

THE NORTH CAROLINA STATE BAR

JOURNAL

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2020



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Jennifer R. Duncan

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The Impacts of the Pandemic on the Practice of Law

BY C. COLON WILLOUGHBY JR.

Four score and seven years ago...I have been waiting for a chance to begin with that opening and have finally gotten the opportunity. Our North Carolina State Bar was brought forth into existence 87 years ago in 1933. Its creation was at a difficult time for our nation, our state, and our profession. The North Carolina Bar Association had been in existence since 1899 and was flourishing. The call for the creation of a mandatory bar to regulate legal education and control the licensing and disbarment of attorneys came in 1921 from then NCBA President Thomas W. Davis. The NCBA leadership believed that the creation of a mandatory regulatory bar would raise the status, dignity, and ethical standards of the bar. It took 12 years and steady persistence from the original call for creation of the North Carolina State Bar to bring the organization into existence by our General Assembly.

While we think that our health and economic situations now are the most dire and most unique that have ever existed, we should remember that those days were also challenging. The Spanish flu pandemic of 1918-20 infected about one third of the world's population, and the death toll is estimated to be somewhere between 17-50 million people. By 1933 we had come out of the pandemic and were in the midst of the Great Depression. The stock market had lost about 90% of its market value from 1929 to 1933, and 25% of our workforce was unemployed. Long lines were common in places where the homeless and hungry waited for a meal. Our economic woes sparked social and political upheaval and prompted mass



migrations within our country.

Despite that grim reality, North Carolina lawyers were focused on raising ethical standards and improving our profession. Many in the leadership of the NCBA favored creating a new bar organization and worked tirelessly to make it happen. I. M. Bailey, a lawyer representative from Onslow County, was one of the key driving forces for forming a mandatory regulatory bar, and he went on to be the first president of the North Carolina State Bar. His son, Ruffin, and grandson, Jim, followed in his footsteps as lawyers. Lawyers like Bailey felt raising standards and making legal services more widely available were for the good of the public and the profession, and they took bold steps to make it happen.

Creation of the State Bar was not without its challenges or detractors. Some of the same issues that confront us today were hot buttons at that time. Originally, Bar dues were proposed to be \$4, but that caused such a ruckus they were scaled back to \$3. One of the legislative representatives stated that he did not want to pay for anything that cost more than \$1 unless he could eat it or wear it. The proper methodology for licensing of new lawyers was another controversial subject. The question of whether admission to the bar should be by examination or whether graduates of law schools within North Carolina that were approved by the American Association of Law Schools should be admitted by diploma privilege upon graduation was vigorously debated. Ultimately, the General Assembly followed the recommendation of the American and

North Carolina Bar Associations and required examination of all law students.

Even now, as we experience a pandemic and economic uncertainty, the leadership of our bar organizations and courts are focused on improving the profession and access to justice for many who legitimately believe they are not heard or protected in civil or criminal courts. Increased attention and efforts to ensure that lawyers recognize the unmet needs and respond in appropriate fashion are being well received across the state. Thousands of lawyers have responded to the call for *pro bono* and "low bono" services to assist clients. Last year, more than 1,200 lawyers publicly reported that they heeded the call and donated tens of thousands of hours to those in need of representation. Even more met the call and provided *pro bono* services without recognition. Hundreds more provided "low bono" services through their work representing indigents, charities, and small businesses.

As many of us are learning to work with new environments and technology, we are also encountering new clients and new problems. Employment, housing, health, and insolvency issues have exploded and increased in complexity. Furloughed and displaced employees face mounting bills, as do their employers and landlords. Loss of health insurance and childcare services, evictions, end of life decisions, and inability to communicate with loved ones housed in hospitals and care facilities have created unanticipated legal obstacles for clients. Longtime corporate giants, once believed to be invincible, are also not immune from the devastating impact of COVID 19. Some familiar corporate names may cease to exist as we know them.

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“Justice Isn’t Always Blind”

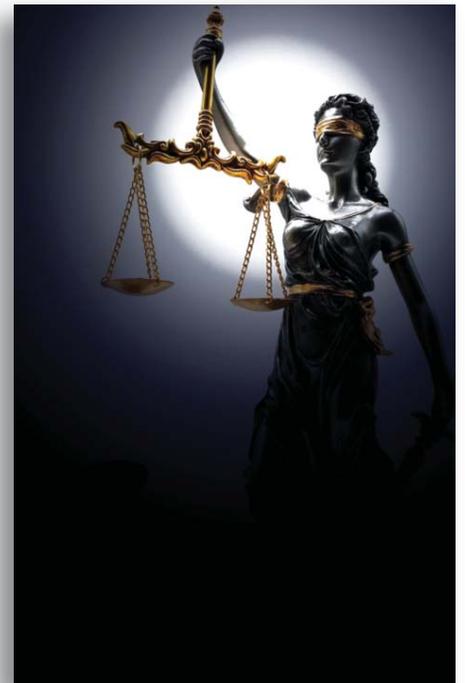
BY JUDGE ASHLEIGH PARKER DUNSTON

As we navigate this new world of masks, social distancing, and quarantines, we are constantly reminded that there is a silent virus lurking that could infect each of us differently. Some people are asymptomatic, others are hospitalized, and at the time of authoring this article, over 126,000 people have lost their lives in the US alone.¹ Similar to COVID-19, there’s another virus that has existed for over 400 years and has been exposed more prevalently in recent months and years, and it can no longer be ignored or swept under the rug. This virus is called systemic racism.

This virus not only affects Black people involved as parties in the criminal justice system from obtaining housing, education, healthcare, and employment opportunities, but it is also pervasive within our legal profession as a whole. So many times, we as attorneys pretend that we’re immune to instances of racism because of our education, background, or experiences. Some of us even go so far as to say that we don’t “see color;” however, to not “see color” is as much of a farce as it is to say that racism isn’t a thing that we should be concerned about because it hasn’t affected us directly.² This form of microinvalidation is hurtful and suppresses the experiences of our Black colleagues, such

as these:³

- As a rookie prosecutor in the late 1970s, I quickly learned how to deal with one of the most racist judges I would ever encounter. Not only would this judge slap his .45 caliber handgun down on the bench, but once he even hung a hangman’s noose in front of the bench during a murder trial. It didn’t take long for me to notice a pattern when I had to appear before him. If I was prosecuting a white person, he would either find a way to dismiss the charge, continue the case, or find an excuse to not impanel a jury for trial. Most of the time, he wouldn’t even look in my direction unless he just absolutely couldn’t help it.



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- I had only been at the District Attorney’s Office for a month when a defense attorney came into the courtroom telling me that another ADA had made a deal on a previous court date. I informed him that I didn’t feel comfortable dismissing the case because I was new, but that he could take the file to another courtroom and ask that ADA to dismiss it. As he was leaving out of the side door, he called me a “f*cking n*gger.” I confronted him and told him that I heard what he said. I knew that I couldn’t do anything because I would be fired for reacting, so I had to swallow my pride and continue to handle my docket. I’ve continued to have to work with this individual

who has yet to apologize.

- A white female judge would routinely ask my white male colleagues in open court during a hearing whether I was right on the law regarding legal arguments I made. She never asked me whether my white male colleagues were correct on the law—it was just presumed they were correct. In my worst hearing with this judge, my white colleague agreed that I was right on the law and she still refused to believe me. When she refused to allow my clients to speak, which was their constitutional right, I withdrew. She appointed the white attorney, and he represented the clients at the hearing the next week when I had secured leave.

- As a private defense attorney, I represented an African American female with a DWI and reckless driving charge. After she was found not guilty of the DWI by an African American judge, we decided to appeal the reckless driving charge due to ramifications with her employer. The original assistant district attorney told me that my client could do community service to have the case dismissed; however, a different assistant district attorney stated that I was “handed a gift” with the not-guilty of the DWI and that the offer was no longer on the table. The reckless driving charge was set in superior court and continued multiple times, causing my client to continuously have to take off work. My client ended up having to plea to a reduced charge and pay court costs, whereas other cases involving white defendants would have been dismissed.

- In the late 1990s I worked briefly as the only Black assistant district attorney in a small rural county. I dismissed a case for lack of evidence, due to an officer improperly charging a young, Black youth without probable cause. The officer went to my supervising attorney who stormed into the courtroom, demanded to know what happened, and attempted to shame me publicly by saying that he could have prosecuted that case blindfolded with his hands behind his back. I believe he felt comfortable doing this because of my race. This supervising attorney went on to become an appellate judge.

- When I first started practicing, I walked behind the courtroom to go in a side door and check the docket. A deputy chased me down the hallway and told me that this area was for attorneys only. When I told him I was an attorney, he did not apologize, but instead just walked into the courtroom as if

nothing had happened. Mind you, I was in a suit and had my files with me. This is only one of many times that I have been told that I could not be somewhere or sit somewhere because I was not an attorney. In 2020, the assumption remains that if you are a person of color that is dressed up in a courtroom, you are the defendant or a litigant.

- When I was a young lawyer, I was working with a team of well-respected criminal defense attorneys. While out for an evidence viewing at the Sheriff’s Department, we were joined by law enforcement and the district attorney prosecuting the case. I was the only Black person in our group. After the evidence viewing, at which I had remained silent, we were all walking out of the Sheriff’s Office and there was a large chicken plant directly across the street. The district attorney, addressed me for the first time, pointed at the plant, and remarked, “Hey, if this law thing doesn’t work out for you, you can always go get a job over there.” The only response I could muster was a depressed and broken chuckle while everyone else joined in a laugh.

- At my first District Court Judge’s Conference following my 2008 election to the bench, a white female colleague from another county said, “Honey, can ya get us some more napkins?” I replied, “No.”

- I was applying for a job as an assistant public defender. During the interview, the attorney in charge of hiring was making typical small talk. He asked what I did over the weekend. I told him that I had gone to visit my brother in Raleigh. His immediate response was, “So how is Central Prison?” I just sat shocked and uncomfortably laughed. I’ve never been more thankful for not getting a job.

- When I was a new attorney, I practiced in an area where I was the only minority person in the entire district. Every week I was constantly referred to as the “social worker.” A white client told the judge that she didn’t know how she ended up with me as her attorney, but that she couldn’t afford the white male attorney she wanted.

- I am an attorney who has done indigent defense for years. I have 15 years of experience, which includes working for the Public Defender’s Office with extensive trial experience. I applied for another position doing the same thing and was offered a very low amount for the position. I had knowledge that a white female was recently hired for a

similar position, with no experience, and given more pay than I was offered. When I asked for a higher salary, he stated in an indignant tone that, “the offer was reasonable based upon my experience.” I declined the offer.

- As an attorney, I’ve been stopped at the “bar” and been told by bailiffs that only lawyers and court personnel can come any further. Although I’ve complained, nothing has been done about my treatment or likely the treatment of other lawyers who “look” like me.

- I’m a civil litigator and handle cases across the state. After being accosted by the bailiff when trying to enter the bar, the judge questioned me heavily about my case, although it was a motion for final judgment and no one answered the complaint or appeared from the other side. The judge did not question any other attorneys as much as I was questioned, nor did the judge spend as much time reviewing any other court files as he did mine. The judge eventually signed my order and I headed back home, but I still remember how disheartened I felt as I left that courthouse. Other non-Black attorneys were treated courteously and taken at their word; meanwhile, I was treated like an incompetent outsider. It’s been years and the memory of this incident still stings.

- I worked for an office where the intake staff was hesitant to ask clients how they identify racially, so they thought the better option was to assign race based on how clients sound on the phone. They freely shared this and couldn’t understand why this was a big deal to me.

- An assistant clerk of court said to me “So, who’s girl are you?” (thinking I worked for an attorney).

- As a new judge, I was assigned court in a smaller county in NC. I arrived at work with my robe draped over my arm and greeted the deputies. After holding court for the morning session, we took our customary lunch break. I left for lunch and returned to the courthouse and decided to make some phone calls. I was parked in the assigned spaces for judges. At that time one of the deputies came outside and tapped on my window and told me that, “I could not park here because these spaces were reserved for judges only.” I replied that, “The last time I checked I was a judge, but moreover you saw me this morning.” She looked and I looked, then she replied, “Oh,” and walked away. She

never apologized, but I realized that she couldn't conceive that I could even be a judge.

* * * * *

Chief Justice Cheri Beasley of the North Carolina Supreme Court said it best,

Too many people believe that there are two kinds of justice. They believe it because that is their lived experience—they have seen and felt the difference in their own lives. The data also overwhelmingly bears out the truth of those lived experiences. In our courts, African-Americans are more harshly treated, more severely punished, and more likely to be presumed guilty... We must come together to firmly and loudly commit to the declaration that all people are created equal, and we must do more than just speak that truth. We must live it every day in our courtrooms.⁴

Across the nation, your Black colleagues and colleagues of color are being affected, and to do nothing is no longer an option. Despite obtaining the same degree and passing the same bar exam, due to our skin color we are held to different standards, scrutinized at higher levels, seen as illegitimate, and "given" our titles due to affirmative action. Our judgment and competency is always questioned.

And why does that matter? There are personal and professional ramifications to consider. On a personal level, this discriminatory behavior is demeaning, insulting, dangerous, and normalizes inequality among equal individuals. Furthermore, this disparate attitude and treatment towards our colleagues of color impacts not just our development as a lawyer and confidence to seek higher positions, but also affects the potential outcomes that can be achieved for the clients served.⁵ This last point raises professional concerns for this behavior. In addition to our colleagues suffering from this unacceptable behavior, our clients suffer also due to the unequal, detrimental treatment of their lawyers. The very trust that we ask the public to place in the justice system is threatened and made weaker with each instance of discrimination experienced, witnessed, or learned of by the public. The Preamble to the Rules of Professional Conduct charges lawyers to "(6) further the public's understanding of and confidence in the rule of law and the justice system because legal institu-

tions in a constitutional democracy depend on popular participation and support to maintain their authority."⁶ How can the public feel confident in the justice system if the primary participants in that system are often treated unequally based upon the color of their skin?

However, there is hope! Much like the preventative actions that we take daily to curb the spread of COVID-19, we must do the same to eradicate racial disparities. It's extremely important that we begin to understand that the legal profession is not immune to instances of racism—neither explicit nor implicit—and it's time to educate ourselves so that we can all exemplify the highest level of professionalism and competency. We must take an inner look at ourselves and our beliefs, and then outwardly work to facilitate those changes. We must educate ourselves on the plight of others, correct colleagues who say improper things and act inappropriately, check our implicit biases, and be willing to have difficult and uncomfortable conversations.⁷

Additionally, we can work on tangible things to prevent further instances of this behavior in our Bar. One way is to advocate for a mandatory bias/diversity/inclusion CLE requirement to be conducted on a semi-annual basis. Another way is to advocate for our State Bar to adopt ABA Model Rule 8.4(g) that renders it misconduct for an attorney to:

engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.⁸

I know that we will all rise to the call of action to make the necessary changes to our lives and profession. Our colleagues, clients, future generations of lawyers, and the general public are depending on us to do everything we can to prevent the spread of racism. ■

Judge Ashleigh Dunston is a district court judge in the 10th Judicial District, which encompasses Wake County. For more information about Judge Dunston or to request for her

A Message from President Colon Willoughby

June 4, 2020

The death of George Floyd, combined with the nationwide call to action inspired by that death and the senseless deaths of too many other people of color, has brought to the forefront of our lives the historical inequities of our justice system and of our society. Much has been said about the issues surrounding racial inequality in America, and yet much more needs to be said. And, most importantly, the anguish that underlies the protests needs to be heard and acted upon.

The Preamble to the North Carolina Rules of Professional Conduct calls upon lawyers to "seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession." Further, the Preamble demands that lawyers "be mindful of deficiencies in the administration of justice" and devote our time and toil to ensure "equal access to our system of justice for all."

Tuesday, our Chief Justice pledged that our courtrooms will become an example of our shared commitment to the declaration that all people are created equal. North Carolina lawyers must heed and aid in the fulfillment of that pledge. We must dedicate ourselves to the ideals of our Preamble against the insidious injustice of racism, both implicit and institutional. If we truly believe in freedom and justice in this nation, then we need to embrace racial equality for all.

To the lawyers and citizens of North Carolina: The call to action has been heard; we stand with those who seek equal justice for all; and we promise to do our part to encourage, assist, and support lawyers in fulfilling their professional responsibility to do the same.

to present a CLE on this topic, please visit her website at JudgeAshleigh.com.

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Surviving and Thriving Following a Pandemic

BY CAMILLE STELL

Unprecedented times. Navigating the crisis. Stay-at-home orders issued. These are the headlines of the day. And every lawyer—regardless of age, experience, or circumstances—has been affected.

Maybe you had high hopes for launching your legal career but didn't plan for a pandemic. Or perhaps your career is well underway, yet the pandemic has created challenges never before encountered and not yet fully defined.

For insight, I talked with a few people who started practicing law during or immediately after another crisis, the Great Recession. And though the situations aren't identical—what worked in 2008 might not work now—their stories of evolving and thriving give us hope and a blueprint for moving forward.

Persistence and Creativity: Heather Hazelwood

Heather Hazelwood practices estate planning and estate administration as the solo owner of Ampersand Law, established in Durham in 2016. Heather is a second career lawyer having worked in the non-profit sector for eight years prior to law school. She graduated from the University of Wisconsin Law School in May 2011.

Heather was able to find work as an associate in a Wisconsin firm, where she focused on family law and estate planning. She says she did not receive a set salary, but was paid based on her billings. "I found clients by hustle, creativity, networking, flexibility, adjusting my expectations, and a lot of trial and error."

After two years of practice, Heather says



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she began to think about ways to do law differently. "I was especially interested in finding new ways of doing business to update the (slow-to-change) long-established traditional models for law firms. That's when the idea of going out on my own began to form."

Two years later, UNC-Chapel Hill recruited Heather's wife, they moved to North Carolina, she sat for the NC bar exam, and opened her own firm, Ampersand Law.

How has the pandemic changed her practice?

"This has impacted my practice in two ways. First, I've had an increase in inquiries

from potential clients. And second, clients are eager to finish their documents much faster than before. People seem more eager, now than ever, to get estate plans in place. However, as the financial impacts of the pandemic stretch out for months and months, I expect many potential clients won't be able to afford to work with an attorney."

Advice for lawyers and recent graduates? "Be realistic, especially about your own expectations. Ask for and give help when needed. Develop and practice healthy coping skills. Remember why you started. If you have the resources, throw money at the

problem. There are many ways to make this more manageable if you can afford them. If you don't have the resources, try to identify people who have figured it out and ask them for advice. My two greatest strengths are interlaced: persistence and not being afraid of being told no."

Heather says that at some point in her career, she realized that success is not linear, and that the only real failure is never trying. "Running your own business is much more trial-and-error than you'd expect. And most of us don't spend much time advertising the errors. Nothing is as good or easy as it looks on Instagram."

Heather has an active social media presence. Follow her Instagram account at @ampersandlawnc and check out her blog, &LawBlog at her website, ampersand-law.com/blog.

There are Always Opportunities: Kathy Brown

Kathy Brown practices in West Virginia as well as North Carolina. She entered law school following a 20-year career as a television journalist.

In September 2008, Kathy was downsized from a national mass tort firm on a Friday; Lehman Brothers collapsed the following Monday.

"It was a terrifying time. I suffered with anxiety and depression. I had never been without a job since I was 15. I had three medical malpractice cases that stayed with me when I was downsized. One of the cases settled in a few months, which gave me some money to live on. I also took a contract position doing computerized document review work for \$21 per hour. I was local, but I was working with lawyers who were driving in from Pittsburgh, Cleveland, and other surrounding cities to Wheeling, West Virginia, just to have work."

Kathy was able to start working with a small firm, and she eventually left the contract position. In March 2009 she opened her own practice. Through networking, Kathy was able to build a profitable practice, and by 2012 she joined forces with another firm on a mass tort case that resulted in a multi-million-dollar settlement for 3,500 cases.

Her greatest strengths during the Great Recession? "My connections, not being afraid to ask for work, and not being afraid to share the fee."

Kathy is trying to forecast the future and determine whether her practice is recession-proof. "That's a hard thing to assess. My practice does a lot of medical malpractice cases. I fear that people will not want to sue their doctor or their hospital in this time that doctors are the warriors on the front-line of this pandemic. I am watching what is changing, trying to educate myself, and be nimble enough to change as needed."

Advice to lawyers starting their practices? "Figure out a niche, be alert to how the business is changing and what services people are looking for now, network with others who are doing what you want to do, join organizations, participate in webinars. Don't be afraid to ask for help."

This advice also applies to established lawyers: "Reach out to others. Find out how others who do what you do handled the crisis. You may need to downsize or do work yourself. Since starting my own firm, I have never had a paralegal or support staff. If I needed help, I hired it on a contract basis. Otherwise, if I had a big case, I would ask a larger firm to help me and we shared fees. I am a hard worker, I want to help others, I wasn't afraid to ask for help and wasn't afraid to give up half the fee to someone who helped me."

What traits helped you succeed? "My brother told me during the Great Recession, 'There are always opportunities.' I let that be my guiding light. Because of the wonderful success I have had since 2009, I can see opportunities better during this crisis than I could then. I have helped others start businesses in part by just encouraging them to be positive. You have value to add and there are always people who will want your help if you offer it for the right reasons."

Look for Inner Strength: Niya Fonville

Niya Fonville graduated from Campbell Law School in 2008. Following graduation, Niya began a one-year fellowship with Legal Aid of North Carolina, Inc. (LANC) in Morganton. Niya had her job secured before graduation. While many of her classmates were experiencing a tough job market with very few jobs available and employers rescinding offers, Niya's position was funded by a grant and guaranteed for one year. As her grant was expiring, another lawyer left and Niya moved into her role and stayed with LANC for ten years.

As a result of the economic impact of

The Great Recession, many more individuals became financially eligible for services and found themselves needing assistance from LANC. At the same time, LANC was facing their own reverberations of the recession, and the Morganton office went from serving five counties to serving nine counties in western NC.

"Starting my career during a recession required me to look for inner strength. My family, particularly my grandfather, instilled in me a great work ethic. When you have a job to do, it is expected that you do it. Additionally, you figure out how to make do with what you have. Find an alternative, if necessary, to get the job done."

After ten years, Niya decided to make a career change and she joined Campbell Law School as the associate director for career & professional development. She coaches the next generation of lawyers through programming, exploration of career options, and instruction in the summer Externship Program.

Advice for managing work during a crisis?

"Exhibit resiliency, grace (to yourself and others), and a willingness and eagerness to learn. Be creative and innovative in your approach. Welcome challenges. Seek a mentor or guidance from supervisors and colleagues. But no matter what, DON'T GIVE UP. This is an honorable profession, and your presence, lived experiences, integrity, and existence makes it better."

When thinking about a post-COVID world, Niya says, "I hope that we continue to extend grace and compassion to ourselves and to each other. To remember that we are all dealing with issues outside of the legal matter that brings us together, but, nevertheless, most of us are trying to do the best that we can."

Be Willing to Wear Different Hats: Neil Magnuson

Neil Magnuson graduated from UNC Law School in 2009. "I clerked for Williams Mullen during the summer prior to my 3L year and received an offer at the end of that summer. Many firms at the time had to push back start dates for incoming associates, and Williams Mullen did so in my case but, fortunately, they were able to bring me in after a few months' delay (during which they also graciously provided me a stipend). I understand that some other firms at the time were forced to postpone

start dates for even longer or, in some cases, retract offers, so I felt very fortunate to have been able to begin when I did.”

What strengths did you develop by starting work during a recession?

“In hindsight, I suppose it would have been the efforts during my first year or two out of law school to try to learn as much as I could, as quickly as I could, while trying to do good work when I had work to do. I also endeavored to never turn down work, so long as I felt confident I had the time to get it done and done well. Eventually, I was able to gain experience handling a variety of matters, which luckily led to my being able to stay busy. The breadth of experience has also been helpful in-house, where one may need to wear different hats from time to time.”

Today, Neil works as media counsel for NASCAR Media Ventures. “I work on the media side of the NASCAR business, primarily doing transactional work for the digital and broadcasting teams. I draft and review contracts, advise on media and IP matters, and help maintain our IP portfolio, among other things.”

