NC; Chief Judge Linda McGee, NC Court of Appeals; Judge Donna Stroud, NC Court of Appeals; and District Court Judge Christine Walczyk, District 10.

## University of North Carolina School of Law

*UNC School of Law receives largest single cash gift in school’s history*—NC native and former Carolina Panthers co-owner Jerry Wordsworth made his gift to the law school in recognition that lawyers trained at Carolina played critical roles in the growth of his business. Dean Martin H. Brinkley ‘92 served as Wordsworth’s company’s lead outside counsel for more than two decades. “Although I am not a lawyer and did not

graduate from UNC, I believe that lawyers who hold to the highest ethical standards, are committed to public service, and understand business are critical to the future of our country. I wanted to play a part in making sure other business entrepreneurs and communities have access to the best legal counsel,” said Wordsworth.

*School welcomes new faculty members*—As part of the school’s new Institute for Innovation, Zaneta Robinson is clinical associate professor of the Intellectual Property Clinic, and Marjorie White is clinical professor and director of small business initiatives. Rick Su teaches immigration and citizenship, property, and state and local government law.

*Professor Anne Klinefelter selected for Finland Fulbright-Nokia distinguished chair in information and communications technologies*—Klinefelter is spending the fall in Finland researching how Helsinki libraries approach digitizing information while complying with European Union privacy law.

*LeAnn Nease Brown ’84 sworn in as NC Bar Association president*—Additionally, ten UNC School of Law alumni and Charles Daye, Henry Brandis professor of law emeritus, received awards from the NCBA. Six alumni were recognized for their new leadership roles within the organization, including President LeAnn Nease Brown ‘84.

*Christian Legal Society recognized at UNC Public Service Awards*—The group was recognized by the Carolina Center for Public Service for its work to provide legal assistance to refugees and immigrants in partnership with Apex Immigration Services and supervising attorneys.

## Wake Forest School of Law

*Wake Forest Law welcomes new dean Jane Aiken*—Aiken comes to Wake Forest from Georgetown Law, where she has been a professor and administrator since 2007. At Georgetown, she founded the Community Justice Project to enable students to represent clients in cases involving questions of justice where remedies are often transactional, policy-based, or require extraordinary measures for adjudication. She also served as associate dean for experiential education and then vice dean for the Law Center in addition to chairing the University Task Force on Gender Equity.

Aiken is a leading scholar in clinical pedagogy and has directed a wide array of clinics involving prisoner’s rights, domestic violence

against women and children, HIV, homelessness, police brutality, and international human rights. In 2014 she coauthored “The Clinic Seminar” and “Teaching the Clinical Seminar.” Her doctrinal courses primarily have been evidence and torts, while other courses included motherhood and the law and the law of extradition.

*Wake Forest Law LLM program recognized by International Jurist magazine*—The Wake Forest Law LLM program was recognized by the *International Jurist* magazine as a top program for student experience, value, and career outcomes. In 2018 the program added several degree specialization options to the curriculum, allowing students to specialize in business law, criminal law, intellectual property law, and technology law.

*Professor Raina Haque and Brent Plummer coauthor article on blockchain development*—Professor Raina Haque and Brent Plummer (JD ‘19) are coauthors of the *Stanford Journal of Blockchain Law & Policy* article, *Blockchain Development and Fiduciary Duty*. This article is legal literature’s first detailed analysis of the operations and incentives involved in public blockchain development.

Professor Haque also served as an expert source for a *Wall Street Journal* article on Facebook’s new cryptocurrency, Libra. ■

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## Legal Ethics (cont.)

ethics hotline. The issue can be something simple. You might already know the answer. It doesn’t matter. Hopefully, a lawyer that has already gone through the process of contacting the ethics hotline will not hesitate to reach out to ethics counsel when a real ethics issue arises. (But please don’t have your interns ask the sex with a client question because that is just wrong.)

### Do Write This Down

Contact information for the State Bar ethics staff:

**Nichole McLaughlin** nmclaughlin@ncbar.gov

**Suzanne Lever** slever@ncbar.gov

**Brian Oten** boten@ncbar.gov

**Designated ethics email address**

ethicsadvice@ncbar.gov

**Telephone** 919-828-4620 ■

## Jordan Nominated as Vice-President



Salisbury Attorney Darrin D. Jordan has been selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina

State Bar. The election will take place in October at the State Bar's annual meeting. At that time, Raleigh attorney C. Colon Willoughby Jr. will assume the office of president, and Greensboro Attorney Barbara R. Christy will also stand for election to president-elect.