NASCAR sounds like a dream job that perfectly suits Neil’s skill set.

“Prior to law school, I was a software engineer in the sports television industry—more on the productions/graphics and statistics side of sports television. Certainly I had great interest in someday returning to the sports (and television) world on the legal side, but expected that opportunities to do so would not present often. Fortunately, a position opened up at NASCAR five years ago that seemed to be a good fit, and luckily, I was hired. And it has been a good fit, and a wonderful place to work. I grew up on stick-and-ball sports, but I now love a NASCAR race.”

She Wrote a Book: Venus Liles

Venus Liles has a great pandemic story to share. An in-house attorney at SAS Institute in Cary, she also moonlights on the side, helping startups and small to mid-sized businesses with their corporate legal needs.

Venus has two small kids, Violet (age five) and Ivy (age three). As Venus says, “I searched for a children’s book to help explain the coronavirus and social distancing to my kids. When I couldn’t find one, I decided to write it myself. I knew from the beginning that although I wanted the book to explain the coronavirus and good

hygiene practices to kids, what I really wanted the book to focus on was the emotional side of social distancing. I also wanted the book to have a hopeful ending. I wrote the whole thing in one sitting, but a significant number of late-night edits followed. It was such a time-sensitive subject matter that I had to act quickly.”

When asked whether her girls are old enough to appreciate that their mommy wrote a children’s book, Venus says, “My older daughter gets it and was very interested in the writing process. They both have a paperback copy in their rooms and refer to it as ‘mommy’s book,’ which is sweet.”

Venus devotes a portion of the book proceeds—as well as a portion of revenue from her law firm—to charity.

“I just really love the idea of giving back in different ways. With the book, I’m able to help families have honest conversations with their children about what’s going on in the world and donate funds to the World Health Organization’s COVID-19 Response Fund. With my company, I’m able to help startups and small businesses with affordable legal services and give back to local nonprofits. All of that makes the hard work completely worth it.”

Recent Law Graduates

I also had the chance to speak to a few recent graduates from Elon Law School.

Richard Glenn is a December 2019 graduate who took the February 2020 bar exam. Richard is working as an associate with the Deuterma Law Group, where he interned during law school. He is practicing personal injury work. Richard notes that he moved to remote work soon after starting his job because of COVID-19. He and his wife share workspace at home, which can at times be tricky.

Richard says when he was in the office, he could walk into his supervising attorney’s office to ask questions. Now, he uses the firm’s communication tools such as email, Slack, and their case management messaging tool to communicate with attorneys, staff, and clients.

Tips for working through a pandemic include patience and preparation.

“Being patient often helps me gain better perception. Preparation helps me to control what I can and acknowledge what I cannot.”

Richard goes on to say, “From a personal

perspective, I do not believe that there will be a ‘return to normal’ for our society, and for the practice of law especially. There will certainly be another adjustment once social distancing and other measures are lifted, but I do not think this adjustment will be to regress to pre-pandemic practices. Law is a progressive practice. These unprecedented times are setting precedent. The changes being made in response to this pandemic are not fugacious. The decisions made during this pandemic will have lasting impacts on how our society functions. I am most nervous about whether those decisions being made are the correct ones.”

December 2019 Elon Law graduate Lauren Zickert is working as an associate at The Elderlaw Firm in the areas of estate planning and elder law. Lauren interned with the firm during law school. In response to the pandemic, her firm offered free statutory form health care powers of attorney, and they offer a Fast Track Program to get essential estate planning documents in place in a short period of time.

Lauren describes herself as resilient, entrepreneurial, and stubborn. “When the odds are against me, usually my first thought is, ‘we will see about that.’ I am always up for a new challenge and love finding creative solutions to meet my clients’ needs.”

When asked to peer into the future, Lauren says, “I am most nervous that we won’t ‘return to normal,’ and that this type of sickness will reoccur. If the new normal involves this virus, I think the legislature is going to need to reconsider how documents can be notarized. It cannot be ignored that we have the technology to do virtual signings and that we are putting clients at risk every time we require them to come into contact with others. Our firm does a fantastic job of sanitizing surfaces, utilizing our resources and our space effectively to minimize client contact, and taking normal precautions such as frequent hand washing, sanitizing, and/or wearing gloves. It is still a risk, though minimal, for our clients, especially for the elderly to come into our office.”

Je’vonne Knox, Elon Law class of 2019, is working as a paralegal at Gate City Legal Services, a general practice firm including family, criminal, and immigration law. Because of the pandemic, Je’vonne has not yet been able to step into the role of an asso-

ciate at the firm. However, she is handling all client intake and consultations.

“Although it took some adaptation, the transition to working from home was fairly smooth. Programs such as Google Voice have been a great help in transitioning to remote work. Although many of us would like to stay in the comfort of our own homes until there is a remedy to COVID-19, much of my job requires client interaction, so I will be returning to the office.”

How has COVID-19 impacted the practice? “Like many other Americans, the inability to work put a strain on our clients’ ability to pay. Our law firm currently offers *pro bono* consultations for those financially affected by the pandemic.”

Perspective of a Law Student

Lawyers Mutual participates in the NC Bar Association, Minorities in the Profession, 1L Summer Associate Program. This summer we were fortunate to have Quay Wembley intern with us.

“As a law student during the time of a world-wide pandemic, it has been difficult to stay positive,” he says. “After a semester-and-a-half of becoming accustomed to the rigor and fast-paced learning in law school, I

found myself having to start back at square one during the most crucial part of my 1L year. Within a matter of months, all law students across the country were forced to quickly adapt to remote learning. With tenacity and perseverance, I was able to finish my 1L year strong and in great standing, but that was only half the battle.”

“At the conclusion of my 1L year, the pandemic cases gradually increased. As a result, many of my classmates and colleagues had their summer opportunities canceled. Fortunately, I was able to continue my summer internship remotely with Lawyers Mutual. Although my internship became completely remote, I am grateful to have the opportunity to move forward as well as gain experience in the practice of law.”

“After reflecting on the events during these past few weeks, I realized that there is a silver lining to my experience. I can truly say that I am watching the practice of law drastically change and evolve right in front of me. Within the legal profession, people of all ages are beginning to utilize technology more than it has ever been used before. During my summer internship, I was able to take part in an online mediation via Zoom video call, which was a new experi-

ence, even for my supervising attorney.”

“With the costs of travel and efforts to maintain social distancing, it is foreseeable that mediations, depositions, arbitrations, and other out-of-court proceedings will be conducted online more often. The use of technology and online software are likely to become the new normal in the practice of law. Stepping into summer employment during a pandemic has been challenging, but this experience will prepare me to adapt, as well as develop resiliency for whatever lies ahead.”

We are in Uncharted Territory

You have probably never experienced a pandemic or had to develop a plan for surviving one. Both are scary. But with a plan, and the advice and counsel of our colleagues, we can not only survive this challenge, but emerge even stronger. ■

Camille Stell is the president of Lawyers Mutual Consulting & Services and a specialist in working with lawyers and firms on strategic planning and succession planning. Continue this conversation by contacting Camille at camille@lawyersmutualconsulting.com or 800-662-8843.

President’s Message (cont.)

The normal stresses of running law offices while helping clients who may be facing life changing situations have been magnified. Meeting our own operating expenses of salaries, rent, and equipment while serving clients who are struggling to keep their businesses afloat has been difficult for many. Some of our faithful clients now in need are least able to make timely payments for legal services. We practice in a profession that is called on to assist people when they have legal, business, physical, personal, and emotional problems. The nature of that work is physically and mentally demanding under the best of circumstances, and, under the current environment, can seem daunting.

We must recognize the toll our professional work takes on all lawyers and be especially sensitive to those who may be overwhelmed. Stress and isolation coupled together can trigger feelings of depression.

Many are able to recognize the signs and take steps to manage their current state of mental health, but for others, it is not a self-manageable condition. The old adage of “the cobbler’s children have no shoes” may be applicable to our profession as well. The mental health of our fellow lawyers must be a matter of our concern. As Chief Justice Beasley addressed in her message to the State Bar Council at the July meeting, there is cause for concern and vigilance. We are our brothers’ and sisters’ keepers. Historically, lawyers have turned to each other in times of stress and need, and found comfort and assistance readily available. But we have a responsibility to the public and our fellow lawyers to be vigilant for indications of lawyers needing assistance and not wait for a call. The Lawyer Assistance Program (LAP) and BarCARES both provide wonderful and necessary help to lawyers, and they need our help and support. Even more, a phone call, a note, or a socially distanced cup of coffee could be the timely antidote for one of our

own in need.

During these times it is important to reflect on how our predecessors at the Bar managed to keep their focus on improving the profession and standards under which they practiced, even in difficult times. They also maintained a sense of camaraderie and concern for their fellow practitioners before we created formalized programs of support. This has been a defining part of the practice of law, and we don’t have to look far for great role models as examples. We are fortunate that we now stand on the shoulders of those giants, and we can provide shoulders of support for another generation of lawyers. As we go forward, let us remember why we were drawn to this profession. We have the responsibility to preserve the best of it for the future, and an obligation to improve it for those to come. Let’s make the most of our opportunity. ■

C. Colon Willoughby Jr. is a partner with the Raleigh firm McGuire Woods.

Selecting the Best Medical Expert Witness

BY JOE D. HAINES

One of the crucial elements in any medical negligence case is the selection of a medical expert witness. Proper attention to getting the “right” expert can make or break a case in many situations. If a firm is fortunate enough to have a stable of tried and proven experts, that is certainly an advantage. However, utilizing the same experts too frequently can also present a problem. In addition, experts retire or simply stop taking cases, so having a screening process for new experts is a valuable tool.

Selecting a great medical expert witness can be reduced to physicians who possess the “six Cs.” These include 1) credibility, 2) competency, 3) congeniality, 4) commanding presence, 5) communicating skills, and 6) coachability. The ideal expert who possesses all of these qualities will reward the attorney for his diligence.

The selection process necessarily begins with credibility, which involves proper credentials. Appropriate education, training, certifications, and licenses must first be established, along with the expert’s area of professional focus. It is crucial to obtain the right specialist (or generalist) for the case. For example, if the allegations are against a family practitioner working in an urgent care setting, then an expert of the same background and practice is necessary.

In choosing a good expert witness, an attorney should adhere to the old Dirty Harry maxim of, “A man’s gotta know his limitations.” A family doctor should not be testifying about the alternatives of a particu-



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lar type of brain surgery. An expert who testifies outside his area of expertise may have his credibility impeached, which can be a disaster for the case. An expert who “is kept in his/her lane” is a credible expert.

Before proceeding with a potential expert, it is also important to screen him for disciplinary action, arrests, lawsuits, or other negative information in the expert’s background. Failure to establish these sorts of details can waste time when the expert must be withdrawn, or even damage the case if overlooked.

In addition to being credible, it is desirable for experts to be independent. Ideally, the expert witness should spend no more than 10% of his professional time on medical-legal matters. Otherwise they may be portrayed as a “hired gun” who spends more time in court than in the clinic, resulting in diminished credibility.

The second quality important for an expert witness to possess is competency. In my opinion, fewer than five years clinical experience is too little to prove competency in the expert’s field. Generally ten years or more is acceptable. A competent expert is also one who knows how to deal with attorneys—they should be prompt and extremely thorough in case analysis.

The third “C” is congeniality. When retaining an expert, thought must be given as to the impression the expert will make to a jury. This does not mean the expert should be “grinning like an idiot,” but have a pleasant demeanor that makes him or her relatable to a jury. Most jurors’ contact with physicians is limited to their interactions as a patient. So ultimately, the jury is asking itself if they would want this expert as their doctor. An expert who is aloof, condescending, or argumentative does not play well with most juries.

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Fourth, the expert must be commanding. He or she must be proficient in the facts of the case and of the salient points of his or her opinion. The expert should also understand the opposing counsel's argument inside and out. There can be no surprise questions that the expert has not anticipated. Opinions must be expressed confidently and completely.

The fifth "C" is communicator. An expert must be able to communicate effectively to the jury. This is second nature for most primary care physicians, as they spend their days communicating often complex medical data to their patients. This does not mean giving a lecture in response to a question, but providing clear, concise answers.

The final "C" refers to the ability to coach the witness, or coachability. One of the key areas to focus on is helping the expert cope with trick questions, which should be expected. The expert must be able to recognize and defeat them. Avoiding the pitfalls of these can be the difference between being an effective witness and a discredited one. Since most physicians are unfamiliar with trick questions, some examples follow.

The purpose of the trick question is to confuse the expert witness, distort the testimony, and mislead the jury. There is often an attempt by the opposing attorney to skirt the substance or reasoning behind the expert's testimony. According to former trial attorney Judge David M. Lawson, a trick question can take one of the five following forms:

1. assumes unestablished facts
2. assumes a false premise
3. demands an answer that cannot be given
4. imposes unreasonable limitations
5. draws the expert out of his field of expertise.

Recognizing the trick question is just half the battle; it is the appropriate response that is crucial. Here are a few of the many varieties of trick questions.

Q. "Doctor, are you being paid for your testimony today?"

A. "No, I'm being paid for my opinion and my time away from the office." (The expert is never paid for testimony, but for his time and professional opinion.)

Q. "Doctor, isn't it true that you mainly testify for plaintiffs (defendants)?"

A. "My job is to review the case I am asked to analyze and call it as I see it." (The attorney is attempting to impeach the expert's credibility by making him appear biased towards plaintiff or defense.)

Q. "Doctor, will you agree to give me a simple 'yes' or 'no' answer to my questions?"

A. "For those questions that can be answered with a simple 'yes' or 'no' I will agree. However some questions may require an explanation when a simple 'yes' or 'no' may not be entirely truthful." (Don't take the "deal" the attorney is offering you in order to restrict your answers and mislead the jury.)

Q. "Doctor, what is the weakest part of

your case?"

A. "It's not my case, it's the attorney's case."

Q. "Doctor, have you ever made a mistake?"

A. "Yes, but I haven't made any errors in opinion concerning this case."

Q. "Doctor would you consider this textbook as an authoritative source?"

A. "That depends upon which chapter, section, page, or passage to which you are referring."

Q. "Doctor, would you agree that reasonable doctors can disagree?"

A. "Yes." (It is important to concede this point, otherwise the expert may appear unreasonable.)

Q. "Doctor, would you agree that the treating doctor would have greater knowledge of the patient and her problem that would allow him to make better decisions regarding this particular patient?"

A. "Not necessarily. A certain distance from the case allows for greater objectivity when analyzing the facts." (By answering yes, the expert subordinates all of his or her opinions to the treating physician, even if the treating physician was negligent.)

Q. "Doctor, when you reviewed this case, how did you proceed?"

A. "I assumed that the patient had received reasonable care and then analyzed the facts of the case to either prove or disprove my assumption."

There are several important principles to keep in mind when answering trick questions. The expert must not allow the opposing counsel to put words in his or her mouth. Some key phrases for the expert to remember are:

1. "Doctor, would you say...?" "No, but I would say..."
2. "That depends."
3. "Not in this case because of..."
4. "Doctor is it fair to say...?" "That depends on what you mean by 'fair.'"
5. "Isn't it true that...?" (Watch for the inaccurate statement to follow.)

The expert needs to understand that it's important to be responsive to the opposing counsel, while at the same time avoiding volunteering information. A deposition or trial testimony is no time to deliver a lecture. Experts need to understand that their role is not to educate the opposing counsel, who

CONTINUED ON PAGE 21

Uniform Collaborative Law Act Enacted—Now More than Ever, Collaborative Law is Open for Business

BY AIDA DOSS HAVEL AND JOHN SARRATT

The Uniform Collaborative Law Act was signed into law by Governor Cooper on July 1, after having passed both the House and the



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Senate by substantial bi-partisan majorities (91-25 and 47-1). Collaborative Law Practice is a client-centered out-of-court method for resolving disputes that first arose 30 years ago in the family law setting as part of a general shift towards what became known as alternate dispute resolution (“ADR” and now, more commonly, just dispute resolution, perhaps signaling the general acceptance of mediation and arbitration as options to litigation).

Today we are finding that collaborative practice is especially well-suited to a new legal and cultural shift which in many ways

may prove to be permanent. That, of course, is change brought about by the COVID crisis, along with the lessons we are learning

about the limitations of a system based on appearance at a public courthouse, and the advantages we are discovering of conducting

all sorts of activities online.

Collaborative practice was created by a divorce lawyer in Minnesota in 1990 because he felt his clients, who were couples going through a wrenching personal experience, were not being well served by the highly adversarial and often destructive litigation model of resolving disputes. Coincidentally, others had reached the same conclusion about civil litigation in general. In 1983 the North Carolina Bar Foundation's Task Force on Dispute Resolution was created to look at possible alternatives to trial as a way of resolving disputes. That task force became the NCBA's Committee on Dispute Resolution and later the Dispute Resolution Section, and the extensive development of mediation in North Carolina had begun. In the meantime, the use of arbitration as an alternative to trial was also growing.

Over time, however—even before the COVID crisis—many lawyers, judges, and clients had begun to feel that the entire system of litigation, including alternatives such as mediation and arbitration, was becoming bogged down in expensive and time-consuming discovery, motion practice, rules of evidence and of procedure, and the gamesmanship that is part of any winner-take-all system. Many would say that while clients are the primary losers in a system that has become increasingly time-consuming and expensive, lawyers themselves are also suffering in the stressful win-lose environment in which they find themselves.

For the client, the collaborative approach offers a highly efficient, expedient, and less costly solution to all kinds of civil disputes, not just in the divorce setting. It also puts the client in charge and works to improve rather than harm existing business and personal relationships. Every negotiating session in the collaborative process includes all of the parties sitting down face-to-face accompanied by, but not shielded by, their counsel. For lawyers, especially those burned out by Rambo-style litigation, it offers an opportunity to serve clients by solving their problems without the destructive features of win-at-all-costs litigation. For the courts, it removes cases entirely from the court system, providing more resources for those cases that are not appropriate for a collaborative solution.

The COVID crisis has exposed additional challenges inherent in the trial system. Most in-person court proceedings, as well as discovery proceedings and mediations, have

been postponed. At the same time, we are discovering added benefits of dispute resolution not dependent on the court system and learning how much we can accomplish online. Even as the crisis subsides, these challenges and benefits will remain. While recovery from much of the suffering and dislocation caused by COVID will be difficult, in the area of dispute resolution, steps can be taken to address pressing problems without delay by using the collaborative process.

The collaborative process occurs entirely outside the court system. There is no reliance on courthouses, judges, juries, or public filing of documents. There is no need for depositions, mediations, or other in-person proceedings. Instead, the parties and their counsel agree to use the collaborative process, which puts them in complete control of all proceedings. Everything takes place at a time and place agreed to by the parties, along with their lawyers trained in the collaborative process, who sit at a table together and work towards a mutually agreed upon solution to the shared problem that divides them.

Together they agree on an exchange of needed information. They may determine that an expert opinion is needed—say from an accountant or engineer—and agree on who they think would be able to provide the most reliable information. The cost of this neutral expert is shared by the parties. Rather than taking hard positions and making demands, they discuss their real needs and interests and brainstorm ways to resolve their dispute.

The end result is a settlement agreement that is truly “owned” by all parties because they have been instrumental in reaching that agreement. The lawyers are completely dedicated to reaching a resolution out of court and agree that they will not serve as litigation counsel if the matter ultimately goes to court. Typically, the entire process takes a mere fraction of the time or expense of a court proceeding.

Ordinarily, meetings that are part of the collaborative process take place in person. However, there is no reason they cannot occur online, either because of a major dislocation like the COVID crisis, or because a party or counsel is ill or cannot conveniently come to the location where the meetings occur. Using Zoom or a similar online meeting platform, any party or attorney could be in a separate space if necessary, while still maintaining the concept of being together

to resolve their dispute. Collaborative practice allows all parties greater flexibility to manage their schedules and meet online to continue moving towards a resolution even when face-to-face meetings are impracticable for any reason.

The collaborative approach to dispute resolution makes the most sense when the parties have an ongoing relationship they wish to maintain. Not only is there an incentive to avoid destructive litigation techniques that might drive the parties further apart, but there is also likely to be greater comfort in voluntarily sharing information and cooperating in procedural steps such as agreeing on a neutral expert. Such situations might include a probate dispute among siblings, the breakup of a family business, or a dispute among businesses that wish to continue their profitable relationship with one another. In many such disputes, there are implications to the negotiations and outcome beyond considerations of money or property. These can include underlying needs and interests, values, and emotions that a purely legalistic approach may fail to consider. Just having their “day in court” may leave the parties frustrated and dissatisfied if these concerns are not addressed by a strict application of the law.

While the collaborative process is more flexible than a court proceeding, it does not abandon basic legal protections and attorney responsibilities. Each party has a lawyer whose job includes keeping things on the collaborative track, but also advising each client as to their legal rights and options. The attorney-client privilege remains completely intact. When agreement is reached, it is memorialized in an enforceable settlement agreement, just as binding as that reached in other dispute resolution venues. The collaborative attorney is zealously pursuing the remedy the client has chosen: to resolve the existing dispute quickly and inexpensively while attempting to preserve or even improve the relationship between the parties.

The collaborative process is entirely voluntary. It would be inconsistent with the nature of the process to make it mandatory. Likewise, any party can withdraw from the process at any time, and any attorney can impasse the process if their client is unwilling to follow the collaborative protocols such as voluntary disclosure of relevant information and foregoing the “take it or leave it” approach of much positional negotiation

techniques. The perspective of the collaborative process is forward looking—towards an agreed-upon solution to a common problem—and not backward looking to try only to assess fault or blame.

All of these protocols—the voluntary exchange of information, selection of mutually agreed upon neutral experts if needed, withdrawal of counsel if the case impasses and goes to litigation, the ability to withdraw at any time, and the obligation of counsel to impasse the proceeding if their client is unable or unwilling to comply with these protocols—are put in a written “Participation Agreement” signed by the parties and by counsel at the outset of the collaborative proceeding and makes the ground rules explicit.

A note here about collaborative practice as it relates to mediation: Collaborative differs significantly from mediation in its process, tone, and scope. It seeks not merely settlement, but also a measure of healing and mutual understanding. As someone else has said, “If you don’t understand the other side of the problem, you don’t understand the problem.” A paradigm shift often occurs during the collaborative process that enhances creativity and empowers the parties to voice their underlying concerns and interests. It is a process that can transform the clients over a period of weeks, rather than further polarizing them as often results from a one-day mediation or prolonged litigation process, with or without a trial and appeal.

There are several international, national, and statewide organizations devoted to further spreading and developing collaborative practice. One international organization whose focus is on non-family civil collaborative is the Global Collaborative Law Council (GCLC), globalcollaborativelaw.com. It was established in 2004 and has members throughout the United States and abroad with a mission to advance the use of the collaborative process in resolving all types of civil disputes.

The first national organization to be established—and the largest—is the International Academy of Collaborative Professionals (IACP), collaborativepractice.com, an international, interdisciplinary organization that has promulgated a uniform definition of collaborative practice, standards for collaborative practitioners and trainers, a model interdisciplinary code of ethics, and

public and professional education programs. While its resources are applicable to any collaborative matter, IACP has focused its attention on collaborative family law.

In North Carolina, the collaborative method first took hold in the early 2000s, and there are a substantial number of collaborative lawyers practicing in the family law area. In the spring of 2014, the Dispute Resolution Section of the North Carolina Bar Association formed a Collaborative Law Committee to explore expanding Collaborative to non-family matters. Among other things, the committee has sponsored eight 14-hour basic training sessions attended by over 250 attorneys across the state. A number of the lawyers who received that training came together towards the end of 2017 to form a non-profit, the North Carolina Civil Collaborative Law Association (NCCCLA), which works in cooperation with the North Carolina Bar Association to raise awareness about collaborative law practice among lawyers and clients, and to offer resources and develop standards of excellence for its members.

In 2009, the Uniform Law Commission promulgated a Uniform Collaborative Law Act to create uniformity in the advancement of collaborative law practice among the states that adopted it. Prior to the recent adoption by North Carolina, it had been adopted in 18 states and the District of Columbia, and there are eight more states where efforts are underway to consider adoption. The exact application of the act is in fact not uniform, with some states limiting its application to family law or with other variations; however, there is a trend developing for a uniform law governing collaborative practice. North Carolina has a collaborative law statute limited to family law that actually pre-dates the Uniform Act: N.C.G.S. 50-70 et seq. The North Carolina General Statutes Commission introduced the Uniform Act into the North Carolina legislature in 2018. It passed the House in both the 2018 and 2019 Sessions and passed the Senate on June 22, 2020. It was signed by the governor on July 1 and has an effective date of October 31, 2020.

Whether in the midst of COVID or on the other side of this crisis, the collaborative approach to dispute resolution allows the parties to proceed as though the crisis had never occurred. Having our courts close their doors for over two months is an occurrence that none of us have ever experienced

before, and it has been disruptive for us and our clients. We certainly hope never to have to live through such a “waiting period” again, but if we do, we can offer our clients a method of resolving disputes that does not rely on external structures being open for business.

Now—more than ever—collaborative practice is open for business!

To learn more about collaborative law practice, visit nccivilcollaborativelaw.org. ■

Aida Doss Havel is a recovering litigator and experienced collaborative practice trainer and family law practitioner living on Hattens Island, North Carolina, is co-chair of the Civil Collaborative Committee of the Dispute Resolution Section of the North Carolina Bar Association, and is a member of the Board of the Global Collaborative Law Council.

John Sarratt is an attorney with Harris Sarratt & Hodges in Raleigh, is co-chair of the Civil Collaborative Committee of the DR Section of the NCBA, and is the president of both the North Carolina Civil Collaborative Law Association as well as the Global Collaborative Law Council.

Justice Isn’t Always Blind (cont.)

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Remarks on 200th Anniversary of the North Carolina Supreme Court

BY CHESLIE KRIST

The following remarks were made at a celebration of the North Carolina Supreme Court's 200th Anniversary, which took place on October 10, 2019.

Thanks so much!

I won the title of Miss North Carolina USA last year and was actually a little worried about how the legal industry was going to handle things...and y'all slapped me on the front of *North Carolina Lawyer* magazine, so thank you so much for that.

I was very relieved and excited to see that cover, and I think more than anything I was really excited about the photo that the editors chose. It was me in a red pantsuit, and if you watched the Miss USA competition this year you probably remember that I have a colorful history with pantsuits. A history that gave me a glimpse of what the North Carolina legal industry used to look like and what I wanted it to look like.

When I competed on the moot court team at Wake Forest we traveled to a lot of different places. One of the competitions I went to was a sports and entertainment law competition held in New Orleans, Louisiana, during Mardi Gras. Of course, I had a genuine interest in sports and entertainment law and it had nothing to do with going to New Orleans during Mardi Gras. Which is exactly why I don't practice sports and entertainment law now.

But when I was there, my teammates and I, we competed in a few courtrooms that were really cold. I chose one day to wear a pantsuit to one of our rounds. These rounds were 30 minutes and my co-counsel and I shared those 30 minute rounds. This partic-



ular round we had a really cold bench. There were three judges, and out of our 30 minutes I think we collectively received five or six questions. After the round was over, one of the judges came up to me and said, "You know, next time consider wearing a skirt suit because," and I quote, "the male judges prefer to see women in skirts." I didn't receive any substantive feedback from this judge.

Not a, "You did really good, keep going." Or, "You sucked please stop." Instead, I just received comments about what I wore. And I listened quietly in the courtroom while the same judge whispered advice to our male opponents.

I was taken aback by this particular instance, so I shared it in a Facebook group with a little over a million members. And I

was shocked and horrified when women across the country—women who were attorneys in Louisiana, in North Carolina, in northern states, in midwestern states—shared very similar stories. Women who were practicing attorneys who were told by judges to leave the courtroom for not wearing pantyhose. Or women who were asked not to come back wearing red lipstick or red nail polish. Women who were criticized about the heels that they wore or didn't wear.

It was something that was profoundly interesting and challenging for me to understand that something like that could still happen in this day and age. After I shared this information and read those stories I thought to myself, it's no wonder that there are so few women compared to men who serve as advocates in courtrooms or [are] partners in law firms when you can walk in to argue about substantive issues and be relegated to talking about clothes and shoes and nail polish, which is interesting coming from me, a woman who runs a fashion blog about women's professional clothing. But there's a time and a place.

It's easy to judge women who leave the legal industry after being worn out by the inequities that we face both large and small, but it's also easy to understand why we want a level playing field. I'm not just talking about men perpetuating this behavior. In fact, the judge who made the comment to me during my moot court competition was actually a woman. She was a Black woman. She was a double minority like me, who may have faced racist and sexist comments her entire life. Like when a schoolmate of mine at Wake Forest [suggested] that I only won the 1L Trial Bar Competition at Wake because the judge was Black and she wanted a Black girl to win. Or when I was in high school and [was] told that I was really pretty for a Black girl.

At times North Carolina is marred by misogyny and racism. Other times, progress and change and innovation like we've heard about today feel like they're rinsing us clean. We have a rich and beautiful history here in the state that I call home. And it isn't a perfect history, but no state has that title.

For 200 years we've had a court that has been reflective of or a change agent for the people in the state. This happy anniversary is an excellent time to challenge ourselves to think what next year will look like. And the next five years. Or the next 50. Imagine what

you want this legal community to look like, and know that each one of us has a responsibility to build that vision. Obviously, the vision that you have shouldn't only be about race and gender.

When you're thinking about using more innovative technology and different strategies in your workplaces, don't leave it up to the young people to figure it out. In fact, some of the most innovative companies in our nation are led by seasoned professionals. Like Apple's Tim Cook at 58. Amazon's Jeff Bezos at 55. Or Microsoft's Bill Gates at 63. Rather than rolling your eyes when millennials like me ask for flex work policies, try to understand that we sat at dinner tables with our parents during the Great Recession of 2008, watching as they were fired from companies they were loyal to for decades. Understand that because of that, we don't want work to define us, but rather want a life outside of it.

Many at my firm, Poyner Spruill, understood the concept of going to bat as a team. When it came to diversifying our ranks, it wasn't up to the Black attorney to fix it. It wasn't up to the females to figure things out. Instead, the firm itself understood that this was an issue we needed to handle together. So, when we organized a panel and a reception to honor and celebrate Black History Month, in the two years that I've been at the panel and reception I looked into the audience and saw the faces of white people and people of color learning and listening together.

And when you're thinking about the Supreme Court here in North Carolina, know that having one of the most diverse courts in the nation led by a Black woman for the first time ever isn't a celebration just for Black people or for women. It can be celebrated by people of any race in the state knowing that we don't make empty promises about glass ceilings being broken, but instead we put our money where our [mouths are]. And we demonstrate that race and gender alone will not bar you from reaching our state's highest court. Like we just heard, "This has been done before by someone who looks like me."

In the coming years we need to continue proving that. That it's not just possible for you to reach your goals despite race or gender, but that it's probable. That we can't guarantee success, but we can ensure equal footing. There are still more milestones to reach,

and it is your job to set the bar higher and to continue to lift this state higher. This journey to continued progress in this industry will be straighter and more quickly traveled if we refuse to leave the duty of solving problems to those who are most acutely affected by them. Take up the mantle. And we will lead this state forward together.

Cheslie Kryst is a complex civil litigation attorney licensed to practice law in North and South Carolina. Cheslie was crowned Miss USA in May 2019, and worked full time at Poyner Spruill, LLP before winning the title. Passionate about criminal justice reform, she has worked pro bono for clients serving excessive time for low-level drug offenses. In October 2019, Cheslie was named a correspondent for the nationally broadcast entertainment news show, Extra. Cheslie is a Dress for Success Impact Ambassador and supports chapters across the country, traveling to local communities to give back. She also serves on the National Board of Directors for Big Brothers Big Sisters of America. Cheslie earned both her law degree and MBA from Wake Forest University and graduated cum laude with a bachelor's degree from the Honors College at the University of South Carolina.



Grievance Committee and DHC Actions

NOTE: More than 29,000 people are licensed to practice law in North Carolina. Some share the same or similar names. All discipline reports may be checked on the State Bar's website at ncbar.gov/dhcoders.

Disbarments

Peter S. Coleman of Raleigh surrendered his license and was disbarred by the Wake

County Superior Court. Coleman admitted that he misappropriated entrusted funds in an amount in excess of \$60,000. Coleman also pled guilty in Wake County District Court to one count each of felony common law forgery and felony notary violation.

John Vincent Ivsan of White Deer, Pennsylvania, surrendered his license and was disbarred by the State Bar Council. Ivsan pled guilty in the US District Court for the Eastern District of Pennsylvania to one count of conspiracy to defraud a United States agency, the Internal Revenue Service, in violation of 18 U.S.C. § 371, and one count of tax evasion in violation of 26 U.S.C § 7201.

Daniel Matthias Kincheloe of Richmond, Virginia, surrendered his license and was disbarred by the State Bar Council. Kincheloe pled guilty in the US District Court for the Western District of Virginia to one count of transmission of interstate communications with intent to extort in violation of 18 U.S.C. § 875(d).

Kristin Harmon Lang of Charlotte surrendered her license and was disbarred by the Wake County Superior Court. Lang admitted that she misappropriated entrusted funds totaling \$10,860.

Suspensions & Stayed Suspensions

Steven J. Allen of Hendersonville had a sexual relationship with and cohabitated with a client while her child custody case was ongoing, thereby making himself a necessary witness in the case and causing prejudice to the administration of justice. He was suspended by the DHC for one year.

James Pressley Mattox of Statesville did not conduct required monthly and quarterly reconciliations and reviews of his trust accounts, disbursed more funds from his trust account to clients than he held in the trust account for those clients, did not always promptly disburse entrusted funds, did not supervise an assistant to whom he delegated trust accounting tasks, and back-dated reports in preparation for a random

audit by the State Bar. Mattox was suspended for two years. The suspension is stayed for two years upon his compliance with numerous conditions.

John C. Snyder of Matthews neglected and did not communicate with his client, made false statements to his client and to opposing counsel, did not return his client's file, filed frivolous motions and pleadings in a civil case, made a false representation to a tribunal, knowingly made a misrepresentation or omission to the Grievance Committee, and did not respond to the Grievance Committee. The DHC suspended him for three years. After serving two years of the suspension, Snyder may apply for a stay of the balance upon proving his compliance with numerous conditions.

Interim Suspensions

The chair of the DHC entered an order of interim suspension of the law license of Charlotte lawyer **Nikita V. Mackey**.

Censures

Eva F. Lee of Raleigh was censured by the Grievance Committee. She sent an email to an attorney serving as guardian of an estate, to outside entities, and to the media containing baseless allegations of malfeasance by the guardian and containing other assertions that were false or without legal and/or factual basis. The New Hanover Superior Court convicted Lee of indirect contempt of court after it determined that Lee's conduct was designed to deter the guardian from complying with a court order to sell the ward's property.

Charlotte lawyer **Bradley Pearce** was censured by the Grievance Committee. A bankruptcy court determined that Pearce filed a motion to disqualify opposing counsel which was not legally and factually warranted and was filed for an improper purpose.

Reprimands

Isabel Guzman-Uresty of Durham was

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reprimanded by the Grievance Committee. Guzman-Uretsky was employed by Alexander Lapinski. After Lapinski was disbarred, Guzman-Uretsky employed him as her office manager. She permitted Lapinski to provide substantive legal assistance to her clients. She also employed Lapinski's wife as a legal assistant and provided excessive compensation to both, violating the prohibition against sharing legal fees with nonlawyers.

Transfers to Disability Inactive Status

Gregory A. Buscemi of Wrightsville Beach was transferred to disability inactive status by the chair of the Grievance Committee.

Notice of Intent to Seek Reinstatement

In the Matter of Michael King

Notice is hereby given that Michael King of Salisbury intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. King surrendered his license and was disbarred by the Disciplinary Hearing Commission of the

North Carolina State Bar by Order dated October 3, 2005. King's disbarment was the result of being found to have engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit.

Individuals who wish to note their con-

currence with or opposition to this petition for reinstatement should file written notice with the secretary of the North Carolina State Bar, PO Box 25908, Raleigh, NC, 27611, before November 1, 2020 (60 days after publication). ■

Selecting the Best Medical Expert Witness (cont.)

probably knows the case very well. In addition, the more one talks, the greater the opportunity for a misstatement which can be used against the expert.

Finally, certain words or phrases should always be avoided, such as, "to be entirely honest," "to tell the truth," and "to be candid about this." These comments may give the impression that prior remarks were less than honest or accurate. The expert also needs to understand that "I don't know" may be a perfectly reasonable response.

Experts should be coached to treat both attorneys the same, even though one is trying to trip up the expert. In addition, experts

must understand that it is never appropriate to lose one's temper or behave in a less than gentlemanly or ladylike fashion, even when being personally insulted. The jury won't like the rude treatment of an expert, unless the expert returns the rudeness.

Ultimately, the jury looks at the medical expert and asks themselves if this is the sort of person they would want for their doctor. The expert who comes across as caring, patient, friendly, and not condescending or adversarial, has the credibility battle won. ■

Joe D. Haines Jr., MD, MPH, FAAFP is a board certified family physician with over 25 years of experience as a medical expert witness. He is a US Navy veteran, having served as wing surgeon with the Marines in Afghanistan in 2011. He currently practices in Pittsboro, NC.

Where You Bank Matters

In the Summer edition of the *Journal*, the IOLTA Update considered the impact of the pandemic on the low-income individuals and communities ultimately served by the funding IOLTA provides, as well as the impact on grantee nonprofit organizations. We now know the context of the last Update, some six weeks into the establishment of stay at home orders in North Carolina, was really just the beginning of our collective time at home and the onset of challenges facing us all, including our fellow North Carolinians who are least able to access basic human necessities.

The question is not if an organization, its staff, and the population it serves have been impacted by the pandemic, but how. No doubt, the readers of this Update are drawing on their own resilience and past experiences to face challenges in the workplace, as well as personal ones within families and local communities as a result of the pandemic.

The NC Center for Nonprofits, North Carolina's statewide membership association of nonprofit organizations, conducted a survey in the spring to capture the impact of the coronavirus on nonprofits in our state. In addition to the cancellation of events and programming and the challenges related to working remotely, survey respondents illuminated other organizational challenges they are experiencing: disruption of services (76%), budgetary implications (75%), and increased and sustained staff and volunteer absences (48%), to name a few. Nonprofits providing critical social services, like legal aid programs across the state, are seeing increased demand in certain areas as individuals navigate unemployment, health, and family crises. This increased demand strains financial resources and organizational capacity at a time when staff are working in new environments and facing their own personal constraints.

NC IOLTA is also strategizing amidst the pandemic to respond to present circumstances, support grantee partners, and pre-

pare for new realities. Currently, NC IOLTA is looking ahead to the coming grantmaking cycle, which will kick off with applications available in early August. As we forecast revenue decreases and consider opportunities to increase available funds to pass on to grantee partners, IOLTA reminds all North Carolina attorneys: where you bank matters.

Impact of Pandemic on Revenue

NC IOLTA's primary source of revenue is interest income from participating financial institutions that hold IOLTA accounts. After the Federal Funds Target Rate was cut on March 16, 2020, financial institutions began reaching out to propose changes in their rate structure. Similarly, in recent months, lower principal balances have been noted. Income for IOLTA in the first quarter of 2020 was consistent with 2019 income; however, income in April and May decreased by 23% compared to 2019.

Across the program's history, NC IOLTA has continuously considered the diversification of revenue, periodically identifying and seizing opportunities to add new revenue streams and make the most of current sources. We commit to continuing these efforts to maximize funds available for grantmaking to critical civil legal aid and administration of justice efforts. The limitations of the model remain, however, and IOLTA is facing decreases in revenue as a result.

In a press release dated May 29, 2020, the National Association of IOLTA Programs, of which NC IOLTA is a member, reported on the projected impact on funding administered by IOLTA programs in 2020. A survey conducted by the National Association of IOLTA Programs (NAIP) documented early projections of "a steep drop" in revenue of at least \$157.4 million to state-based programs that administer IOLTA compared to 2019. The largest source of revenue to programs—interest on lawyers' trust accounts—was projected to decrease by 46% on average, with some pro-

IOLTA Update

- While income in the first quarter of 2020 was consistent with 2019, income in the first two months of the second quarter has decreased by 23% compared to 2019. IOLTA staff and board will continue to monitor income and interest rates over the coming months and communicate potential impacts with stakeholders.

- NC IOLTA is continuing to communicate with all eligible financial institutions that are seeking to adjust the rate and policies on their IOLTA product as a result of economic conditions. IOLTA encourages banks to communicate with our office regarding proposed changes to ensure continued compliance with the State Bar rules regarding IOLTA. Information about the rules and eligible financial institutions can be found at nciolta.org.

- NC IOLTA continues to administer state funding on behalf of the NC State Bar under the Domestic Violence Victim Assistance Act. 2019-2020 funding totaled \$903,002, a decrease over 2018-2019 due to diminished filing activity in April, May, and June.

- Applications for 2021 funding from NC IOLTA will be available in early August and are due on October 1, 2020.

- NC IOLTA published the program's 2019 Annual Report, *Celebrating Justice*. Please join us in celebrating the work of IOLTA and its partners in 2019 to pursue justice for all.

grams anticipating losses in IOLTA revenue

CONTINUED ON PAGE 24

Ben and Christine Burnside, Board Certified Specialists in Social Security Disability Law

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

I recently had an opportunity to talk with Ben and Christine Burnside, board certified specialists in Social Security disability law, practicing in Greensboro. Ben graduated from UNC Wilmington in 2003 and went straight through to UNC Law. Knowing that he wanted to pursue a career as a plaintiff's attorney, Ben sought out an internship at Deuteran Law Group the summer after his 1L year. When starting out at Deuteran, Ben practiced workers' compensation and personal injury law, but soon found his home in the Social Security disability department. Ben is now a senior associate at Deuteran Law Group.

Christine is a double Tar Heel, having attended UNC for undergrad before returning two years later to study at Carolina Law. When graduating law school in 2012, Christine planned to return to her hometown of Wilmington to look for work, but came across an ad for a position in Greensboro. Taking a chance, she accepted an interview for a workers' compensation attorney at Deuteran Law Group. However, within ten minutes of the interview, the firm director sparked an interest in Christine for Social Security disability law, and the passion for this practice that allows one to make a direct and tangible impact on clients has yet to dwindle. Ben and Christine also met in this first interview and have been married since 2014. Their three-year old twins keep them busy but entertained, especially since working from home during the pandemic. Christine was recently promoted

to senior associate at Deuteran Law Group.

Q: Why did you pursue board certification?

Ben: Pursuing board certification challenges one to learn more about their practice area than might ordinarily be needed in daily practice, to have a deeper understanding of the regulations and rulings and how

they have changed and continue to change over the years. Board certification is also a clear signal to clients that attorneys have this depth of knowledge and experience in their practice area. Dan Deuteran has always encouraged attorneys at Deuteran Law Group to seek board certification, where five of the seven attorneys eligible for board certification have achieved this distinction.

Q: How did you prepare for the examination?

Ben: I found it useful to take several days out of the office immediately before the exam to study. I primarily used the posted study guide as a reference.

Christine: I humbly admit that I only set aside a few hours to study in 2018 due to a busy hearing schedule and then one-year-old twins. I missed a passing grade by roughly 20 points. In 2019 I ensured that I had no meetings or hearings for several days prior to the test and spent the workdays studying the Social Security Regulations, rulings, and posted study guide materials. I encourage anyone who may not have been successful on their first attempt to apply again and not give up.

Q: What do your clients say about your certification?

Christine: For me, it's more what my clients don't say now that I am board certified. I used to get comments regularly from older clients about my young age, and I had to reassure them that I was experienced and competent. Since becoming board certified, these comments have lessened dramatically, and if I am questioned, the fact that I am board certified is always enough to end the conversation.

Q: How do you stay current in your field?

Ben: The two best resources in our practice are the National Organization for Social Security Claimants' Representatives (NOSSCR) and the NCAJ Disability Advocacy Section listserv. The listserv helps us keep our finger on the pulse of local issues, while NOSSCR keeps us informed about national trends, proposed regulations, and how we can advocate for needed change in Congress. Our local NOSSCR representatives, George Piemonte (also 2020-2021 NOSSCR president) and Rick Fleming, do a wonderful job of keeping communication flowing between our local bar and the national organization.

Q: What is most challenging about your work?

Christine: We typically meet our clients when they are going through extremely stressful periods in their life, dealing with difficult medical challenges on top of financial upheaval. Getting denied for disability benefits after losing their health and livelihood can understandably cause great angst and, although we are their advocates in the Social Security disability system, we can often become the face of this problem for our clients.

Ben: It can be challenging to bear the brunt of our clients' frustrations with their life circumstances and with the often years-long process of applying for Social Security disability benefits. However, we are lucky to



Burnside



Burnside

work with a dedicated group of paralegals, legal assistants, and staff who always strive to remember that the harsh words come from a place of pain and grief, not malice.

Q: What is most fun about your work?

Christine: Our work allows us to bring direct change to the lives of some of the most vulnerable members of our society, and securing a win for them never stops being thrilling. The knowledge that our efforts can mean the difference between a client living in a shelter or in stable housing has yet to stop being a daily reward. We also read thousands of medical records a week, and the things that some people say to their doctors can be crazy.

Q: What activities/volunteer groups are you involved in?

Ben: I am an avid hiker and I was training to hike Mount Kilimanjaro in July 2020 before the pandemic canceled all travel plans. I participated in the 2018 Make-a-Wish Trailblaze Challenge, hiking over 28 miles to raise money for the charity.

Christine: I support Ben's efforts, but I am an avid non-hiker. I enjoy voice and theater and made my acting debut at the Winston-Salem Theatre Alliance in 2016 before putting life on the stage on hold due to the arrival of the twins. I take voice lessons at the Cultural Arts Center and plan on moonlighting on Broadway if I can ever find the time.

Q: Has your practice area been impacted substantially by the current pandemic situation?

Christine: There were a worrying few weeks when all Social Security disability hearings were postponed indefinitely, but the Social Security Administration rather quickly pivoted from in-person hearings to telephonic hearings. It has been an adjustment, as we were used to meeting face-to-face with our clients to prepare for the hearings and again for the hearing itself, and we value the in-person interaction between ourselves and the judges at the hearing.

Ben: While it has been a different experience, it hasn't necessarily been a negative experience, as the administrative law judges are also doing all that they can to continue "business as usual" and make these phone hearings as useful as possible. ■

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

IOLTA Update (cont.)

of up to 75%. The press release further reports that some programs have already reduced grants as a result of current and anticipated changes in income, and many more anticipate making grant reductions in the coming year.

Income drops are hitting IOLTA programs across the country and will ultimately reduce funds available to support civil legal aid.

Prime Partners

As you consider where to hold your IOLTA account, know that where you bank matters. In 2019, banks paid rates on IOLTA accounts in North Carolina ranging from 0.009% to 1.73%. While many banks waive fees that may be charged against the IOLTA interest, some do not. Banking with one of NC IOLTA's Prime Partners that pays a superior interest rate and waives fees could provide 75 times more in revenue for access to justice. Choosing a Prime Partner Bank for your IOLTA account is an easy way to support NC IOLTA.

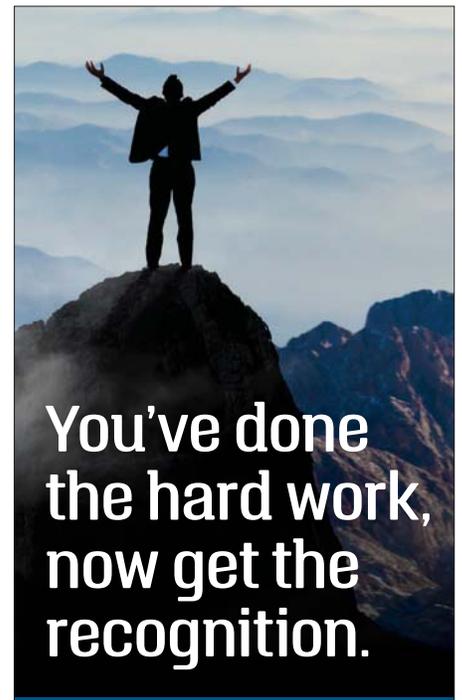
Prime Partners are banks that exceed minimal compliance with the eligibility requirements of NC State Bar Rule .1317 to support the NC IOLTA program by paying the higher of 0.75% or 75% of the Federal Funds Target Rate and waiving service charges.