Jordan earned his BA from Catawba Col-

lege, and his JD from Campbell University School of Law.

A partner of Whitley Jordan & Inge, PA, he has been a board certified specialist in criminal law since 2004.

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

Jordan currently serves as a commissioner on the NC Indigent Defense Services Commission, a position he has held since 2014. The commission presented Jordan with the Professor John Rubin Award for Extraordinary Contributions to Defense Training Programs, which is awarded each year by the Indigent Defense Services Commission in

honor of its namesake at the UNC School of Government.

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

Jordan has written a number of manuscripts and served as a presenter at several continuing legal education seminars, and has been responsible for setting up numerous CLEs for the Rowan County Bar Association focusing on criminal, traffic, domestic law, and other topics of interest in the law. ■

## John B. McMillan Distinguished Service Award

### Anthony S. di Santi

Anthony (Tony) S. di Santi received the John B. McMillan Distinguished Service Award on May 3, 2019, at the 35th Judicial District and North Carolina State Bar Meeting in Boone, North Carolina. C. Colon Willoughby Jr., president-elect of the North Carolina State Bar, presented the award.

Mr. di Santi attended UNC-Chapel Hill for one year before enlisting in the army at the age of 19. He served in the United States Army from 1966 to 1969. He was awarded the Silver Star and the Purple Heart in recognition of his service. After two years of medical recovery, Mr. di Santi returned to Chapel Hill to finish his undergraduate degree in business, and then continued to Wake Forest University to obtain his law degree. Upon graduating

from law school in 1975, he began practicing law in the firm that is now di Santi, Watson, Capua, Wilson and Garrett, PLLC.

Mr. di Santi served as Watauga County Bar Association president from 1980 to 1981. He was actively involved in the North Carolina Academy of Trial Lawyers. He was honored as a certified civil trial advocate by the National Board of Trial Advocacy. In 2001 Mr. di Santi was elected to serve as a state bar representative. Thereafter, he was elected for three successive three-year terms as a councilor. In 2008 Mr. di Santi was elected vice-president, and in 2009 he was elected president-elect. On October 28, 2010, Mr. di Santi was sworn in as president of the North Carolina State Bar.

During his service to the North

Carolina State Bar, Mr. di Santi served on the following committees: Grievance, Administrative, Publications, Executive, Legislative, Authorized Practice, Issues, Issues Demographic Data Subcommittee, Disciplinary Advisory, Special Litigation, Facilities, Ethics, Special Committee to Study Disciplinary Guidelines, Program Evaluation, Finance and Audit, Appointments, and Program Evaluation Authorized Practice Subcommittee.

In 2012 Mr. di Santi served as co-president of the Southern Conference of Bar Presidents. After his service as president, he served as an ABA delegate for the state of North Carolina for four years. In 2013 Mr. di Santi was appointed to the Client Security Fund Board of Trustees. Mr. di Santi provided positive and effective leadership as a board member for three years, and as the board's

chair for an additional two years.

Mr. di Santi's first official act as State Bar president in 2010 was to rename the Distinguished Service Award to the John B. McMillan Distinguished Service Award. Mr. di Santi's life has truly been one of service—to his country, his profession, and his local community.

### **Anne Lafferty Crotty**

Anne Lafferty Crotty received the John B. McMillan Distinguished Service award on May 23, 2019, at the Mecklenburg County Bar annual meeting in Charlotte, North Carolina. North Carolina State Bar President G. Gray Wilson presented the award.

Ms. Crotty received her law degree from UNC Law School in 1975, where she graduated in the top ten percent of her class. Immediately after being admitted to the bar, Ms. Crotty opened a private practice in Hickory, North Carolina. She helped start the Catawba County Council on Status of Women and the local hospice. In 1990 Ms. Crotty moved to Pennsylvania, where she worked as a staff attorney at Laurel Legal Services, practicing in the areas of domestic violence, family law, and bankruptcy.

In 1997 Ms. Crotty returned to North Carolina and spent eight years teaching high school.