NC IOLTA celebrates those financial institutions that go above and beyond the IOLTA eligibility requirements in their commitment to improving access to justice in their communities. Contact one of the Prime Partners to ensure your IOLTA account works harder to provide low-income North Carolinians with access to critically needed civil legal aid.

The following banks maintain Prime Partner status:

- Bank of Oak Ridge
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- Premier Federal Credit Union
- Providence Bank & Trust
- Roxboro Savings Bank
- Union Bank
- US Bank
- Wells Fargo
- Congressional Bank (*settlement agent accounts only*)

For a full list of eligible banks, please visit nciolta.org. ■



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Imagine

BY ROBYNN MORAITES

Imagine for a moment that you and your firm have an appeal going up to the Fourth Circuit and you are handling oral argument. Imagine the amount of prep work. The research. Writing and rewriting the brief. Fine tuning your arguments. Anticipating every curveball, every factual question, every procedural nuance. Rehearsing practice arguments with colleagues. Fielding tough questions. There is a lot at stake and your client is depending on you. Can you see it? Have you actually been there? How would you feel? Like a warrior? Excited? Honored? Up to the task? Nonchalant because it's just part and parcel of the job? Tough? A teeny bit nervous? Assured? Some of all of the above? You have a real opportunity here. You're so prepared you start to dream about the case.

When the day comes, you're ready to go. Up early. Best suit. Great shoes. If you are a woman, you've done your hair and makeup just right. You are polished. Professional. Confident. Prepared. A little mindfulness practice, a couple of (quick!) slow deep breaths, and in you go. You have given it your all, and all that remains is to give the actual oral argument. The appellant attorney argues his case. The justices asked tough but fair questions. You are then called to the podium.

You put your legal pad on the podium. As you look up and say, "May it please the court," one of the justices swivels his chair 180 degrees so that his back is to you. He remains that way for your entire oral argument. It is only when you thank the court for its time and sit down that he swivels his chair back around to face you.

What would be going through your mind if that happened to you? What in the world would you tell your client?

Now I ask you to imagine a different scenario. Imagine it is a few years ago. You have a business client who specializes in fiberoptic cable and digital wiring solutions. With the new building codes that have been promulgated and the emergence of digital day-to-day office needs, he has a large, new,

highly profitable potential market sector: commercial buildings. Most were built before the rise of the technological tools we use today. Commercial building owners and property managers are realizing that to remain competitive, they need to retrofit wiring solutions into their buildings. He approaches you about how to structure this new offering. You meet with him several times to discuss different contract and work order structures, payment models, potential risk exposure and how to mitigate it. He is excited and asks you to structure the very first deal he has with a well-known commercial real estate property owner/manager. He has set a meeting with them to sit down and have an initial talk about the project and if everyone is amenable, he'd like you to draft the contract. He's asked that the meeting take place in your law office.

On the day of the meeting, your assistant buzzes you to let you know your client arrived a few minutes early as did the commercial real estate team and their lawyer (five people). You ask her to go ahead and show them all to the conference room, that you are on your way. You head to the conference room and through the glass wall you see everyone is animated, laughing and talking to each other. As you come into the room a hush falls over the room. You assume it is just because everyone is going to get down to business. But as you take your seat next to your client, the folks on the other side of the table start looking around at each other nervously. The following conversation takes place:

Client: "Okay. Let's get started."

Head of real estate team, hesitant, awkward: "This is not what we expected."

Client: "What do you mean? We arranged to have an initial talk."

Head of real estate team, again looking at his team awkwardly: "This is not the kind of lawyer we expected."

Client: "Huh? What do you mean? He's fully up to speed on the deal and he knows my line of business."

Head of real estate team, still looking



awkward as he and his entourage stand up and leave the room: "This isn't what we were expecting."

The lone female quickly looks over at you and kind of shrugs an embarrassed, I'm sorry look as they depart.

This all takes place very quickly in a matter of about 30 seconds. You know what is happening, but your client is dumbfounded. He looks at you, "What just happened?"

You explain, "Your deal will happen. It's just not going to happen with me. I can refer you to a couple of other attorneys I know who will do a good job."

Now I ask you to imagine one last scenario. You used to work at the public defender's office. You are now working on the prosecution side. You have been with the DA's office just two weeks. You've called the calendar. An attorney approaches you. He reports that he worked out a deal with another prosecutor for his client, who is on the calendar today. He tells you the details of the deal. It all sounds good and makes sense. He asks you to dismiss the case against his client. Because you don't know this attorney, weren't involved in negotiating the plea, the other prosecutor didn't mention it, and you are so new on the job you don't even yet have a relationship established with the other prosecutor, you ask him to go ahead and pull his case off the calendar and take it to the

courtroom two doors down where the other prosecutor is appearing in court today to have him dismiss it directly.

Does this straightforward, professional, reasonable and responsible request warrant anything other than a response of, “Sure. No problem.”?

Instead, the attorney looks irritated, turns and walks away from you. As he walks out the side door of the courtroom a few feet away from you, you hear him say, not quietly, “F*cking n****r.”

These are true stories. If you haven’t yet guessed, the common thread of each of these stories is they happened to Black lawyers. For those of us who are white, we can picture ourselves in each of those scenarios right up until the surprise twist at the very end. These circumstances are unimaginable—unfathomable—to most white lawyers. So much so, we are incredulous. It is hard for us to believe that these things are still going on today.

These events did not happen in 1964. They all happened within the past few years to lawyers who are currently practicing law. I wrote the stories the way I did so that we might spend a few minutes in someone else’s shoes.

I have heard these stories, and many (so many) more like them, over the past eight years at our annual LAP Minority Outreach Conference.¹

Storytelling is one of the most powerful forms of expression and ways to communicate. People can disagree with our politics and policies. People can disagree with our opinions. People can disagree with our beliefs. No one can disagree with our stories. No one can take our experiences away from us.

I have learned so much at the Minority Outreach Conferences by hearing story after story of things that I have never encountered or had to deal with in my life. Situations, events, circumstances, and obstacles that, because they have never happened to me and have not happened in my presence, are essentially invisible to me.^{2,3}

I have been having very open, transparent conversations with Black lawyers I know, love, and trust. I call these “translation conversations” because we each are translating our experience to the other and asking the other about his or her experience. As unfathomable as it is to me to hear some of these stories, it is unfathomable to them how much of this is invisible to whites, even white

allies. I’ve heard a lot of, “Really? ... *Really?*” It is almost as if we live in two different worlds....

We do.

How do we bridge this compassion and understanding gap? I think the answer lies in friendship and love, recognizing we are all part of a system that none of us chose.

As much as I have been talking with Black lawyers, I am having even more conversations with white lawyers, who truly want to understand more and who are trying to see what has been largely invisible to them (myself included) because they (we) have not encountered it directly. I just read an article in *People* magazine penned by 12-year old actor Lonnie Chavis from NBC’s *This Is Us*.⁴ In it, the well known Black actor talks about how even he and his family have had terrifying interactions with the police. I sent it around to some (white) friends. One of them replied, “[Expletive], and I’ve got to stop saying, ‘Hard to believe these stories.’”

This article is not addressing this issue through a political lens. I hope to provide a personal and psychological perspective. But from speaking with our Black and LGBTQ LAP volunteers, I have come to understand that for marginalized people, the political cannot be separated from the personal and vice versa. They do not have the privilege of “leaving politics at the door” like I do. One consequence is that we in the majority interpret their personal statements or reports of their perspective as inherently political instead of personal. For that reason, Black lawyers often cannot share their stories safely with whites because of the established power dynamic and structure. They best not report a justice’s or judge’s gross judicial bias or racism, which totally affects the administration of justice for their clients, because it would be professional suicide. (While that would likely be true for any of us, white lawyers might not ever be in a position to see it or be on the receiving end.) Similarly, they risk losing their jobs at majority white firms if they speak up.⁵ Regardless of the setting, when they do speak up, they are often seen as over reacting. Or they are not believed. They are told what happened did not happen the way they reported it, or that they are being too sensitive, or that they imagined what they experienced—that they took it the wrong way and the underlying motivation of the other person was not based on race. These invalidating responses whereby Black lawyers’

perceptions and experiences are minimized or denied by whites are a form of gaslighting.

In one of his Netflix specials, Dave Chappelle observes, “[It’s all] hilarious, until it happens to you.” Having been criticized for his statement, he had to painstakingly explain that he was commenting on our modern day lack of empathy: the ability to understand and share the feelings of another. One of the hallmarks of narcissism is the inability to see another’s point of view or to empathize with others. There has been much press on the skyrocketing rise of individual and collective narcissism in modern American society.

Gaslighting is a process in the narcissism paradigm where an individual (or society as a whole) denies and denigrates another’s perception and experience through minimization, dishonesty, and dissemblance. To dissemble is telling only part of the truth (whether it is 10% or 75% of the whole story), which serves you in some way, and omitting or denying the rest; it means to hide under or put on a false appearance by concealing facts, intentions, or true feelings under a pretense. It is essentially the manipulation of another by psychological means.

To the one on the receiving end, research shows that it creates a trauma-based PTSD response. It is exhausting. All of the PTSD-trauma-based research I found about African Americans centered around poor, crime-ridden communities, with a fair amount of research focusing on gang members. Having listened in on our Minority Outreach Conferences, I can attest to the fact that this trauma-based PTSD is not limited to those populations.

A large part of the healing process in formal trauma treatment and therapy, particularly when treating a narcissistic abuse victim, is to actually listen to someone’s experience. To let them speak. To let them begin to claim the reality of what happened to them. To really see them and to acknowledge and honor what they have been through. To acknowledge the reality of it in an undefended way.

Our neurological structure involving mirror neurons must have this experience of being seen and validated to stay mentally healthy. Newborns and infants who do not receive our loving gaze and our goo-goo-gaa-gaa playfulness with them become developmentally disabled. Their brains do not develop properly without positive mirroring.

What is now understood in neuroscience is that we need positive mirroring throughout our lives in order to remain mentally, emotionally, and psychologically healthy. I talk about this all of the time in LAP's Compassion Fatigue and "Getting Lost in Our Own Lives" CLE presentations.

Our professional reputation as lawyers means everything. It is easy to see why Black lawyers stay silent.

I wanted to give them a voice and share their stories with those who are willing to hear them, because they are so powerful. Also serving that purpose, a companion article appears in this edition of the *Journal* with Black lawyers sharing their experiences directly. Here's what I have learned from their stories over the years:

Black lawyers have had to overcome more obstacles than white lawyers can imagine. The sense of isolation is tremendous. Most Black lawyers today are the first in their family to go to college, much less law school. Many Black lawyers grew up accused by their family and friends of trying to be white because they excelled academically.⁶ As a result, there can be a great sense of isolation for them in their personal lives as "the only one" of their family or community who is a lawyer or a professional. Many Black lawyers who come from rural districts are pressured by their home communities and church groups to do all their legal work for free under the moral mandate that they "give back to the community." They may be judged by their home communities for not working in the social justice field of law. Many Black lawyers who work in larger firms and institutions, even academia, are often the only Black lawyer.⁷ As a result, there can be a great sense of isolation for them in their professional lives as "the only one" of their firm or institution. It would be a rare instance in which a white attorney has experienced any of what is described here.

With that backdrop, for some Black attorneys, full equity partnership at a large majority white owned firm is the only definition of success. Anything less is considered a failure—by them and by their families. I share one last, remarkable story here. When I heard this story at the Minority Outreach Conference, I literally gasped. I have asked him to tell it.

"I graduated from Duke Law School. After a federal clerkship, I took a job in a large, predominantly white firm in Charlotte. I was

the only Black first-year associate. The others were white, all male. It was immediately apparent that to survive in this environment, and in order to make it to partner, you had to have a champion to guide you, provide meaningful work assignments, and advocate for you when the time came to make partner. Very quickly, white male partners were selecting first-year associates to mentor. They didn't call it mentoring. It was not a formal program or anything. It's this automatic association that happens in the power structure. The white associates were being taken to lunch with the big clients, getting introduced around, and getting really good assignments from their champion partners. I knew that if I wanted to succeed, I needed to find a champion. There were four partners in my practice area, but I didn't have much in common with any of them. All of them were white men and I didn't think any of them would naturally become my champion. I found out one day that one of them was a JAG officer in the army reserves/NC National Guard. I asked him about it, and after much research and prayer, I decided that joining his unit would help me forge the relationship that I needed. So, I joined the army. I had never fired a gun or even been camping before, but I didn't see any other viable path forward. I felt that if I failed to make partner, I would be letting down my family and that it might be a long time before the firm hired another Black attorney (at the time the firm only had one other Black attorney in its three North Carolina offices).⁸ Joining his unit gave us something to talk about, something in common, and a way to connect both in the office and when we were in uniform. He became my champion. And largely because he was my champion, I eventually became a partner in that firm. I don't think that would have happened if I hadn't joined his unit. I don't think we would have really gotten to know each other without that. That was years ago. I have since left the firm."

LAP volunteers regularly share their stories of depression, anxiety, alcohol, or other problems, and their recovery therefrom in this quarterly LAP column. The reason we do that, the "strategy" if you will, is that by sharing personal stories, a reader might identify and say to themselves, "Wow. Me too. I feel or have felt like that." And our hope is that the reader's response ranges from feeling less alone, to finally picking up the phone and asking for help. Once a lawyer

comes into the fold, they are welcomed with open arms. They are told by our active participants, "Welcome. You are not alone. You belong." And this incredible community and kinship forms.

If you are not Black and you are wondering, "What can I do to help?" start by listening to your Black colleagues. Make some Black friends, real friends. Educate yourself.⁹ Check out the Black Lives Matter collection on Netflix for a different perspective. I was particularly taken with the documentary *13th*. If you are in a large predominantly white firm, champion a Black associate.¹⁰ Challenge your white colleagues or friends when they make snide or racist remarks, either overtly or covertly. If you are in an organizational leadership position, engage substantive long-term racial training for your organization and deeply examine the structure of your policies through a lens that has been informed by racial bias training.¹¹ If you are not in an organizational leadership position, challenge those who are to obtain such training and examine policies. Start a book club and discussion group at work or home to discuss and examine these issues. Most of all, leave your ego, and your need to defend it, at the door so that you can really listen and hear.

If you're reading this article and you are Black and wondering, "How can they (especially white allies) not see this? It's so obvious." Please know that it is not obvious because by and large most of us who consider ourselves white allies have not encountered what you have encountered. We have certainly seen things over the years aired on television, but until recently it felt distant and removed from our day-to-day personal experience. It is for this reason why many of us were genuinely stunned to see the recent years' surge of overt white supremacy. Based on our personal experience prior to 2015-2016, it seemed more of a fringe element that would probably never be fully eradicated. If we have seen a racially based exchange in person, we have seen that one instance. We don't see that for the person who is the target, that they may be experiencing five or ten of those exchanges a day. I do not write any of this as a defense to anything; it is simply an explanation based on conversations I have had, illuminating my and others' (white friends' and colleagues') day-to-day experiences and conversations.

I think to really heal we all must acknowledge that we are all products of a

society that is a legacy derived from decisions that were made +/- 400 years ago, based on a mindset and framework that existed long before those decisions were made and that still exists.

“Mother Teresa diagnosed the world’s ills in this way: we’ve just ‘forgotten that we belong to each other.’ Kinship is what happens to us when we refuse to let that happen.”¹²

My hope is that this article inspires some of us to reach out to our Black or white counterparts and begin to understand we are all products of this system that none of us chose. It isn’t us versus them. It needs to be all of us understanding each other, forming a true kinship, so that together, hand-in-hand, we reshape a broken system and build something new.

The dinosaurs did not become extinct by killing each other off. The environment and landscape changed enough to make their survival impossible. Kinship, love and empathy—real understanding of how these biases operate and a willingness to take different action—is the environment we need today to make individual and institutional racism, like dinosaurs, a relic of the past. ■

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

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

Endnotes

1. Disclaimer: I am a white, cisgender, straight woman. Anything I write or observe is told based on my experience and that perspective. I want to share some of what I have learned with other white attorneys. I obtained permission from each of these lawyers to share these stories, and the lawyers involved had a hand in drafting them with me for purposes of this article. Further disclaimer: I may offend some readers with choice of language or phrasing. It is not my intention, so I hope readers can read through any inartful articulations to hear the underlying message and intent.
2. At our Minority Outreach Conferences, I have benefitted so much from hearing people’s stories and being given a framework. I have learned about micro-aggressions and implicit bias. For instance, one panelist shared that she had attended a fundraiser at her child’s school. She was the only Black mom there, and the only one with an

advanced degree. She was put in charge of the cash box, and one of the moms explained to her how to make change! Stories like this seem preposterous to me as a white female lawyer, and yet my Black colleagues encounter this kind of stuff day in and day out.

3. I know two Black lawyers (one now a judge) who were appointed to represent members of the KKK who were involved in lynching of an African American. Law school does not prepare us for the emotional impact of that kind of situation. I am hard-pressed to think of a white equivalent experience that would not result in the lawyer having to recuse for conflict of interest.
4. people.com/human-interest/voices-against-racism-lonnie-chavis.
5. While many firms have diversity and inclusion policies, it is unclear if they go so far as to directly address racist remarks or behavior. And while a firm may have a nice policy on paper, adequately effectuating it is a different matter.
6. I was an elementary school teacher prior to attending law school. We were trained specifically about this form of bias for our Black students and trained to encourage them academically. With the knowledge that it might isolate them socially from their home communities, we were also trained on how to try to form communities within their academic circles. We are social creatures. We need community; it is hardwired into our brains for survival. Many Black students from economically disadvantaged areas eventually turn away from school to remain part of their community. It is not a conscious choice. It is an unconscious instinctual survival strategy.
7. There is an implicit bias phenomenon whereby whites evaluate Blacks based on stereotype instead of in their individual capacity. Based on the behavior of one Black individual, whites unconsciously generalize the behavior of other Black people. In such a role, there is tremendous pressure on Black lawyers to be the representative example of all Black lawyers. We (whites) do not do the same for whites. This implicit bias stereotyping is deeply embedded in our culture and media for historic and sociological reasons that are the subject of many excellent, scholarly books and documentaries.
8. Per the implicit bias described in endnote 7, a single Black lawyer’s failure to make partner can reinforce unconscious biases and stereotypes in white firm leaders’ minds that does not occur if a white lawyer fails to make partner. The white lawyer is seen and evaluated on an individual level, whereas the Black lawyer could be effectively closing the door for the firm’s willingness to recruit future Black lawyers. Imagine that kind of additional pressure (if you are white) on top of the baseline pressures we all (Black and non-Black) feel as lawyers.
9. A Google doc containing a list of resources was recently turned into a website. justiceinJune.org. There is a growing list of actions contained at whiteaccomplices.org. If you do a Google search with terms “white ally” or “white education about racism” you will find many resources.
10. As Farad Ali, former member of the Durham City council, notes in this fabulous panel discussion on leadership and race hosted by Enlightrepreneurs, having a majority-privileged sponsor or champion and an introduction and access to their networks changes the game for minorities. View panel discussion at youtu.be/ba26mp8LF6s.
11. Reputable resources abound. The Racial Equity Institute in Greensboro is highly regarded: racialequityinstitute.com. For both individual workshops as well as organizational consulting, Karen Geiger, a Charlotte-based consultant, is highly recommended.

karengeiger.com An example of a Diversity & Inclusion 360 Degree Association Scan is at kgdiversity.com/assessment.

12. Quote taken from Richard Rohr from the Center for Action and Contemplation daily mediation, June 4, 2020.

Upcoming Appointments to Commissions and Boards

Anyone interested in being appointed to serve on any of the State Bar’s boards, commissions, or committees should email Lanice Heidbrink at lheidbrink@ncbar.gov and express that interest, being sure to attach a current resume. The council will make the following appointments at its meeting in October 2020:

Client Security Fund Board of Trustees (five-year terms)—There is one appointment to be made. Calvin Murphy is not eligible for reappointment.

Board of Law Examiners (three-year terms)—There are two appointments to be made. George R. Hicks and Roger A. Askew are eligible for reappointment.

Board of Continuing Legal Education (three-year terms)—There are three appointments to be made. Robert C. Kemp III is eligible for reappointment. Linda McGee and J. Dickson Phillips III are not eligible for reappointment.

NC LEAF (one-year term)—There is one appointment to be made. William Purcell is eligible for reappointment.

Board of Paralegal Certification (three-year terms)—There are two paralegal appointments and one lawyer appointment to be made. Lakisha Chichester and Sarah H. Kaufman (paralegal members) and H. Russell Neighbors (lawyer member) are eligible for reappointment.

NC Judicial Standards Commission (six-year terms)—There are two appointments to be made. Forrest Ferrell and William H. Jones Jr. are not eligible for reappointment. ■

“Something’s Off.” Understanding Your Nervous System’s Response to Cues of Danger

BY LAURA MAHR

For a profession that is trained to stay level-headed and unemotional—especially during crisis—many of us in the legal field are finding ourselves exhausted by the emotional roller coaster ride of these past months. “If I didn’t have a family and a job, I’d get into a ball and stay there,” one attorney-client shared with me in her resilience coaching session in June. “I’m usually energized to fight for social justice, but all I want to do is crawl into bed and stay there, hoping I’ll feel better when I come out the other side.” Just the week before, she eagerly participated in the Black Lives Matter protests and was planning ways to foster racial equity at her firm. “Something’s off with me,” she said. “I feel exhausted and hopeless, when just last week I was fired up and ready for action.” She was not the first client who shared with me confusion about a flip-flop in their physical and emotional response to current challenges. Another client shared, “I am sick of worrying about getting sick,” he said. “I have no idea how to keep my family and me safe or how to be in the world right now. If everything would go back to normal I’d be fine, but until then, I feel stuck, like I’m just biding my time at work and home.”

Each of us experiences the world differently based on our personal and professional history and our past setbacks and challenges, in addition to the unique combination of factors that make us who we are (our race, religion, national origin, immigration status, gender, gender identity, sexual orientation, socioeconomic history, genetics, beliefs, mindset, etc.). As unique as each of us is, and as differently as we each may perceive the human experience, neuroscience research has identified four distinct ways our nervous systems respond to “cues of danger.”

A “cue of danger” is anything that alerts

our nervous system that something is “off” and that our safety, contentment, and/or connectedness is at risk. A cue of danger may be big (for example, a client goes into a rage and threatens to make a Bar complaint against you when the judge rules for the opposing side), or small (a client expresses mild annoyance that it took you 48 hours to get back to him). For many of us, change and uncertainty registers as a cue of danger. This is especially true in the legal field where our jobs center around mitigating loss, predicting likely outcomes given our client’s situation, then advocating for the best possible outcome while preparing for the worst. Every day, lawyers are looking for “cues of danger” in our clients’ cases, and we may stay hyper vigilant for cues even after the work day is done and we go home to our families and personal lives. Trying to assess risk as it relates to the pandemic can be particularly disconcerting for lawyers: we can’t “see” COVID-19 and we can’t solve it, which can be paralyzing for lawyers, judges, and professors who like to be able to find solutions to problems and prevent loss. With more unknowns than usual, it is likely more challenging than ever to counsel our clients or rule on a case with calm confidence. We may perceive all of the unknowns as cues of danger, which can leave our nervous systems continuously on edge, causing us to feel uncertain and afraid. “I feel like I can’t take a deep breath,” another attorney-client shared with me. “I can’t settle down and all I want to do is



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check the news, even though the news makes me feel more anxious.”