In 2005 Ms. Crotty joined the International House Immigration Law Clinic where she worked until she retired. Ms. Crotty's practice focused on helping clients avoid victimization and assisting them in obtaining legal residency, in naturalization, and with family reunification. During her tenure at the Immigration Law Clinic, Ms. Crotty was instrumental in expanding the clinic's capacity to serve immigrants with severe economic and social barriers. Ms. Crotty collaborated with local nonprofits to recognize the needs of the underserved immigrant community. She also served as the chair of the Mecklenburg County Bar Outreach Committee and co-chair of the immigration section of the Mecklenburg County Bar. From 2007 to 2012 she co-led citizenship workshops assisting local immigrants with naturalization. During this time she also participated in the Immigration Working Group discussing legal needs of the immigrant community in Charlotte. In 2017 she developed a *pro bono* program to

expand citizenship representation to low-income clients.

Ms. Crotty has used her passion for teaching to further serve the legal community. She has mentored members of the immigration bar as well as 11 McMillan Fellows. She has served as the keynote speaker for many programs for the Mecklenburg Bar, promoting diverse participation within the legal profession and encouraging members of the bar to offer *pro bono* services. She has presented CLEs cultivating the bar's knowledge of immigration issues, and spoken at many community gatherings and faith organizations to educate the public on immigrant rights.

As stated by one of Ms. Crotty's colleagues: "A book could be written on Ms. Crotty's contribution to the Charlotte community and the hundreds of migrant lives she has touched. She is, in the highest and best sense, a lawyer of the people; one whose impact will extend far beyond those who have walked through her door."

### **Judge Rebecca Thorne Tin**

Judge Rebecca Thorne Tin was presented with the John B. McMillan Distinguished Service Award on May 2, 2019, at the Mecklenburg County Bar's Law Day Luncheon. C. Colon Willoughby Jr., president-elect of the North Carolina State Bar, presented the award.

Judge Tin received her undergraduate degree from Cornell University in 1982 with distinction in all subjects. She received her master's degree from the New School for Social Research in 1987.

From 1983 to 1990, Judge Tin worked as a journalist for NPR affiliate stations, reporting on issues related to homelessness, immigration, race, and poverty. In 1993 Judge Tin received her law degree from Harvard Law School. While at Harvard, Judge Tin co-chaired the law school's Battered Women's Advocacy Project and represented child refugees from Haiti as an intern with Catholic Charities.

After law school, Judge Tin clerked for Chief Judge Gene Carter of the United State District Court of the District of Maine. She then went on to work as an appellate defender in New Hampshire. In 1995 Judge Tin returned to North Carolina and joined the civil rights firm of Ferguson Stein Chambers in Charlotte, North Carolina. Judge Tin left private

practice to join the Children's Law Center, a nonprofit organization that provides essential legal services to children and families.

In 2002 Judge Tin was elected to the district court bench for the 26th judicial district. She subsequently ran unopposed for three more terms and retired in 2018. Judge Tin played a leadership role in every court to which she was assigned. For several years Judge Tin served on the North Carolina District Judge's Education Committee, planning and teaching numerous programs for the state's district court judges. Judge Tin spoke to training programs for *pro bono* attorneys and custody advocates. She helped broker connections between child support defendants and job skills agencies. She also worked with women in the prison population as a board member of Summit House.

Judge Tin received the Women of Justice Award in 2013 and the North Carolina Women Attorneys Association's Judge of the Year award in 2018. Judge Tin has continuously cultivated knowledge of the law, employed that knowledge in reform of the law, and worked to strengthen legal education. Judge Tin's many years of leadership within the bar, on the bench, and in the community have been exemplary.

### **Nominations Sought**

Members of the Bar are encouraged to nominate colleagues who have demonstrated 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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## **Client Security Fund (cont.)**

to file the bankruptcy and provided no meaningful legal services for the fee paid. The board previously reimbursed one other Johnson client a total of \$2,500.

6. An award of \$2,000 to a former client of Van Johnson. The board determined that Johnson was retained to file bankruptcy for a client. Johnson failed to file the bankruptcy and provided no meaningful legal services for the fee paid. ■



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**CHANGE IS  
HERE**  
TOMORROW

How to give our insureds a competitive edge?

By offering them more services – from risk management to loss prevention and claim repair.

And by never forgetting that relationships are the bedrock of our business.

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

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

Fall 2019

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