The four ways neuroscience research found that our nervous system will respond to cues of danger are: fight, flight, freeze, and fold. (Note that while some mental health professionals include “fawning” as a fifth way people may respond to cues of danger, I will not be discussing it here.) Whether it is a threat to our health—such as the coronavirus—or a threat to our personal or societal well-being—such as racial injustice—our nervous system responds in a way that it believes is our best chance for survival. Depending on the circumstance and the way our individual nervous system operates, we may be mobilized to move toward a threat (fight); or to move away from a threat (flee/flight). Other times, we may be unsure whether to move toward or away from a threat and get stuck (freeze); or at times we may shut down or collapse and withdraw (fold) when our nervous system detects a cue of danger. When our nervous system is in fight, flight, freeze, or fold, neurobiologists call this a “dysregulated state.”

Many move between the different nervous system responses to cues of danger

depending on the day and situation. For example, you may be experiencing these four dysregulated nervous system states during the pandemic like this: feeling angry that you are facing financial problems and being argumentative with your business partner or your family when talking about finances (fight); feeling anxious about losing your job or your practice and frantically looking for a new job or career (flight); feeling unsure about what to do with immense financial uncertainty and feeling confused about whether you should fight to keep your job or move in a new direction (freeze); or feeling totally overwhelmed by your current situation, hopeless about the future, and withdrawing from social connections and professional engagements (even virtual), hoping you can come back online when everything is “back to normal” in an imagined “safe future” (fold).

Take a moment now to reflect on how you are responding to any current cues of danger in your life, whether it be the coronavirus, social unrest, racial inequality, personal or professional challenges, health concerns, etc. You may want to think about one thing at a time, or even one specific incident that you registered as a cue of danger today. Think about how your nervous system responded. Did you have an impulse to fight, flee, fold, or did you freeze? Or have you, at different times, felt some of each?

Optimally, as we better understand our nervous system responses, we can be more mindful about which state we are in. Identifying when your nervous system is dysregulated is our first step toward helping it return to a state of regulation. Of course, if there is a real threat to your immediate physical safety, you want it to kick in and help you to fight or flee or even fold (think “possum”) to help you survive that incident. In fact, the four nervous system responses to cues of danger are designed for immediate action and a quick resolution to the threat. But if the cue you perceive is about a future danger that may or may not occur and in ruminating about it we feel undesirable stress, it’s ideal to catch yourself the moment you notice you are in fight, flight, freeze, or fold. Then, do something right then—to help regulate your nervous system.

A regulated nervous system feels calm, breathing is steady and slow, muscles are relaxed, emotions are even, and the mind is clear. The sooner we notice that our nerv-

ous system is dysregulated—i.e., not feeling calm, clear, and relaxed—the sooner we can help ourselves return to a regulated state. From a regulated state, we can respond to the cue of danger for ourselves—and for our clients—feeling steady, capable, and able to problem solve with others in meaningful and effective ways. While we may momentarily feel dysregulated (e.g., angry about the situation and feel like fighting; scared and feel like fleeing; hopeless and feel like collapsing; not sure what to do and feel frozen), ideally we can train our nervous system to return to a place of clarity and calm confidence, and then take helpful action in a reasonable amount of time.

Finding ways to return to a regulated nervous system state is much easier than you may expect and takes less time than you may anticipate. Since the beginning of the COVID-19 pandemic in the United States, I have virtually trained and coached over 15,000 lawyers, judges, professors, legal administrators, legal support staff, and law school students nationally about how to stay resilient in challenging times. There are quick and effective ways to move out of a dysregulated nervous system state and back into a regulated state. As we—the legal profession in North Carolina—connected virtually over the past few months, we learned that what is happening in our lives right now is difficult for all of us in different ways. And yet, we are also learning from each other that there are many positive changes happening in our lives and profession, including many of us having more time to spend with our families, identifying where we can “shore up the ship,” and having opportunities to share our stressors with each other so that none of us feels alone.

It’s inspiring to hear from CLE participants and individual clients how using the nervous system-regulating tools is having a positive impact on their health and well-being, and on their productivity and optimism about the future. For example, some participants are taking leadership roles at their firm to foster the hiring and retention of lawyers of color. Some are motivated to pursue a job that’s better aligned with their goals and purpose. Others are finding ways to improve their personal health by using the tools to get better sleep.

This fall, while we may continue to be physically distanced from our colleagues in the Bar, we can also feel more connected

than ever by the unifying experience of going through a historic time of uncertainty and dysregulation together. We can acknowledge how strange it feels to be a lawyer whose job it is to fight, to feel instead like collapsing; or to be a judge whose job it is to feel clear, instead to feel muddled; or to be parents whose job it is to guide their children, to feel stuck. By joining together as a Bar, we can better understand our nervous systems’ responses, and experience the benefits of calming our nervous systems together. Wouldn’t it be meaningful to move forward as the clear-thinking professionals we are trained and hired to be and enjoy being the legal leaders our world is looking for to navigate issues arising from both the pandemic and systemic racism—regardless of the uncertainty and roller coaster ride of these times?

If you’d like to read about how to regulate your nervous system using “minimoments of well-being,” read the article I wrote previously for the *Journal*. nbar.gov/for-lawyers/pathways-to-well-being/wellbeing-while-you-wait.

If you’d like to listen to an in-depth discussion of the human nervous system’s response to cues of danger, check out this interview by my polyvegal theory teacher Deb Dana, clinician and coordinator of the Kinsey Institute Traumatic Stress Research Consortium, on the Sounds True Insights at the Edge podcast: bit.ly/Fall2020Pathways. ■

Laura Mahr is a NC lawyer and the founder of Conscious Legal Minds LLC, providing mindfulness based well-being coaching, training, and consulting for attorneys and law offices nationwide. Her work is informed by 13 years of practice as a civil sexual assault attorney, 25 years as a student and teacher of mindfulness and yoga, a love of neuroscience, and a passion for resilience. If you would like to bring Laura to your firm or event to conduct a well-being CLE or do one-on-one resilience coaching with Laura, contact her at consciouslegalminds.com.

If you’d like to learn more about stress reduction and improved cognitive functioning using mindfulness, check out: “Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness, Meditation, and Neuroscience” (approved for up to four hours of credit of online, on demand, mental health and/or general CLE in NC), consciouslegalminds.com/register.

Establishing Boundaries: Ethical Issues Pertaining to Third-Party Payor

BY SUZANNE LEVER, ASSISTANT ETHICS COUNSEL

A question I get from lawyers surprisingly often has to do with the permissibility of accepting payment for legal fees from someone other than the client. I say “surprisingly” because there is actually a Rule of Professional Conduct specific to this issue. This nifty little rule is tucked away in a list of nine specific types of concurrent conflicts of interest set out in Rule 1.8. Third-party payor arrangements are addressed in Rule 1.8(f). Pursuant to Rule 1.8(f), a lawyer may accept compensation for representing a client from one other than the client if: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

Third-party payor agreements are commonplace in insurance litigation, and no doubt most insurance defense lawyers are familiar with the provision. The questions I receive generally involve fee payments by friends or relatives in the areas of family and criminal law. Such arrangements are generally permissible, although they create unique ethical issues. The expectations of friends or family footing a client’s legal bill often conflict with the obligations the lawyer owes the client under the Rules of Professional Conduct. Therefore, certain ethical issues need to be addressed at the beginning of any representation involving a third-party payor.

Consent

Because the expectations and objectives of the third-party payor may not align with the best interests of the client, a lawyer who will be compensated by someone other than the client must obtain the client’s informed consent to the arrangement. Rule 1.8(f)(1). In order to obtain “informed” consent, the lawyer must tell the client about any material

risks of the arrangement and any reasonably available alternatives. *See* Rule 1.0(f) (“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and an explanation appropriate to the circumstances). For example, where a husband has agreed to pay a wife’s legal fees in a volatile domestic matter, the lawyer should discuss with the client the possible ramifications if the husband suddenly decides to stop payment, as well as alternative means of financing the litigation that may be available to the client.

The lawyer will also have to obtain the client’s informed consent if the third-party payor fee arrangement creates a conflict of interest for the lawyer under Rule 1.7. For example, a concurrent conflict of interest may exist if the payor is one of the lawyer’s regular clients. If the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-party payor, the lawyer must comply with the requirements set out in Rule 1.7(b).

Control

A lawyer may not accept a financial arrangement that interferes with the lawyer’s independence of professional judgment or with the client-lawyer relationship. Rule 1.8(f)(2). A similar prohibition is set out in Rule 5.4(c) (lawyer may not permit a person who pays the lawyer to render legal services for another to “direct or regulate” the lawyer’s professional judgment). Third-party payors may want to exercise some control over the manner of the representation. It is imperative for the lawyer to establish at the beginning of the representation that the third-party payor is not the lawyer’s client and that the lawyer will be acting solely at the direction of—and in the best interest of—the client.

For example, in 2003 FEO 7 an adult child seeks to hire (and pay) a lawyer to prepare a durable power of attorney for her father to execute. The father is not present at the time of the request. The adult child asks that specific powers be included in the document, including the power to transfer to her, as attorney-in-fact, title to any of her father’s assets. The opinion provides that, before agreeing to the representation, the lawyer must clarify to the payor that he represents the father and conduct an independent consultation with the father to obtain his informed consent to the representation and to determine whether father wants or needs the requested power of attorney. *Id.* *See also* 2006 FEO 11 (lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal).

Often the attempts to control the representation pertain to the payor’s desire to minimize the amount of fees spent on the representation. For example, in a criminal matter, the third party may want the lawyer to plea the case out instead of going to trial. The lawyer may not enter in a third-party payor agreement that requires cost saving measures that may restrain the lawyer’s exercise of independent professional judgment when determining the tasks and services necessary to represent the client competently. If the requirements will restrain the lawyer’s professional judgment, the lawyer is ethically prohibited from complying with restrictions. For example, in 98 FEO 17, the Ethics Committee concluded that a lawyer may not enter into a third party payor billing arrangement with an insurance carrier if the billing requirements interfere with the lawyer’s ability to exercise his independent professional judgment.

ment in the representation of the insured.

Some constraints on the representation requested by a third-party payor may be permissible if the client consents in advance after full disclosure of the benefits and risks involved. Rule 1.2(c) permits a lawyer to limit the scope of a representation “if the limitation is reasonable under the circumstances.” As noted in comment [6] to Rule 1.2, “The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client....In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly.”

Confidentiality

If a lawyer is accepting payment of legal fees from someone other than the client, the lawyer must ensure that information relating to representation of a client is protected as required by Rule 1.6. Rule 1.8(f)(3). A third-party payor may expect to be kept informed regarding the status of the representation. However, the lawyer’s duty of confidentiality runs to the client alone. Therefore, information about the client’s representation must not be disclosed to the payor unless the lawyer obtains the client’s informed consent or the particular situation fits within another exception to Rule 1.6. Even if the client consents to the disclosure of information to the third-party payor, the lawyer should consider the effect such disclosure may have on the application or waiver of the attorney-client privilege.

Written Agreements

The lawyer should enter into carefully drafted agreements with the client and the payor at the outset of the litigation. I have included below an example of a Third-Party Payor Provision for a client’s engagement agreement provided by Lawyers Mutual. The lawyer should enter into a separate agreement with the third-party payor. Both agreements should state that the third-party payor is not the lawyer’s client in the matter; that the payor will have no right to instruct the lawyer in the matter; and that lawyer will not, without the client’s prior permission, disclose confidential information regarding the matter to the payor.

If payment on the matter will be ongoing, billing issues should be addressed in advance and the procedure for payments set out in the agreements. The lawyer may need to obtain consent from the client to provide the third-party payor with information pertaining to billing. Both agreements should provide who is entitled to any funds left over at the end of the legal matter. (For examples of scenarios that may occur *without* this last provision in the agreements, take a look at 2005 FEO 12, Payment of Legal Fees by Third Parties).

Conclusion

Lawyers must be mindful that no matter the source of payment for legal fees, the lawyer’s professional responsibilities are owed solely to the client. When a third party will pay the lawyer’s legal fee, it is imperative that the lawyer explain the restrictions set out in Rule 1.8(f) to the client and to the third-party payor and memorialize that understanding in a written fee agreement signed by the client and a separate agreement signed by the third-party payor.

Lawyers Mutual Sample Contract Provision

Third Party Payor of Fees and Expenses

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

[NOTE: In addition to supplementing the engagement letter with a clause regarding third party payment of fees and expenses, a separate letter should be sent to the third-party payor confirming that he or she is not the lawyer’s client, is not entitled to receive privileged or confidential information, and will not have input regarding the direction of the representation. This separate letter should also confirm details of the billing arrangement with the third-party payor, in accordance with parameters set by the client.]

Fees and Expenses Paid by Third Party

As we have discussed, some or all of the fees for legal work performed by Lawyer for Client will be paid by _____ (the “Third Party Payor”).

Based on all the information presently available, Lawyer has concluded that this arrangement will not compromise Lawyer’s

duty of loyalty or independent judgment to the client. Specifically, Lawyer has determined that his or her representation of Client will not be materially limited by Lawyer’s own interests in accommodating Third Party Payor or by Lawyer’s responsibilities to a payor who is also a co-client. In reaching this conclusion, Lawyer has considered the requirements of Rule 1.7(b) of the North Carolina Rules of Professional Conduct.

It is understood and agreed that Third Party Payor is not Lawyer’s client in this matter. Lawyer will take instructions from Client, not from Third Party Payor, and Lawyer will only pursue Client’s best interests in this matter. Third Party Payor will not be consulted concerning strategic decisions in the case, nor will he or she in any other way have power, input, or influence as to the representation. Lawyer’s sole duty and loyalty in this matter is to Client. Privileged or confidential information cannot and will not be disseminated to any third party, including Third Party Payor, except as directed by Client. Please let the firm know immediately if Client objects to the firm sending invoices directly to Third Party Payor that contain details of each task performed on Client’s behalf, who performed the task, and how long the task took to complete. If Client has any concerns regarding Lawyer’s billing method, we will work closely with Client to come up with an alternative that is acceptable to Lawyer, Client, and Third Party Payor, such as sending only summary invoices to Third Party Payor.

Although we do not currently anticipate any conflict as a result of this arrangement, it is possible that circumstances could change in the future causing a divergence of interests. If a conflict arises between the duties Lawyer owes Client and the interests of Third Party Payor that could materially limit Lawyer’s representation of Client, Lawyer may be required to withdraw from this engagement.

Client understands and consents to the payment of fees and expenses by Third Party Payor.

[Optional] Although Third Party Payor has agreed to pay fees incurred by Lawyer on Client’s behalf, Lawyer holds both Third Party Payor and Client individually and collectively responsible for payment of Lawyer’s fees and expenses. Should Third Party Payor become delinquent regarding payment of Lawyer’s fees and expenses, Client will be notified and attempts will be made to seek payment from either Client or an additional third party. ■

Three Opinions Published; Subcommittees Created to Study Inclusion of Anti-Discrimination and Implicit Bias Language in Rules of Professional Conduct

Council Actions

The State Bar Council did not adopt any ethics opinions this quarter. Following a favorable vote by the Ethics Committee, the State Bar Council voted to publish two proposed amendments to the Rules of Professional Conduct for comment. The first proposal is an amendment to the Preamble identifying the avoidance of discriminatory conduct while employed or engaged in a professional capacity as a fundamental value of the profession. The second proposal is an amendment to Rule 1.5 (Fees), clarifying that a lawyer may not charge anything of value for responding to an inquiry by a disciplinary authority regarding allegations concerning the lawyer's own conduct. Both proposed amendments are included in this *Journal*.

Ethics Committee Actions

At its meeting on July 23, 2020, the Ethics Committee considered a total of four proposed amendments to the Rules of Professional Conduct, including the two proposed Rule amendments published for comment by the State Bar Council listed above. The other two proposed Rule amendments concern the adoption of anti-discrimination language in the text of the Rules of Professional Conduct and the adoption of language to the comments of Rule 1.1 (Competency) recognizing a lawyer's responsibility to be aware of how implicit bias and cultural differences can impact the representation of a client. These two proposals were sent to separate subcommittees for further study.

In addition to the proposed Rule amendments, the Ethics Committee considered a total of ten ethics inquiries. Seven inquiries were sent or returned to subcommittee for further study, including inquiries addressing

a lawyer's duty of confidentiality regarding information from a public hearing, a lawyer's permissibility of certain communications with judges, and a lawyer's professional responsibility in utilizing machine learning/artificial intelligence in a law practice. The committee approved the publication of proposed opinions for the remaining three inquiries, which appear below.

Proposed 2020 Formal Ethics Opinion 2 Advancing Client Portion of Settlement July 23, 2020

Proposed opinion rules that a lawyer may not advance a client's portion of settlement proceeds while a matter is pending or litigation is contemplated, but may advance a client's portion of settlement proceeds under other circumstance if the lawyer complies with Rule 1.8(a).

Inquiry #1:

Lawyer represents Client in a civil dispute. On behalf of Client, Lawyer filed a civil lawsuit against the defendant claiming damages. Prior to trial, Lawyer settles Client's matter with the defendant. Client has executed the necessary release to resolve the claim, and Lawyer has received a check from the defendant representing the settlement proceeds. The check is not one that would permit disbursement on provisional credit pursuant to the Good Funds Settlement Act. Prior to the settlement proceeds check clearing Lawyer's trust account, Client informs Lawyer about a significant and pressing financial need and asks Lawyer to advance to him his share of the settlement proceeds. Lawyer will make the advancement to Client out of Lawyer's personal or operating account. Lawyer will reimburse himself by deducting the amount advanced to Client

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 at ethicscomments@ncbar.gov no later than October 2, 2020.

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.

from the settlement proceeds once defendant's check clears Lawyer's trust account.

May Lawyer advance settlement proceeds to Client?

Opinion #1:

No. Rule 1.8(e)(1) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation, except that the lawyer may advance court costs and expenses of litigation.

The term “pending” is not defined in the terminology section of the Rules of Professional Conduct. However, citing a 1941 case, the North Carolina Court of Appeals opined that, “an action is deemed to be pending from the time it is commenced until its final determination[.]” *Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999) (internal citations omitted). See also *Black’s Law Dictionary* 1021 (5th ed. 1979) (“an action or suit is ‘pending’ from its inception until the rendition of final judgment”).

Until the release is signed, the settlement funds are paid to Lawyer or Client, and an order dismissing the lawsuit is filed with the court, the matter is pending, and Lawyer cannot advance settlement proceeds to Client.

Inquiry #2:

Lawyer represents Client in a civil dispute. Lawyer settles Client’s matter with the defendant prior to filing a lawsuit against the defendant. Client has executed the necessary release to resolve the claim, and Lawyer has received a check from the defendant representing the settlement proceeds. The check is not one that would permit disbursement on provisional credit pursuant to the Good Funds Settlement Act. Prior to the settlement proceeds check clearing Lawyer’s trust account, Client informs Lawyer about a significant and pressing financial need and asks Lawyer to advance to him his share of the settlement proceeds. Lawyer will make the advancement to Client out of Lawyer’s personal or operating account. Lawyer will reimburse himself by deducting the amount advanced to Client from the settlement proceeds once defendant’s check clears Lawyer’s trust account.

May Lawyer advance settlement proceeds to Client?

Opinion #2:

Yes, provided Lawyer satisfies himself that the potential litigation against the defendant is no longer contemplated and Lawyer complies with Rule 1.8(a) as set out in Opinion

#3 below. Rule 1.8(e)(1) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation, except that the lawyer may advance court costs and expenses of litigation. The scenario in this inquiry differs from that in Inquiry #1 in that the litigation is not pending (*see* Opinion #1) and litigation is no longer contemplated under Rule 1.8(e). The *Merriam-Webster Dictionary* defines “contemplate” as, “To view or consider with continued attention; meditate on; to view as likely or probable or as an end or intention.” With the release signed, the parties have effectively resolved their dispute, and the litigation is reasonably presumed to be both concluded and no longer contemplated for purposes of Rule 1.8(e).

However, although execution of a settlement agreement and/or release related to the action expresses the parties’ collective desire to resolve the matter and serve as a significant step in carrying out that desire, the parties may continue to contemplate the continued pursuit of litigation to resolve the dispute until the actual exchange of consideration between the parties occurs and is final. For example, checks representing settlement funds can be dishonored, and clients who previously signed a release can withdraw their agreement with the resolution. Therefore, whether a matter is no longer contemplated under Rule 1.8(e) must be determined individually by the lawyer based upon the circumstances. Considerations for making this determination can include the financial stability and reliability of the defendant, the legitimacy of the check or instrument conveying the settlement funds, the lawyer’s prior dealings with the defendant, and the client’s certainty and satisfaction with the resolution. It is incumbent upon the lawyer to reasonably determine whether litigation remains or should remain contemplated. If a lawyer reasonably concludes that litigation remains contemplated despite steps taken to act upon a settlement agreement, the lawyer is prohibited from providing the advancement pursuant to Rule 1.8(e).

Inquiry #3:

Lawyer represents Client in a civil dispute. Lawyer settles Client’s matter with the defendant, and the litigation is no longer pending and/or no longer contemplated per Rule 1.8(e). Client has executed the necessary release to resolve the dispute, and

Lawyer has received a check from the defendant representing the settlement proceeds. The check is not one that would permit disbursement on provisional credit pursuant to the Good Funds Settlement Act. Prior to the settlement proceeds check clearing Lawyer’s trust account, Client informs Lawyer about a significant and pressing financial need and asks Lawyer to advance to him his share of the settlement proceeds. Lawyer will make the advancement to Client out of Lawyer’s personal or operating account. Lawyer will reimburse himself by deducting the amount advanced to Client from the settlement proceeds once defendant’s check clears Lawyer’s trust account.

May Lawyer advance settlement proceeds to Client under these circumstances?

Opinion #3:

Yes, if the lawyer complies with Rule 1.8(a). Presuming the lawyer concludes that the litigation is no longer pending nor contemplated, a lawyer may advance the client’s portion of settlement proceeds to the client without violating Rule 1.8(e). However, the advancement provided by the lawyer to his client is a business transaction made with the client subject to Rule 1.8(a). 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). In considering what terms are “fair and reasonable” to a client in this scenario, the Ethics Committee considered the purpose for the advancement and the need to protect clients from potential disputes with their lawyer as a result of this advancement. Accordingly, any advancement of settlement proceeds made by a

lawyer to his client in this scenario must contain at least the following “fair and reasonable” terms:

1. Lawyer will not attempt to recover from Client any funds provided to Client as part of this advancement should the instrument conveying settlement proceeds be dishonored;

2. Lawyer will not attempt to recover from Client any funds provided to Client as part of this advancement should Lawyer’s calculation of funds result in an over-disbursement to Client;

3. Lawyer will provide to Client any and all remaining settlement funds not previously provided to Client via the advancement; and

4. Lawyer will not charge Client any interest on the advancement made and will not charge an administrative fee associated with the advancement to Client.

If Lawyer complies with the entirety of Rule 1.8(a), including inclusion of the above terms into the signed agreement with Client, Lawyer may provide Client’s portion of settlement proceeds to Client as described in the inquiry.

Lastly, the Ethics Committee notes that, in making the eventual reimbursement to Lawyer from Client’s settlement proceeds once the instrument conveying the funds clears Lawyer’s trust account, Lawyer must keep detailed records of the transaction to justify the reimbursement. As a result of the advancement, Lawyer’s trust account will reflect disbursements made to himself/his practice, and no disbursements made to Client in the settlement. Every disbursement from a trust account must be accounted for and justified by client directive. *See* Rule 1.15-2. Accordingly, if Lawyer advances Client’s portion of settlement proceeds as described in this inquiry, Lawyer must retain all records necessary to support the disbursements made, including but not limited to copies of bank records for the advancement and Client’s executed agreement consenting to the transaction pursuant to Rule 1.8(a).

Inquiry #4:

May Lawyer advertise to the public or otherwise inform potential clients that Lawyer may consider advancing Client’s portion of any settlement proceeds prior to the settlement proceeds check clearing his trust account?

Opinion #4:

No. Rule 7.1(a) prohibits a lawyer from making false or misleading communications about the lawyer or lawyer’s services. Rule 7.1(a)(2) states that a communication is false or misleading if the communication “is likely to create an unjustified expectation about results the lawyer can achieve[.]” As noted in Opinion #2, a lawyer must individually and thoroughly evaluate his client’s case and circumstances, as well as the lawyer’s own circumstances, to determine whether advancing settlement proceeds prior to the actual receipt of proceeds is appropriate and something the lawyer is willing to do. Each case and each client is different, and circumstances surrounding the case, the client, and the lawyer have the potential to change during the course of the representation. Accordingly, a lawyer cannot communicate with requisite certainty his willingness to offer an advancement of the client’s settlement proceeds prior to actually receiving the proceeds at the outset of litigation. Making such a communication creates an unjustified expectation about the lawyer’s service and the results the client can expect through the lawyer’s services in violation of Rule 7.1(a). Accordingly, because of the potential for unjustified expectations in violation of Rule 7.1(a), the possibility of advancement may not be used as an inducement by the lawyer to obtain employment, and the possibility of advancement may not be advertised or publicized by the lawyer.

Proposed 2020 Formal Ethics Opinion 3 Solo Practitioner as Witness/Litigant July 23, 2020

Proposed opinion rules that a solo practitioner/owner of a PLLC is not prohibited from representing the PLLC and testifying in a dispute with a former client.

Facts:

Lawyer is a solo practitioner and the sole owner of his practice, Lawyer Firm PLLC. Lawyer, through Lawyer Firm PLLC, represented Client in an intellectual property matter. Client did not pay the entirety of the invoices submitted by Lawyer Firm PLLC to Client for services rendered. Lawyer, on behalf of Lawyer Firm PLLC, subsequently filed a lawsuit against Client seeking to recover the sums Lawyer contends Client owes to Lawyer Firm PLLC. Lawyer is the

sole counsel representing Lawyer Firm PLLC. Because Lawyer performed the legal services that resulted in the dispute over legal fees owed, Lawyer will be a necessary witness in the litigation.

Lawyer, on behalf of Lawyer Firm PLLC, moved for summary judgment against Client. Prior to the court’s ruling on the motion, opposing counsel alleged to the court that Lawyer should be disqualified from representing Lawyer Firm PLLC because Lawyer—a necessary witness to the dispute—is prohibited from serving as both advocate and witness in the matter pursuant to Rule 3.7 of the North Carolina Rules of Professional Conduct.

Inquiry #1:

Is Lawyer prohibited from representing Lawyer Firm PLLC in the dispute between Lawyer Firm PLLC and Client?

Opinion #1:

No. With some limited exceptions, Rule 3.7 provides that a lawyer may not act as advocate at a trial in which the lawyer is likely to be a necessary witness. The underlying reason for the prohibition is to avoid confusion regarding the lawyer’s role. Rule 3.7, cmt. [2]. The rationale does not apply when the lawyer is also a litigant. *See* 2011 FEO 1. The same analysis applies in this scenario where the lawyer-litigant is the sole owner of his own law practice.

It is the sole prerogative of a court to determine advocate/witness issues when raised in a motion to disqualify. *Id.* For example, considering the underlying concerns about confusion regarding the lawyer’s role in a particular proceeding, a court may find it necessary to disqualify a lawyer from representing his solo practice in a trial before a jury, but not in a trial before the bench. This ethics opinion merely holds that a lawyer/litigant in this scenario is not required to find alternative counsel prior to a court’s ruling on a motion to disqualify.

The Ethics Committee is aware of the North Carolina Court of Appeals’ decisions in *Cunningham v. Sams*, 161 N.C. App. 295 (2003) and *Harris & Hilton v. Rasette*, ___ N.C. App. ___, 798 S.E.2d 154 (2017). The committee is also aware that different jurisdictions have reached different conclusions on the issue of whether a lawyer may represent his or her solely owned law practice in a dispute against the law practice where the

lawyer is a necessary witness. Compare *Nat'l Child Care, Inc. v. Dickinson*, 446 N.W.2d 810 (Iowa 1989) and *Mt. Rushmore Broad., Inc. v. Statewide Collections*, 42 P.3d 478 (Wyo. 2002). Despite their differing outcomes, these cases illustrate the overarching principle that a trial court can rationally reach different conclusions based upon the circumstances of each case, and that the trial court appropriately retains discretion in determining whether disqualification is appropriate in these matters.

Inquiry #2:

Should the court determine that Lawyer is disqualified from representing Lawyer Firm PLLC at trial, is Lawyer prohibited from representing Lawyer Firm PLLC in the motion for summary judgment?

Opinion #2:

No. Rule 3.7(a) states, "A lawyer shall not act as an advocate *at a trial* in which the lawyer is likely to be a necessary witness..." (emphasis added). Rule 3.7's prohibition on a lawyer acting as both advocate and witness in a particular matter is confined to a lawyer's representation of a client at trial and does not automatically extend to the lawyer's representation of a client in pretrial proceedings. Absent a conflict created by the lawyer's representation in the matter or court order disqualifying the lawyer, a lawyer may represent a client in pretrial proceedings even if the lawyer is likely to be a necessary witness at trial. However, the Ethics Committee notes that some courts would disqualify a lawyer under Rule 3.7 from participating in pretrial activities if the pretrial activities involve evidence that, if admitted at trial, would reveal the lawyer's dual role. See, e.g., *Williams v. Borden Chem. Inc.*, 501 F. Supp. 2d 1219 (S.D. Iowa 2007) (lawyer, who was to serve as a fact witness, was disqualified from acting as trial counsel but was permitted to engage in pretrial activities other than taking or appearing at depositions); *Lowe v. Experian*, 328 F. Supp. 2d 1122 (D. Kan. 2004) (disqualification was not required for lawyer's pretrial activities, "such as participating in strategy sessions, pretrial hearings or conferences, settlement conferences, or motions practice," but may be necessary if pretrial activities include "obtaining evidence which, if admitted at trial, would reveal the attorney's dual role[.]").

Proposed 2020 Formal Ethics Opinion 4 Investment in Litigation Financing July 23, 2020

Proposed opinion rules that a lawyer may not invest in a fund that provides litigation financing if the lawyer's practice accepts clients who obtain litigation financing.

Facts:

Lawyer is an associate at Law Firm. Lawyer has no control over Law Firm's selection of clients or matters. Fund is an investment vehicle that provides litigation financing. Fund advances money to plaintiffs or law firms in commercial litigation in exchange for a share of any recovery. The money advanced by Fund is used to pay litigation expenses and attorney fees. Fund makes numerous investments on behalf of its partners, with the goal of turning a profit. Fund's profits are passed through to investors *pro rata*.

Lawyer would like to invest in a "feeder fund" that aggregates smaller investments and invests the larger total in Fund in order to meet Fund's investment minimums. Lawyer will not refer clients to Fund and will have no control over Fund's investment decisions. Fund does not disclose the identity of their clients to their investors (if at all) until the litigation matter is concluded.

It is possible that Fund would advance money to Law Firm to support litigation that Firm is handling on behalf of a plaintiff or directly to a plaintiff that is represented by Law firm. It is also possible that Fund would advance money to support a plaintiff or law firm in litigation where Firm is representing the defendant. If Law Firm represents a plaintiff that has obtained money from Fund to pursue particular litigation, Law Firm's litigation team for the case will likely be aware of the client's transaction with Fund. If a client's opponent obtains money from Fund, it is unlikely that Lawyer or Law Firm would learn about the transaction. However, if a court ordered disclosure in discovery of litigation finance agreements, Firm's litigation team on the particular matter would learn of the transaction with Fund.

Inquiry #1:

May Lawyer invest in Fund?

Opinion #1:

No.

Several prior ethics opinions have approved alternative litigation financing arrangements. In 2000 FEO 4, the Ethics Committee concluded that a lawyer may refer a personal injury client to a finance company that would advance funds to the client in exchange for an interest in any recovery the client might obtain. In 2005 FEO 12, the Ethics Committee concluded that a lawyer may obtain litigation funding from a financing company. In 2018 FEO 4, the Ethics Committee concluded that a lawyer may offer clients on-site access to a financial brokerage company as a payment option for legal fees.

Although an alternative litigation financing arrangement may be permissible, a lawyer may never allow the financing arrangement to interfere with his duty to act in the best interests of his client. See Rule 1.7, cmt. [10]. In that regard, the Ethics Committee concluded in 2006 FEO 2 that a lawyer may not refer a client to a company that pays a lump sum to a client in exchange for the client's interest in a structured settlement if the lawyer receives a "finder's fee" from the company in exchange for the referral. Furthermore, the opinion rules that the lawyer may not refer a client to the company merely as a means of paying the lawyer for his legal services. The lawyer's interest in obtaining a finder's fee or in getting paid from the lump sum could interfere with the lawyer's duty to act in the client's best interest.

So too, Lawyer may not invest in Fund if the investment will compromise his professional responsibilities to Lawyer's current or future clients. Rule 1.7(a)(2). Fund advances money to plaintiffs or law firms in commercial litigation in exchange for a share of any recovery. Fund's goal of turning a profit may not align with the best interests of a particular recipient of money from Fund. If a firm client, or an opposing party to a firm client, independently contracts with Fund to obtain litigation financing, and Lawyer has no knowledge of the arrangement, it is unlikely that Lawyer's independent professional judgment will be affected by the financial arrangement. However, if Lawyer learns during the representation that a client or opposing party has received money from Fund, Lawyer would then have a duty to disclose the conflict to Firm's client and seek consent.

CONTINUED ON PAGE 42

Amendments Pending Supreme Court Approval

At its meeting, July 24, 2020, the Council of the North Carolina State Bar 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 and Summer 2020 editions of the *Journal* or visit the State Bar website.)

Proposed Amendments to the Rules on the Annual Membership Fee

27 N.C.A.C. 1A, Section .0200, Membership—Annual Membership Fee

The proposed amendments make the language of Rule .0203 consistent with the authorizing statute and delay imposition of the late fee until September 1, 2020, for the 2020 calendar year only.

Proposed Amendments to the Discipline Rules

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

The proposed amendments eliminate the requirements that letters of warning, admonitions, reprimands, and censures issued by the Grievance Committee be served by certified mail or personal service when valid service has previously been accomplished upon the respondent.

Proposed Amendments to the Rules on Reinstatement from Inactive Status and Administrative Suspension

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

The proposed amendments to Rule .0902 and Rule .0904 eliminate the six-hour cap on online CLE when fulfilling the requirement for reinstatement from inactive status and from administrative suspension.

Proposed Amendments to the Certification Standards for the Immigration Law Specialty

27 N.C.A.C. 1D, Section .2600,

Certification Standards for the Immigration Law Specialty

The proposed amendments update and clarify the requirements for substantial involvement for certification as a specialist in immigration law.

Proposed Amendments to the Rules on Prepaid Legal Services Plans

27 N.C.A.C. 1E, Section .0300, Rules Concerning Prepaid Legal Services Plans

The proposed amendments to the rules on prepaid legal services plans are comprehensive and include the following: incorporating the registration, renewal, and amendment forms in the rules; eliminating the requirement that the State Bar review plan documents to determine whether representations made in the registration, renewal, and amendment forms are true; and specifying that registration and renewal fees shall be in amounts to be determined by the State Bar Council. During the publication period following the January meeting, comments on the proposed amendments were received. At its meeting on April 17, 2020, the council deferred action on the proposed amendments until its July meeting when it considered modifications to the proposed amendments in response to the comments received. The council accepted the modifications, but determined that the modifications were not substantive and did not require republication.

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

Rules Governing Admission to the Practice of Law in the State of North Carolina

Section .0500, Requirements for Applicants; Section .0600, Moral Character and General Fitness; Section .1200, Board Hearings

The North Carolina Board of Law Examiners proposed amendments to its

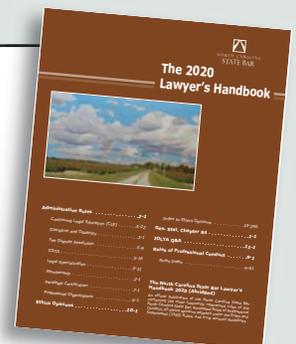
Highlights

- Comprehensive proposed amendments to the rules on legal advertising in the Rules of Professional Conduct are published for comment. To read the proposed amendments and learn more about the background on and reasons for the proposed changes, go to the separate article on the advertising rules on page 43.
- A proposed amendment to the Preamble to the Rules of Professional Conduct is published for comment. The amendment identifies the avoidance of discriminatory conduct while acting in a professional capacity as a value of the provision. See the sidebar to this article.

admission rules that streamline the processing of comity, military-spouse comity, and transfer applications that do not present character and fitness issues.

The 2020 Lawyer's Handbook

The digital version of the 2020 *Lawyer's Handbook* is now available for download, free of charge, from the State Bar's website: ncbar.gov/news-publications/lawyers-handbook.



Proposed Amendments

At its meeting on July 24, 2020, the council voted to publish for comment the following proposed rule amendments:

Proposed Amendments to the Student Practice Rules

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

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

.0201 Purpose

The rules in this subchapter are adopted for the following purposes: to support the development of clinical experiential legal education programs at North Carolina’s law schools in order that the law schools may provide their students with supervised practical training of varying kinds during the period of their formal legal education; to enable law students to obtain supervised practical training while serving as legal interns certified law students for government agencies; and to assist law schools in providing substantial opportunities for student participation and experiential education in *pro bono* service.

.0202 Definitions

The following definitions shall apply to the terms used in this section:

- (a) Clinical legal education program - ...
- (b) Eligible persons - ...
- (c) Certified law student – A law student who is certified to work in conjunction with a supervising attorney to provide legal services to clients under the provisions of this subchapter.

~~Field placement – Practical training opportunities within a law school’s clinical legal education program that place students in legal practice settings external to the law school. Students in a field placement represent clients or perform other lawyering roles under the supervision of practicing lawyers or other qualified legal profession-~~

~~als. Faculty have overall responsibility for assuring the educational value of the learning in the field. Supervising attorneys provide direct feedback and guidance to the students. Site supervisors have administrative responsibility for the legal intern program at the field placement. Such practical training opportunities may be referred to as “externships.”~~

(d) Government agencies - The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public defender’s office or a district attorney’s office.

(e) Law school - ...

(g) Legal intern – A law student who is certified to provide supervised representation to clients under the provisions of the rules of this subchapter.

(h) ~~Legal services organization~~ - A non-profit North Carolina organization organized to operate in accordance with N.C. Gen. Stat. §84-5.1.

(h) ~~(i)~~ Pro bono activity – An opportunity while in law school for students to provide legal services to those unable to pay, or otherwise under a disability or disadvantage, consistent with the objectives of Rule 6.1 of the Rules of Professional Conduct.

(i) ~~(j)~~ Rules of Professional Conduct – The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar, approved by the North Carolina Supreme Court, and in effect at the time of application of the rules in this subchapter.

(j) ~~(k)~~ Site supervisor – The attorney at a field student practice placement who assumes administrative responsibility for the certified law student program at the field placement and provides the notices statements to the State Bar and the certified law student’s law school required by Rule .0205(b) of this subchapter. A site supervisor may also be a supervising attorney at a field student practice placement.

(k) Student practice placement - Legal practice setting external to the law school that provides the student with practical legal training opportunities. A student participating in a student practice placement represents clients or performs other lawyering roles under the supervision of practicing

lawyers. A supervising attorney provides direct feedback and guidance to the student. The site supervisor has administrative responsibility for the certified law student program at the student practice placement. Such practical training opportunities include the following:

(1) Externship – A course within a law school’s clinical legal education program in which the law school places the student in a legal practice setting external to the law school. An externship may include placement at a government agency.

(2) Government internship – A practical training opportunity in which the student is placed in a government agency and no law school credit is earned. A government internship may be facilitated by the student’s law school or obtained by the student independently.

(3) Internship – A practical training opportunity in which the student is placed in a legal practice setting external to the law school and no law school credit is earned. An internship may be facilitated by the student’s law school or obtained by the student independently.

(l) Supervising attorney - ...

.0203 Eligibility

To engage in activities permitted by these rules, a law student must satisfy the following requirements:

(a) be enrolled as a J.D. or LL.M. student in a law school approved by the Council of the North Carolina State Bar;

(b) be certified in writing by a representative of his or her law school, authorized by the dean of the law school, to provide such certification, as being of good character with requisite legal ability and legal education to perform as a legal intern certified law student, which education shall include satisfaction of the prerequisites for participation in the clinic, externship, or field other student practice placement;

(c) ...;

(d) ...; and

(e) certify attest in writing that he or she has read the North Carolina Rules of Professional Conduct and is familiar with the opinions interpretive thereof.

.0203 Form and Duration of Certification

Upon receipt of the written materials required by Rule .0203(b) and (e) and Rule .0205(b), the North Carolina State Bar shall certify that the law student may serve as a legal intern certified law student. The certification shall be subject to the following limitations:

(a) Duration. The certification shall be effective for 18 consecutive months or until the announcement of the results of the first bar examination following the legal intern's graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar. **For the duration of the certification, the certification shall be transferable from one student practice placement or law school clinic to another student practice placement or law school clinic, provided that (i) all student practice placements are approved by the law school prior to the certified law student's graduation, and (ii) the supervision and filing requirements in Rule .0205 of this subchapter are at all times satisfied.**

(b) Withdrawal of Certification. The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

- (1) notice from a representative of the legal intern's certified law student's law school, authorized to act by the dean of the law school, that the legal intern student has not graduated but is no longer enrolled;
- (2) notice from a representative of the legal intern's certified law student's law school, authorized to act by the dean of the law school, that the legal intern student is no longer in good standing at the law school;
- (3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern certified law student and that no other qualified attorney has assumed the supervision of the legal intern student; or
- (4) notice from a judge before whom the legal intern certified law student has appeared that the certification should be withdrawn.

.0205 Supervision

(a) Supervision Requirements. A supervis-

ing attorney shall

(1) for a law school clinic, concurrently supervise an unlimited number of legal intern certified law students if the supervising attorney is a full-time, part-time, or adjunct member of a law school's faculty or staff whose primary responsibility is supervising legal intern certified law students in a law school clinic and, further provided, the number of legal intern certified law students concurrently supervised is not so large as to compromise the effective and beneficial practical training of the legal intern students or the competent representation of clients;

(2) for a field student practice placement, concurrently supervise no more than two legal intern certified law students; however, a greater number of legal intern certified law students may be concurrently supervised by a single supervising attorney if **(A) an appropriate faculty member of each certified law student's law school supervisor** determines, in his or her reasoned discretion, that the effective and beneficial practical training of the legal intern students will not be compromised, and **(B) the supervising attorney determines that** the competent representation of clients will not be compromised;

(3) assume personal professional responsibility for any work undertaken by a legal intern certified law student while under his or her supervision;

(4) assist and counsel with a legal intern certified law student in the activities permitted by these rules and review such activities with the legal intern certified law student, all to the extent required for the proper practical training of the legal intern student and the competent representation of the client; **and**

(5) read, approve and personally sign any pleadings or other papers prepared by a legal intern certified law student prior to the filing thereof, and read and approve any documents prepared by a legal intern certified law student for execution by a client or third party prior to the execution thereof; **and**

(6) for externships and internships (other than placements at government agencies), ensure that any activities by the certified law student that are authorized by Rule .0206 are limited to representations of eligible persons.

(b) Filing Requirements.

(1) Prior to commencing supervision, a supervising attorney in a law school clinic shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the supervision of identified legal intern certified law students, (ii) stating the period during which the supervising attorney expects to supervise the activities of the identified legal intern certified law students, and (iii) certifying that the supervising attorney will adequately supervise the legal intern certified law students in accordance with these rules.

(2) Prior to the commencement of a field student practice placement for a legal intern certified law student(s), the site supervisor shall provide a signed statement to the North Carolina State Bar **and to the certified law student's law school** (i) assuming responsibility for the administration of the field placement in compliance with these rules, (ii) identifying the participating legal intern certified law student(s) and stating the period during which the legal intern certified law student(s) is expected to participate in the program at the field placement, (iii) identifying the supervising attorney(s) at the field placement, and (iv) certifying that the supervising attorney(s) will adequately supervise the legal intern certified law student(s) in accordance with these rules.

(3) A supervising attorney in a law school clinic and a site supervisor for a legal intern certified law student program at a field student practice placement shall notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern certified law student concludes prior to the designated period of supervision.

(c) Responsibilities of Law School Clinic in Absence of legal intern certified law student. During any period when a legal intern certified law student is not available to provide representation due to law school seasonal breaks, graduation, or other reason, the supervising attorney shall maintain the status quo of a client matter and shall take action as necessary to protect the interests of the client until the legal intern certified law student is available or a new legal intern certified law student is assigned to the matter. During law school seasonal breaks, or other periods when a legal intern certified law student is not available, if a law school clinic or a super-

vising attorney is presented with an inquiry from an eligible person or a legal matter that may be appropriate for representation by a ~~legal intern certified law student~~, the representation may be undertaken by a supervising attorney to preserve the matter for subsequent representation by a ~~legal intern certified law student~~. Communications by a supervising attorney with a prospective client to determine whether the prospective client is eligible for clinic representation may include providing immediate legal advice or information even if it is subsequently determined that the matter is not appropriate for clinic representation.

(d) Independent Legal Practice. Nothing in these rules prohibits a supervising attorney in a law school clinic from providing legal services to third parties outside of the scope of the supervising attorney's employment by the law school operating the clinic.

.0206 Activities

(a) A properly certified ~~legal intern law student~~ may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a ~~legal intern certified law student~~ may give advice to a client, including a government agency, on legal matters provided that the ~~legal intern certified law student~~ gives a clear prior explanation that the ~~legal intern certified law student~~ is not an attorney and the supervising attorney has given the ~~legal intern certified law student~~ permission to render legal advice in the subject area involved.

(c) A ~~legal intern certified law student~~ may represent an eligible person, the state in criminal prosecutions, a criminal defendant who is represented by the public defender, or a government agency in any proceeding before a federal, state, or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the ~~legal intern certified law student~~.

(d) In all cases under this rule in which a ~~legal intern certified law student~~ makes an

appearance before a tribunal or agency on behalf of a client who is an individual, the ~~legal intern certified law student~~ shall have the written consent in advance of the client. The client shall be given a clear explanation, prior to the giving of his or her consent, that the ~~legal intern certified law student~~ is not an attorney. This consent shall be filed with the tribunal and made a part of the record in the case. In all cases in which a ~~legal intern certified law student~~ makes an appearance before a tribunal or agency on behalf of a government agency, the consent of the government agency shall be presumed if the ~~legal intern certified law student~~ is participating in a law school externship program or an internship program of the government agency. A statement advising the court of the ~~legal intern's certified law student's~~ participation in an externship or internship program ~~of at~~ the government agency shall be filed with the tribunal and made a part of the record in the case.

(e) In all cases under this rule in which a ~~legal intern certified law student~~ is permitted to make an appearance before a tribunal or agency, subject to any limitations imposed by the tribunal, the ~~legal intern certified law student~~ may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notice of appeal.

.0207 Use of Student's Name

(a) A ~~legal intern's certified law student's~~ name may properly

(1) be printed or typed on briefs, pleadings, and other similar documents on which the ~~legal intern certified law student~~ has worked with or under the direction of the supervising attorney, provided the ~~legal intern certified law student~~ is clearly identified as a ~~legal intern student~~ certified under these rules, and provided further that the ~~legal intern certified law student~~ shall not sign his or her name to such briefs, pleadings, or other similar documents;

(2) be signed to letters written on the letterhead of the supervising attorney, legal aid clinic, or government agency, provided there appears below the ~~legal intern certified law student's~~ signature a clear identification that the ~~legal intern student~~ is certified under these rules. An appropriate

designation is "~~Certified Legal Intern~~ Certified Law Student under the Supervision of [supervising attorney]", and

(3) be printed on a business card, provided the name of the supervising attorney also appears on the business card and there appears below the ~~legal intern certified law student's~~ name a clear statement that the ~~legal intern student~~ is certified under these rules. An appropriate designation is ~~Certified Legal Intern~~ Certified Law Student under the Supervision of [supervising attorney]."

(b) ...

.0208 Field Student Practice Placements

(a) A law student ~~enrolled participating in a field student practice~~ placement at an organization, entity, ~~agency, or law firm, or at a government agency~~, shall be certified ~~as a legal intern~~ if the law student will (i) provide legal advice or services in matters governed by North Carolina law to eligible persons ~~or government agencies~~ outside the organization, entity, ~~agency,~~ or law firm or to the government agency where the student is placed, or (ii) appear before any North Carolina tribunal or agency on behalf of an eligible person or a government agency.

(b) Supervision of a ~~legal intern certified law student~~ enrolled in a field student practice placement may be shared by two or more attorneys employed by the organization, entity, ~~agency,~~ or law firm, or a government agency, provided one attorney acts as site supervisor, assuming administrative responsibility for the a ~~legal intern certified law student~~ program at the field placement and ~~providing the notices to filing with~~ the State Bar and the certified law student's law school the statements required by Rule .0205(b) of this subchapter. All supervising attorneys at a field student practice placement shall comply with the requirements of Rule .0205(a).

.0209 Relationship of Law School and Clinics; Responsibility Upon Departure of Supervising Attorney or Closure of Clinic

(a) Relationship to Other Clinics.

...

(e) Engagement Letter. In addition to the consent agreement required by Rule .0206(d) of this section for any representation of an individual client in a matter before a tribunal, a written engagement letter or memorandum of understanding with each client is recom-

mended. The writing should state the general nature of the legal services to be provided and explain the roles and responsibilities of the clinic, the supervising attorney, and the ~~legal intern~~ **certified law student**. See Rule 1.5, cmt. [2] of the Rules of Professional Conduct (“A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.”)

(f) Responsibility upon Departure of Supervising Attorney.

...

.0210 Pro Bono Activities

(a) *Pro Bono* Activities for Law Students...

(b) Student Certification Not Required.

Regardless of whether the *pro bono* activity is provided under the auspices of a clinical legal education program or another program or department of a law school, a law student participating in a *pro bono* activity made available by a law school is not required to be certified ~~as a legal intern~~ if

(1) the law student will not perform any legal service; or

(2) all of the following conditions are satisfied: (i) the student will perform specifically delegated substantive legal services for third parties (clients) under the direct supervision of an attorney who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal services to be undertaken (the responsible attorney); (ii) the legal services shall not include representation of clients before a tribunal or agency; (iii) the responsible attorney is personally and professionally responsible for the representation of the clients and for the law student’s work product; and (iv) the role of the law student as an assistant to the responsible attorney is clearly explained to each client in advance of the performance of any legal service for the client by the law student.

(c) Law School Faculty and Staff Providing *Pro Bono* Services Under Auspices of a Clinical Legal Education Program.

...

Proposed Amendments to Rule 1.5, Fees, of the Rules of Professional Conduct

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

Proposed amendments to Rule 1.5 add a specific prohibition on charging a client for responding to an inquiry by a disciplinary

Proposed Amendment to the Preamble of the Rules of Professional Conduct

The Preamble to the North Carolina Rules of Professional Conduct sets forth the values of the legal profession in North Carolina. Upon the recommendation of the Ethics Committee, the council is publishing a proposed amendment to the Preamble that identifies the avoidance of discriminatory conduct while acting in a professional capacity as a fundamental value of the profession. Although the council approved a substantially similar amendment to the Preamble in 2010, the North Carolina Supreme Court did not approve the amendment at that time. The comments of the membership are encouraged and welcomed.

The Ethics Committee is also considering two additional proposed amendments to the Rules of Professional Conduct, including whether Rule 8.4, Misconduct, should be amended to include a provision that is the same or similar to paragraph (g) of ABA Model Rule 8.4, which provides as follows:

It is professional misconduct for a lawyer to... (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or

withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

A subcommittee of the Ethics Committee will study this question and another ethics subcommittee will study a proposal to include awareness of implicit bias in the description of competency in the comment to Rule 1.1. Comments on these proposals are encouraged.

0.1 Preamble: A Lawyer’s Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] ...

[6] While acting in a professional capacity, a lawyer should not discriminate on the basis of a person’s race, gender, national origin, religion, age, disability, sexual orientation, gender identity, marital status, or socioeconomic status. This responsibility of non-discrimination does not limit a lawyer’s right to advocate on any issue, nor does this responsibility limit the prerogative of a lawyer to accept, decline, or withdraw from a representation in accordance with these rules.

~~[6]~~[7] ...

[re-numbering remaining paragraphs] ■

authority regarding allegations of professional misconduct by the lawyer; for responding to a Client Security Fund claim alleging wrongful conduct by the lawyer; or responding to and participating in the resolution of a petition for resolution of a disputed fee filed against the lawyer.

Rule 1.5, Fees

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. ...

(b) ...

(g) A lawyer shall not enter into an arrangement for, charge, or collect anything of value for responding to an inquiry by a disciplinary authority regarding allegations of professional misconduct by the lawyer, for responding to a Client Security Fund claim alleging wrongful conduct by the lawyer, or for responding to and participating in the resolution of a petition for resolution of a disputed fee filed against the lawyer.

Comment

[1] ...

[13] Lawyers have a professional obligation to respond to inquiries by disciplinary authorities regarding allegations of their own professional misconduct, to respond to Client Security Fund claims alleging wrongful conduct by the lawyer, and to respond to and participate in good faith in the fee dispute resolution process. It is improper for a lawyer to charge a client for the time expended on these professional obligations because they are not legal services that a lawyer provides to a client, but rather they advance the interests of the public and the profession. ■

Proposed Opinions (cont.)

Rule 1.7(b). The possibility of a conflict arising in the midst of litigation based on Lawyer's investment in Fund necessarily means that Lawyer is putting his own interest in receiving a return from Fund over a potential client's interest to be represented by a lawyer without conflict. Comment [3] to Rule 1.7 states that when a conflict of interest exists before representation is undertaken, the representation must be declined, unless the lawyer obtains the informed consent of the client. The potential latent conflict that exists, to which Lawyer is unable to obtain informed consent, prohibits Lawyer from investing in Fund.

In addition to the prohibitions set out in Rule 1.7, Lawyer is also prohibited from investing in Fund due to prohibitions set out in Rule 1.8. Rule 1.8(e) prohibits lawyers from providing clients with financial assistance in connection with pending or contemplated litigation with limited exceptions. A violation of Rule 1.8(e) arises because the payments from Fund would constitute financial assistance to Lawyer's client. While Lawyers may advance court costs and expenses of litigation, money advanced by Fund is used to pay litigation expenses and attorney fees. Lawyers are not permitted to advance financial assistance that includes lawyer's fees billed on a non-contingency basis. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1145 (2018); *see also* Rule 8.4(a) (lawyer may not violate Rules of Professional Conduct through the acts of another.)

Lawyer is also prohibited from investing in Fund by Rule 1.8(i), which provides that a

In Memoriam

William J. Cathey III
Rosman, NC

Harold Donald Colston
Rocky Mount, NC

Sydney M. Cone III
New York, NY

William Reid Dalton III
Burlington, NC

Bobby Gray Deaver
Hobe Sound, FL

Billie Ray Ellerbe
Charlotte, NC

Michael Gray Gibson
Charlotte, NC

Allan R. Gitter
Winston-Salem, NC

Lawrence G. Gordon Jr.
Germanton, NC

Millicent Goins Graves
Wilson, NC

Robert C. Hord Jr.
Charlotte, NC

Joseph Edward Johnson
Raleigh, NC

Thomas W. Jordan Jr.
Raleigh, NC

Edwin Nick Kearns
Raleigh, NC

Devere Craven Lentz Jr.
Asheville, NC

Alan C. Leonard
Tryon, NC

Amos E. Link Jr.
Raleigh, NC

Oscar Graydon Lonon III
West Jefferson, NC

Mitchell M. McEntire
Graham, NC

Shawn Middlebrooks
Apex, NC

Lee West Movius
Charlotte, NC

Gary Lester Presnell
Raleigh, NC

Otto K. Pridgen II
Wilmington, NC

Anthony Eden Rand
Fayetteville, NC

Harold M. Robinson Jr.
Morganton, NC

Wendell H. Sawyer
Greensboro, NC

Robert Thomas Speed
Boone, NC

Joel Bond Stevenson
Brevard, NC

Samuel McDowell Tate
Morganton, NC

Tarleton Roberts Thompson Jr.
Aurora, NC

John Gary Vannoy Sr.
North Wilkesboro, NC

lawyer may not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except for a lien authorized by law or a reasonable contingent fee in a civil case. Rule 1.8(i) is designed to avoid giving a lawyer too great an interest in the representation. By providing money to Lawyer's client in exchange for a share of any recovery, Fund would acquire a prohibited proprietary interest in the client's claim. As an investor in Fund, Lawyer would also acquire a prohibited proprietary interest.

There are no informed consent exceptions

to Rules 1.8(e) and 1.8(i). Furthermore, the conflict issues raised by Rule 1.8 in relation to Lawyer's investment in Fund would be imputed to all lawyers associated with Law Firm. *See* Rule 1.8(j) (while lawyers are associated in a firm, a prohibition in paragraphs (a) through (i), that applies to any one of them applies to all of them). Therefore, neither Lawyer nor any lawyer in Lawyer's firm may represent a client who obtains advanced litigation financing from a financing company—or is opposed to a party who obtains such financing—if any lawyer in the firm is an investor in Fund. ■

Proposed Amendments to Rules on Lawyer Advertising

In August 2018, the American Bar Association amended the Model Rules of Professional Conduct on advertising (formerly Model Rules 7.1 through 7.5). The ABA identified three primary concerns necessitating the review of and amendments to the Model Rules on advertising. First, the need for consistency among the different jurisdictions' lawyer advertising rules—the ABA explained that lawyers in the 21st century increasingly practiced in multiple jurisdictions, and that a “breathtaking variety” in advertising rules across the nation made compliance by lawyers and law firms with multi-jurisdictional practices unnecessarily complex. Second, the substantial presence and impact that social media and the Internet has had on business generally, including the practice of law. Third, recent trends in First Amendment and antitrust law suggested burdensome and unnecessary restrictions on lawyer commercial speech may be unlawful. The ABA explained that, with these considerations in mind, the goals for amending the Model Rules were to eliminate compliance confusion and promote consistency in lawyer advertising rules, to provide lawyers and regulators across the nation with updates to the advertising rules that would protect clients from false and misleading advertising while freeing lawyers to use expanding technologies to communicate the availability of their services, and to increase consumer access to accurate information about legal services.

In April 2018, then-State Bar President John Silverstein appointed a special committee of the State Bar Council to review the ABA's proposed amendments to the Model Rules on advertising. The committee met a total of 14 times between April 2018 and July 2020. The committee reviewed each amendment made to the Model Rules on advertising, comparing the Model Rules to the corresponding provision in the North Carolina Rules of Professional Conduct (Rules 7.1 through 7.5), and determining whether to recommend adoption of the

Model Rule, retention of the North Carolina Rule, or some other alternative. For two years, the committee thoughtfully considered each word in both the Model Rules and the North Carolina Rules on advertising in determining what would protect the public, while also recognizing the practical realities of practicing law today. Similar to the stated goals of the Model Rule amendments, the committee sought to strengthen and prioritize the prohibition on false and misleading communications concerning a lawyer's services; to streamline the Rules on advertising and eliminate unnecessary or unclear provisions; to update the Rules to reflect the current state of society and the profession, including the recognition of technology's presence in our personal and professional lives and the evolution of the consuming public; and to enable lawyers effectively and truthfully to communicate the availability of legal services, including utilizing new technologies. With these worthy goals and considerations in mind, the committee adopted the Model Rule provision when appropriate in pursuit of consistency with both the Model Rules and potentially other jurisdictions. However, the committee remained committed to the ultimate goal of protecting the public in North Carolina; to that end, the committee deviated from the Model Rules when necessary and appropriate.

With the approval of the State Bar Council, the committee's recommended amendments to the Rules of Professional Conduct on advertising appear below. While some amendments clarify long-standing Rules, others present significant changes. For example, under these proposed amendments, lawyers are permitted to give nominal gifts as an expression of appreciation for recommending a lawyer's services; the various labeling requirements for targeted mail communications are eliminated; and the bulk of the rules previously listed in Rules 7.4 and 7.5 are relocated to the comments of Rules 7.1 and 7.2.

The State Bar Council now solicits the

profession's feedback on these proposed amendments. Comments, which are welcome and encouraged, can be emailed to ethicscomments@ncbar.gov.

Rule 7.1, Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; **Such communications include but are not limited to a statement that**

(2) is likely to create an unjustified expectation about results the lawyer can achieve; a statement that ~~or~~ states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or **a statement that**

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

~~(b) A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.~~

Comment

False and Misleading Communications

[1] This Rule governs all communications about a lawyer's services, including advertising ~~permitted by Rule 7.2~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] **Misleading** ~~truthful statements that are misleading~~ **are also** prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is

also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] An advertisement. A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with the services or fees those of other lawyers or law firms may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm Names, Letterheads, and Professional Designations

[5] Firm names, letterhead, and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current principals or by the names of deceased or retired principals where there has been a succession in the firm's identity. The name of a retired principal may be used in the name of a law firm only if the principal has ceased the practice of law. A lawyer or law firm also may be designated by a trade name, a distinctive website address, social media username, or comparable pro-

fessional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased or retired lawyer who was not a former principal of the firm, with a lawyer not associated with the firm or a predecessor firm, with a non-lawyer, or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public or charitable legal services organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(d), because to do so would be false and misleading. It is also misleading to use a designation such as "Smith and Associates" for a solo practice.

[8] This Rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is exclusively limited to areas that do not require a North Carolina law license. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina.

[9] If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C. Admin. Code 1E.0200 et seq.

Dramatizations

[10] Dramatizations of fictional cases in video advertisements are potentially misleading. See 2010 FEO 9, RPC 164. A communication by a lawyer that contains a dramatization depicting a fictional situation is not misleading if it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning

and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.

Rule 7.2 Advertising Communications Concerning a Lawyer's Services: Specific Rules

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise communicate information regarding the lawyer's services through written, recorded or electronic communication, including public any media.

(b) A lawyer shall not compensate, give, or promise anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2(d), an intermediary organization that complies with Rule 7.4 or a prepaid or group legal services plan that complies with Rule 7.3(d) 27 N.C. Admin. Code 1E.0301 et seq.; and

(3) pay for a law practice in accordance with Rule 1.17; and

(4) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state that the lawyer specializes or is a specialist in a field of practice unless:

(1) the lawyer is certified as a specialist in the field of practice by:

(A) the North Carolina State Bar;

(B) an organization that is accredited by the North Carolina State Bar; or

(C) an organization that is accredited by the American Bar Association under procedures and criteria endorsed by the North Carolina State Bar; and

(2) the name of the certifying organization is clearly identified in the communication.

(~~e~~)(d) Any communication made pursuant to under this Rule, other than that of a lawyer referral service as described in paragraph (d), shall must include the name and office address contact information of at least one lawyer or law firm responsible for its content.

(d) A lawyer may participate in a lawyer referral service subject to the following conditions:

(1) the lawyer is professionally responsible for its operation including the use of a false, deceptive, or misleading name by the referral service;

(2) the referral service is not operated for a profit;

(3) the lawyer may pay to the lawyer referral service only a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs;

(4) the lawyer does not directly or indirectly receive anything of value other than legal fees earned from representation of clients referred by the service;

(5) employees of the referral service do not initiate contact with prospective clients and do not engage in live telephone or in-person solicitation of clients;

(6) the referral service does not collect any sums from clients or potential clients for use of the service; and

(7) all advertisements by the lawyer referral service shall:

(A) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state where such information may be obtained; and

(B) explain the method by which the needs of the prospective client are matched with the qualifications of the recommended lawyer.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers may entail the risk of practices that are misleading or overreaching.

[2][1] This Rule permits public dissemination of information concerning a lawyer's

name or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization and see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[5] "Electronic communication(s)," as used in Section 7 of the Rules of Professional Conduct, refers to the transfer of writing, signals, data, sounds, images, signs or intelligence via an electronic device or over any electronic medium. Examples of electric communications include, but are not limited to, websites, email, text messages, social media messaging and image sharing. A lawyer who sends electronic communications to advertise or market the lawyer's professional services must comply with these Rules and with any state or federal restrictions on such communications. See, e.g., N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act, 47 U.S.C. §227; and 47 CFR 64.

Paying Others to Recommend a Lawyer [6][2] Except as permitted under paragraphs (b)(1)-(b)(3)(4), lawyers are not permitted to pay others for recommending the

lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons, and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 1.5(c)(division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's service). To comply with Rule 7.1, a lawyer must not pay a lead generator if the lead generator states, implies, or creates an impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a)(duty to avoid violating the Rules through the acts of another).

[4] Paragraph (b)(4) permits a lawyer to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement, or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

Paying Lead Generators

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[7] A lawyer may pay the usual charges of a prepaid or group legal services plan or a not-for-profit lawyer referral service. A legal services plan is defined in Rule 7.3(d). Such a plan assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

Referrals from Intermediary Organizations and Prepaid Legal Service Plans

[6] A lawyer who accepts assignments or referrals from a prepaid or group legal service plan or referrals from a lawyer referral service an intermediary organization must act reasonably to assure that the activities of the plan or service organization are compatible with the lawyer's professional obligations. See Rule 5.3, Rule 7.3, and Rule 7.4. A prepaid legal service plan assists people who seek to secure legal representation. Intermediary organizations, including lawyer referral services, are understood by the public to be consumer-oriented organi-

zations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Any lawyer who participates in a legal services plan or lawyer referral service is professionally responsible for the operation of the service in accordance with these rules regardless of the lawyer's knowledge, or lack of knowledge, of the activities of the service. Prepaid legal service plans and lawyer referral services intermediary organizations may communicate with the public, but such communication must be in conformity with these Rules; notably, such communication must not be false or misleading. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer. To avoid misrepresentation, paragraph (d)(7)(B) requires that every advertisement for the service must include an explanation of the method by which a prospective client is matched with the lawyer to whom he or she is referred. In addition, the lawyer may not allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

Specialty Certification

[7] The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations are expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. The Rule requires that a

representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization accredited by the North Carolina State Bar, or an organization accredited by the American Bar Association under procedures approved by the North Carolina State Bar. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification.

[8] A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This Rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation."

Contact Information

[9] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address, or a physical office location.

Rule 7.3 Direct Contact with Potential Clients Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

(a)(b) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the person contacted contact is with a:

- (1) is a lawyer; or
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(b)(c) A lawyer shall not solicit profes-

sional employment from a potential client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment, ~~compulsion, intimidation, or threats.~~

~~(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice), which shall be conspicuous and subject to the following requirements:~~

~~(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the front or the back of the envelope. If more than one color or type of font is used on the front or the back of the envelope, the font used for the advertising notice shall match in color, type, and size the largest and widest of the fonts. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the enclosed written communication in a font as large as or larger than any other printing contained in the enclosed written communication. If more than one color or type of font is used on the enclosed written communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing on the envelope or the enclosed written communication shall be more conspicuous than the advertising notice.~~

~~(2) Electronic Communications. The advertising notice shall appear in the "in reference" or subject box of the address or header section of the communication. No other statement shall appear in this block.~~

The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.

~~(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

~~(d)(e) Notwithstanding the prohibitions in paragraph (a) this Rule, a lawyer may participate with a prepaid or group legal service plan in compliance with 27 N.C. Admin. Code 1E.0301 et seq. that uses live person-to-person contact to enroll members or sell subscriptions for the plan to persons who are not known to need legal services in a particular matter covered by the plan, provide that, after reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with 27 N.C. Admin. Code 1E.0301 et seq., and the lawyer's participation in the plan does not otherwise violate the Rules of Professional Conduct, subject to the following:~~

(1) Definition. A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of any immediate need for the specified legal service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director or owner of the plan. A prepaid legal services plan does not include the sale of an identified, limited legal service, such as draft-

ing a will, for a fixed, one-time fee.

~~(2) Conditions for Participation:~~

~~(A) The plan must be operated by an organization that is not owned or directed by the lawyer;~~

~~(B) The plan must be registered with the North Carolina State Bar and comply with all applicable rules regarding such plans;~~

~~(C) The lawyer must notify the State Bar in writing before participating in a plan and must notify the State Bar no later than 30 days after the lawyer discontinues participation in the plan;~~

~~(D) After reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with the Revised Rules of Professional Conduct and other pertinent rules of the State Bar;~~

~~(E) All advertisements by the plan representing that it is registered with the State Bar shall also explain that registration does not constitute approval by the State Bar; and~~

~~(F) Notwithstanding the prohibitions in paragraph (a), the plan may use in person or telephone contact to solicit memberships or subscriptions provided:~~

~~(i) The solicited person is not known to need legal services in a particular matter covered by the plan; and~~

~~(ii) The contact does not involve coercion, duress, or harassment and the communication with the solicited person is not false, deceptive or misleading.~~

Comment

[1] A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. In contrast, a A lawyer's communication typically does not constitute is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet electronic searches.

[2] "Live person-to-person contact"

~~means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services by live person-to-person contact. These forms~~ **This form** of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon ~~being retained immediately~~ **an immediate response**. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] This potential for ~~abuse overreaching~~ inherent in ~~direct in-person, live telephone, or real-time electronic solicitation~~ **live person-to-person contact** justifies its prohibition, particularly because ~~since~~ lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not ~~involve real-time contact and do not~~ violate other laws governing solicitations. These forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to ~~direct in-person, telephone or real-time electronic~~ **live person-to-person** persuasion that may overwhelm a person's judgment.

[4] ~~The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of~~

~~advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic~~ **live person-to-person** contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in ~~abusive practices~~ **overreaching** against a former client, or a person with whom the lawyer has a close personal, ~~or family,~~ **business, or professional** relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer ~~or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(e) are not applicable in those situations. Also, p~~ **Paragraph** (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6] ~~But even permitted forms of solicitation can be abused. Thus, any~~ **A** solicitation ~~which that~~ contains ~~information which is~~ false or misleading **information** within the meaning of Rule 7.1, which involves coercion, duress, ~~or~~ harassment, ~~compulsion, intimidation, or threats~~ within the meaning of Rule 7.3(b)(c)(2), or ~~which that~~ involves contact with someone who has made known to the lawyer a desire not to be solicited by

the lawyer within the meaning of Rule 7.3(b)(c)(1) is prohibited. ~~Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

Contact to Establish Prepaid Legal Service Plan

[7] This Rule ~~is does not intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become **potential prospective** clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] ~~Paragraph (c) of this Rule requires that all targeted mail solicitations of potential clients must be mailed in an envelope on which the statement, "This is an advertisement for legal services," appears in capital letters in a font at least as large as any other printing on the front or the back of the envelope. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for targeted mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear in the "in reference" or subject box of an electronic communication (email) and at the beginning of any paper or electronic communication in a font that is at least as large as the font used for any other printing in the paper or electronic communication. On any paper or electronic communication required by this Rule to contain the advertising notice, the notice~~

must be conspicuous and should not be obscured by other objects or printing or by manipulating fonts. For example, inclusion of a large photograph or graphic image on the communication may diminish the prominence of the advertising notice. Similarly, a font that is narrow or faint may render the advertising notice inconspicuous if the fonts used elsewhere in the communication are chubby or flamboyant. The font size requirement does not apply to a brochure enclosed with the written communication if the written communication contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. Nevertheless, any such insignia or border cannot be so large that it detracts from the conspicuousness of the advertising notice. The requirement that certain communications be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] See Rule 7.2, cmt. [5] for the definition of "electronic communication(s)" as used in paragraph (c)(2) of this Rule. A lawyer may not send electronic or recorded communications if prohibited by law. See, e.g., N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act 47 U.S.C. §227; and 47 CFR 64. "Real-time electronic contact" as used in paragraph (a) of this Rule is distinct from the types of electronic communication identified in Rule 7.2, cmt. [5]. Real-time electronic contact includes, for example, video telephony (e.g., FaceTime) during which a potential client cannot ignore or delay responding to a communication from a lawyer.

Contact to Enroll Members in Prepaid Legal Service Plan

[10][9] Paragraph (d)(e) of this Rule per-

mits a lawyer to participate with an organization which uses personal contact to ~~solicit~~ enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d)(e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the ~~in-person or telephone person-to-person~~ solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but ~~is to~~ must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.3(d) 27 N.C. Admin. Code 1E.0301 *et seq.*, as well as Rules 7.1, 7.2 and 7.3(bc). See 8.4(a).

Rule 7.4 Communication of Fields of Practice and Specialization

Rule is deleted in its entirety.

Rule 7.5 Firm Names and Letterheads

Rule is deleted in its entirety.

Rule 7.4 Intermediary Organizations

(a) An intermediary organization is a lawyer referral service, lawyer advertising cooperative, lawyer matching service, online marketing platform, or other similar organization that engages in referring consumers of legal services to lawyers or facilitating the creation of lawyer-client relationships between consumers of legal services and lawyers willing to provide assistance. A tribunal or similar government agency that appoints or assigns lawyers to represent parties before the tribunal or government agency is not an intermediary organization under this Rule.

(b) Before and while participating in an intermediary organization, the lawyer shall make reasonable efforts to ensure that the intermediary organization's conduct complies with the professional obligations of the lawyer, including the following conditions:

(1) The intermediary organization does not direct or regulate the lawyer's professional judgment in rendering legal services to the client;

(2) The intermediary organization, including its agents and employees, does not engage in improper solicitation pursuant to Rule 7.3;

(3) The intermediary organization makes the criteria for inclusion available to prospective clients, including any payment made or arranged by the lawyer(s) participating in the service and any fee charged to the client for use of the service, at the outset of the client's interaction with the intermediary organization;

(4) The function of the referral arrangement between lawyer and intermediary organization is fully disclosed to the client at the outset of the client's interaction with the lawyer;

(5) The intermediary organization does not require the lawyer to pay more than a reasonable sum representing a proportional share of the organization's administrative and advertising costs, including sums paid in accordance with Rule 5.4(a)(6); and

(6) The intermediary organization is not owned or directed by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm.

(c) If a lawyer discovers an intermediary organization's noncompliance with Rule 7.4(b)(1)-(6), the lawyer shall either withdraw from participation or seek to correct the noncompliance. If the intermediary organization fails to correct the noncompliance, the lawyer must withdraw from participation.

Comment

[1] The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer. ■



Resolution of Appreciation

for

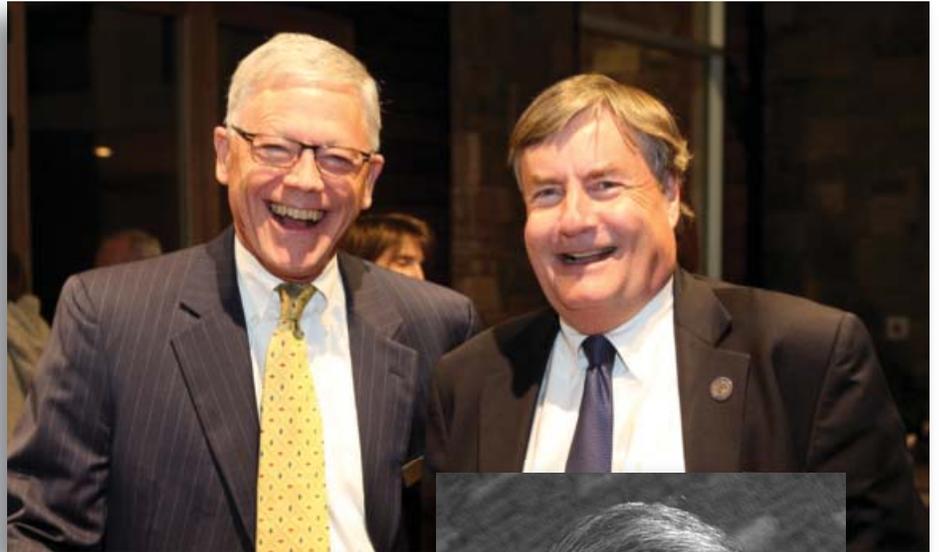
A. Root Edmonson

The Council of the North Carolina State Bar in regular quarterly session duly convened does hereby publish and adopt the resolution set forth below:

WHEREAS, A. Root Edmonson was employed as a trial attorney by the North Carolina State Bar on May 16, 1979, and has faithfully served the council as its lawyer in various capacities ever since. During his career on the State Bar's legal staff he has, among other things, counseled the Grievance Committee, the Unauthorized Practice of Law Committee, and the Client Security Fund's Board of Trustees. He has represented the State Bar in more legal proceedings than any other attorney, including dozens of disciplinary trials and reinstatement hearings. For a period of 11 years between 1980 and 1991, he served as counsel, and

WHEREAS, Root Edmonson has given notice of his intention to retire as a member of the Office of Counsel after a career of unprecedented length and remarkable distinction. After 41 years, spanning six decades and two centuries, Root is participating in his last quarterly meeting of the council, albeit remotely, and taking with him into retirement a disproportionate amount of the organization's heart and soul, and a considerable portion of its institutional memory. Under these circumstances it is entirely fitting that we now formally consider, at long last, the dimensions of his character, his stature in the legal profession, and the quality of his service to the State Bar and the people of North Carolina.

Though not susceptible of proof, it cannot be doubted that Root Edmonson leaves us as the best known and best liked person ever to work for this agency. For legions of lawyers he is the face of the State Bar and is widely acknowledged to represent what we should all aspire to be as lawyers and human beings. As a colleague once observed, "[T]he



longest walk you can ever take is from the entrance of Kenan Stadium to your seat in the company of Root Edmonson. Most of the hundreds of people you encounter will recognize Root, dozens will insist on greeting him, and more than a few will indulge his passion for long discursive conversation. It's ironic, he loves to go to football games and has probably never seen a kickoff. It relates to one of the primary reasons he is so beloved. He always has time for other people, no matter what."

As a member of the State Bar's staff, Root has served the profession and his fellow man in myriad ways. Let us now reflect upon some of the roles he has played.

As a friend and colleague he has been dependable and inexhaustible. He has reliably and sensitively embraced us all in times of exhilaration, crisis, triumph, and grief. He has always done what was required, and often more than his share, with grace, style, and humility. He has inspired us to be better people and better lawyers.

As a mentor he has taught by example and by storytelling, personifying profession-



alism rather than preaching it. He has cultivated empathy in our young lawyers and has modeled compassion instead of condemnation. He has publicly and persistently insisted on doing the right thing, not the easy or expedient thing. And he has often been observed doing his clients the great service of not telling them what they want to hear.

As a prosecutor he has been a zealous and effective advocate who has never taken unfair advantage. He has unfailingly honored the humanity and dignity of his legal adversaries and, especially, their clients. He

has consistently endeavored to make professional discipline meaningful rather than mean. And no one at the State Bar has ever been more observant of the prosecutor's fundamental obligation to "do justice." For Root Edmonson, the only victory in a disciplinary case is an outcome that fairly serves the public interest while taking fully into account the possibility of reformation. Incredibly, most of the people he has opposed in such matters seem to have ultimately come to respect the State Bar's position and to appreciate the decency and integrity of Root's actions on its behalf.

As a legal troubleshooter, Root has put the State Bar's best foot forward in difficult cases in tribunals throughout the State. More often than not, of course, his appearances have simply required the technical legal skills that all of the State Bar's lawyers possess but, occasionally, it has been necessary for him to deploy a remarkable talent that is his alone. As it happens, Root Edmonson has an uncanny ability to facilitate dialogue and civility among lawyers and judges who appear to be incapable of either in the midst of hotly contested legal proceedings. Root is the profession's peacemaker. Time after time he has been able to restore professional decorum in explosive situations, often, it would seem, simply by showing up and bringing his incomparable personality to bear. Perhaps not surprisingly, people find it hard to be unprofessional in his presence. How can such a man ever be replaced?

As staff counsel to the Client Security Fund, Root has carefully guided the Board of Trustees in its application of the program's rules. From the program's inception he has



understood that by collectively underwriting the integrity of the Bar through the Client Security Fund, lawyers have justified in large measure the privilege of self-regulation. In support of the fund's critical mission, Root has facilitated a culture of responsible liberality within the board that promotes the resolution of doubt in favor of the innocent victim and ultimately enhances the public's trust in the legal profession. It may be his greatest legacy.

And, finally, as a member of the profession at large, Root has brought great credit to the North Carolina State Bar. Active in various state and local voluntary bar associations, he has also been highly visible on the national scene, principally as a dedicated member of the National Organization of Bar Counsel. In 2011 he received its President's Award for lifetime achievement in the field of professional responsibility.

Since assuming his position as counsel to the Client Security Fund in 1996, he has also been very active in the National Client Protection Organization, serving as its president from 2004 to 2006. His service to and leadership of these important national organizations has been quite significant. He has been instrumental in formulating rules, policies, and procedures that have vastly improved the profession's regulation of itself. And in so doing, he has always been identified by those present and participating as the wise and exceptionally personable lawyer from North Carolina, our most highly esteemed ambassador for many, many years.

NOW THEREFORE, BE IT RESOLVED that the Council of the North Carolina State Bar does with surpassing affection and appreciation acknowledge the splendid service of its lawyer, A. Root Edmonson, and expresses to him in this public statement the unqualified respect, admiration, and gratitude of the lawyers of North Carolina for his efforts on their behalf for the benefit of the public.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of this meeting of the council and that copies be published in the State Bar Journal and delivered to A. Root Edmonson.

Adopted by the Council of the North Carolina State Bar unanimously by acclamation, this the 24th day of July, 2020.

C. Colon Willoughby Jr., President
Alice Neece Mine, Secretary



Client Security Fund Reimburses Victims

At its July 23, 2020, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$150,954.85 to 32 applicants who suffered financial losses due to the misconduct of North Carolina lawyers. In addition, the board's counsel reimbursed one claim totaling \$1,273.10 for a title insurance premium paid by a client of John Lafferty pursuant to the guidelines established by the board at its meeting in October 2019.

The payments authorized were:

1. An award of \$2,000 to a former client of Sarah J. Brinson of Clinton. The board determined that Brinson was retained to file a U-visa petition for a client. Brinson failed to file the petition or provide any meaningful services for the fee paid. Brinson was disbarred on August 7, 2019. The board previously reimbursed four other Brinson clients a total of \$12,310.

2. An award of \$1,585 to a former client of Sarah J. Brinson. The board determined that Brinson was retained to file a I-130 petition for the claimant's husband. Brinson failed to file the petition or provide any meaningful services for the fee paid.

3. An award of \$2,615 to a former client of Sarah J. Brinson. The board determined that Brinson was retained to handle an application for a CR-1 visa for a client. The client paid for, and Brinson handled, the first part of the process. After the client paid for Brinson's handling of the second part of the process, Brinson failed to file any documents and refused to refund the funds paid.

4. An award of \$1,520.45 to an applicant who suffered a financial loss because of Peter S. Coleman of Raleigh. The board determined that Coleman handled a real estate closing in which the buyer used funds from the applicant for the purchase. Coleman collected funds from the buyer to pay unpaid property taxes in conjunction with the transaction. Coleman failed to pay the taxes prior to his trust account being enjoined due to misappropriation. Coleman's trust account balance is insufficient to satisfy all of his

client obligations. Coleman was disbarred on June 4, 2020.

5. An award of \$2,500 to a former client of Peter S. Coleman. The board determined that the client asked Coleman to hold a renter's security deposit in his trust account in a fiduciary capacity. When the client was able to open her own account for the security deposits, she asked Coleman to return the funds, and he failed to return the funds. Due to his misappropriation, Coleman's trust account balance is insufficient to pay all of his client obligations.

6. An award of \$10,000 to former clients of Peter S. Coleman. The board determined that Coleman handled a real estate closing in which the buyer deposited the required escrow funds into Coleman's trust account. The sale fell through and the sellers requested that Coleman release the escrow funds to them. Coleman responded that the sellers needed to get the contract canceled to protect their ability to list the property again. The sellers did not hear further from Coleman and did not receive the funds prior to Coleman being jailed for forgery. Coleman's trust account balance is insufficient to pay all of his client obligations.

7. An award of \$25,000 to a former client of Peter S. Coleman. The board determined that Coleman handled a real estate closing in which he retained funds from the closing proceeds to cover any potential additional charges to get the mortgage canceled. However, when the deed of trust was marked satisfied in the public record, Coleman failed to disburse those retained funds back to the client. Due to misappropriation, Coleman's trust account balance is insufficient to pay all of his client obligations.

8. An award of \$1,469.24 to a former client of Peter S. Coleman. The board determined that Coleman handled a real estate closing for a client, but failed to make all proper disbursements from the sales proceeds. Due to misappropriation, Coleman's trust account balance is insufficient to pay all of his client obligations.

9. An award of \$1,500 to a former client of Peter S. Coleman. The board determined that Coleman was retained to handle a real estate closing for a client. The client's earnest money check was negotiated and deposited into Coleman's trust account. However, the closing did not occur before Coleman was enjoined from handling entrusted funds, and Coleman failed to refund the payment. Due to misappropriation, Coleman's trust account balance is insufficient to pay all of his client obligations.

10. An award of \$10,000 to a former client of George L. Collins of Jacksonville. The board determined that Collins was retained to handle a client's domestic matters. The separation agreement was not finalized or signed prior to the client's spouse terminating communication with his attorney, and the client then terminating Collins. Collins failed to provide any meaningful legal services for the fee paid prior to being fired by the client. Collins died on April 16, 2020.

11. An award of \$2,500 to a former client of Matthew C. Coxe of Jacksonville. The board determined that Coxe was retained to handle a client's criminal charges. Coxe failed to provide meaningful legal services for the fee paid. Coxe's license was suspended on September 9, 2019.

12. An award of \$5,000 to a former client of Bruce T. Cunningham of Southern Pines. The board determined that a claimant retained Cunningham to file an MAR for her son. Cunningham failed to file the MAR prior to his death. Cunningham died on July 5, 2019. The board previously reimbursed several other Cunningham clients a total of \$62,840.00.

13. An award of \$2,500 to a former client of Bruce T. Cunningham. The board determined that a client retained Cunningham to file an MAR. Cunningham failed to file the MAR prior to his death.

14. An award of \$3,105 to a former client of Bruce T. Cunningham. The board determined that a client retained Cunningham to file an MAR to get his consecutive sentences

consolidated to concurrent sentences. Cunningham failed to file the MAR prior to his death.

15. An award of \$5,000 to a former client of Bruce T. Cunningham. The board determined that Cunningham was retained to handle the direct appeal of a claimant's grandson's conviction. Cunningham failed to file anything prior to his death.

16. An award of \$2,500 to a former client of Bruce T. Cunningham. The board determined that Cunningham was retained to negotiate with the assistant district attorney as to a client's second conviction, but Cunningham failed to do so prior to his death.

17. An award of \$750 to a former client of Bruce T. Cunningham. The board determined that Cunningham was retained to review a client's conviction. There is no evidence that Cunningham was able to review anything prior to his death.

18. An award of \$4,000 to a former client of Bruce T. Cunningham. The board determined that a client retained Cunningham to file an MAR. Cunningham failed to file the MAR prior to his death.

19. An award of \$3,880 to a former client of Bruce T. Cunningham. The board determined that Cunningham was retained to represent a client on an MAR that was expected to get an evidentiary hearing. Cunningham failed to file the MAR prior to his death.

20. An award of \$4,000 to a former client of Bruce T. Cunningham. The board determined that a client retained Cunningham to file an MAR. Cunningham failed to file the MAR prior to his death.

21. An award of \$6,576.64 to a former client of Michael S. Eldredge formerly of Lexington. The board determined that Eldredge was retained to handle a client's personal injury case. Eldredge settled the case without the client's knowledge or consent, embezzled the funds, and failed to pay any of the settlement proceeds to the client or his medical providers. Eldredge was disbarred on August 17, 2017. The board previously reimbursed seven other Eldredge clients a total of \$76,737.92.

22. An award of \$5,000 to a former client of Clifton J. Gray III of Lucama. The board determined that Gray was retained to represent a client on criminal charges. Gray failed to provide any meaningful legal services for the fee paid. Gray was suspended on December 15, 2016. The board previously

reimbursed seven other Gray clients a total of \$40,700.

23. An award of \$2,500 to a former client of John F. Hanzel of Cornelius. The board determined that a client retained Hanzel to open an estate for his deceased sister and to represent him as the personal representative for the estate. Hanzel accepted the representation knowing he was already disbarred for dishonest conduct, and failed to provide any meaningful services for the fee paid. Hanzel was disbarred effective on October 16, 2019. The board previously reimbursed one other Hanzel client a total of \$2,000.

24. An award of \$3,700 to a former client of John F. Hanzel. The board determined that Hanzel was retained to pursue a foreclosure action for a client. Hanzel failed to initiate the filing of the foreclosure action until after the order was entered disbaring him. Hanzel also failed to properly wind up the matter during the wind down of his practice or otherwise inform the client that he could not finish the matter.

25. An award of \$9,850 to a former client of David V. Hartley of Cary. The board determined that Hartley was retained to represent a client on criminal charges. Hartley failed to provide any meaningful legal services for the fee paid prior to getting sick and eventually passing away. Hartley died on September 23, 2019.

26. An award of \$15,688.52 to a former client of John O. Lafferty Jr. of Lincoln. The board determined that Lafferty was retained to represent the estate of a client's mother. After preparing an inventory and final accounting, Lafferty was disbarred and sent the client the estate documents to file with the clerk. Lafferty also sent the client a check from his operating account, which included the client's share of his mother's estate and reimbursement for estate-related fees the client had paid, but the client failed to negotiate the check. Due to misappropriation, Lafferty's trust account balance was insufficient to pay all of his client obligations. Lafferty was disbarred on May 5, 2019. The board previously reimbursed eight other Lafferty clients a total of \$128,906.18.

27. An award of \$2,000 to a former client of Gary S. Leigh of Shelby. The board determined that Leigh handled a personal injury case for a client. Leigh sent the client a check for her share of the settlement proceeds, but the check was returned due to an IRS hold on Leigh's trust account to recover funds

Leigh owed for unpaid income and withholding taxes for several years. Leigh failed to pay his taxes and failed to protect his clients' separate property from seizure by the IRS. Leigh was disbarred on November 13, 2019. The board previously reimbursed three other Leigh clients a total of \$8,233.83.

28. An award of \$600 to a former client of Clinton F. Moore of Charlotte. The board determined that Moore was retained to file for divorce for a client. The client reconciled with his spouse and requested a refund soon thereafter, before Moore could do any work on the case. Although Moore said multiple times that he would refund the fee, he failed to do so and stopped communicating with the client. Moore was disbarred on October 16, 2019.

29. An award of \$1,900 to a former client of Suzanne A. Nelson of Raleigh. The board determined that a client retained Nelson to represent her as a potential defendant in an alienation of affection and criminal conversation lawsuit. Nelson began representing the client's paramour in the related divorce action, and then told the client she could not represent her due to the conflict of interest. Nelson failed to provide any meaningful legal services to the client for the fee paid. The board previously reimbursed one other Nelson client a total of \$2,000.

30. An award of \$2,250 to a former client of Suzanne A. Nelson. The board determined that a client retained Nelson for representation in an action for divorce, alimony, post-separation support, and equitable distribution. Nelson neglected the client's matter and provided no meaningful legal services for the fee paid.

31. An award of \$7,950 to a former client of Suzanne A. Nelson. The board determined that a client retained Nelson to handle an adoption and termination of parental rights for the client's niece and nephew. Nelson provided no meaningful legal services for the fee and court costs paid.

32. An award of \$1,515 to a former client of Katherine H. Pekman of Hickory. The board determined that Pekman was retained to file a divorce and custody matter for a client. After Pekman stopped providing legal services to and communicating with the client, Pekman failed to refund the remainder of the advance fee the client paid. Pekman was suspended on April 15, 2019. The board previously reimbursed three other Pekman clients a total of \$5,732. ■

Law School Briefs

Campbell University School of Law

Campbell Law School plans to expand the Blanchard Community Law Clinic's efforts tied to the Second Chance Act, which improves the ability of North Carolina residents to remove prior non-violent criminal convictions from their records. Since its founding in 2016, the clinic has helped citizens move forward with their lives following incarceration and involvement with the criminal justice system. The clinic partners with Triangle-area community nonprofits to provide free legal services to low-income individuals. *Pro bono* criminal record expunction efforts have been a mainstay of the clinic that has helped more than 400 individuals over the past four years. Campbell Law hopes to expand the clinic's current efforts to meet what is expected to be a big rise in expunction petitions, as well as to enable file reviews of former clients who might now be deemed eligible. A "Second Chance" fundraising campaign has launched at app.mobilecause.com/vf/Blanchard with a goal to raise at least \$100,000 to hire additional clinic staff over two years.

Campbell Law plans to host its annual day-long "Campbell Law Speaks CLE" on Friday, October 23, but with a twist. All Campbell Law alumni are invited and encouraged to attend the CLE, which will be held virtually for the first time, says Assistant Dean of External Relations Megan West Sherron. Earn six hours of CLE credit (including one hour of ethics credit) and hear Campbell lawyers from across the state speak on a variety of hot topics in the legal community. Registration is available at app.mobilecause.com/form/ceR1HQ?vid=9qh0s. "Campbell Law has a wealth of leaders in the legal community, and we're fortunate that so many of them enjoy sharing their expertise," Sherron said.

Duke Law School

Sarah Ludington, a respected scholar in the fields of free speech and privacy law, joined the Duke Law faculty as a clinical pro-

fessor of law and director of the First Amendment Clinic on July 1. She had served, since July 2017, as associate dean of academic affairs at Campbell University's Norman Adrian Wiggins School of Law, where she also taught courses in constitutional law, information privacy, and civil procedure. She was previously an associate professor of law at Campbell Law, where she was granted tenure in 2015. She earlier taught legal writing at Duke Law and practiced law in Washington, DC, and New York. Her scholarship has examined the implications of tenure for the speech of professors and methods for deterring the misuse of personally identifiable information.

The Children's Law Clinic at Duke Law has released a report on North Carolina's school voucher program. "School Vouchers in North Carolina 2014-2020" presents a detailed six-year review of the Opportunity Scholarship Program, which provides taxpayer-funded scholarships to low- and moderate-income students to assist with the payment of tuition at private schools. Included are up-to-date facts and figures about the cost, participation, academic outcomes, and evaluation of the program, as well as a program analysis and recommendations. The report's release follows the introduction of several bills in the state's General Assembly that represent divergent views on the continuation of the program.

Professor Brandon Garrett, faculty director of the Duke Law Center for Science and Justice, has co-authored "Changing Policing: First Steps," a slate of urgently needed policing reform measured to be implemented at the federal, state, and local levels. His co-authors of the reports are faculty who run or are associated with academic research centers devoted to policing and the criminal justice system.

University of North Carolina School of Law

COVID-19 Response Project addresses legal needs of nonprofits—This summer, a team of eight law students offered help—

under the supervision of Troutman Pepper attorneys—to charitable organizations facing coronavirus-related challenges ranging from CARES Act loans and loan forgiveness to employment law to liability issues.

Civil Legal Assistance Clinic and immigrant advocates launch Spanish-language eviction hotline—A day after the expiration of a statewide moratorium on eviction cases, the clinic partnered with Siembra NC to launch a hotline for Latinx tenants to identify whether their dwellings are covered under the CARES Act, and present them with information to help them advocate for themselves in eviction hearings.

NCCU and UNC-Chapel Hill law schools partner to revive veterans clinic—The schools are collaborating to meet the ongoing needs of current and former service members in North Carolina. This partnership will support the universities' joint effort in assisting active military personnel, veterans, and their families who might otherwise not be able to afford proper representation.

Veterans Advocacy Legal Organization receives UNC public service awards—The student group was recognized for its spring break *pro bono* trip. Many homeless veterans with service-related health issues who seek medical care are not fully supported due to benefit restrictions and discharge characterizations. Students spent time completing the intake process for service members in Asheville, NC.

Research on court fines and poverty influences Federal Reserve survey—The Survey of Household Economics and Decisionmaking included a new question based on research about debt people face from court fines and fees by Professor Gene Nichol, Heather Hunt, '02 and students.

Professor Annie Scardulla joins the Writing and Learning Resources Center—Scardulla teaches research, reasoning, writing, and advocacy.

Fall classes begin earlier—Due to COVID-19, the fall semester started two weeks earlier than usual, on August 10. ■



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