The Supreme Court of South Carolina

COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION

October 24, 2023

RCBA

Richland County Bar Association

COURSE #	DATE	COURSE NAME	CREDITS	ETHICS	SA/MH	TRIAL AD	SPECIALTY CREDIT
933090	10/27/23	Annual Ethics CLE Columbia, SC	3.50	3.50	0.00	0.00	

Your application(s) for accreditation has been approved.

In extending accreditation for CLE activities, the Commission reserves the right to have a representative attend all programs without charge to the Commission and/or its representatives and requires adherence to its accreditation standards found on page two of the Application for Accreditation.

Click this link to review the **Application for Accreditation.**

Within 30 days of the CLE, attendance is required to be furnished to the Commission with a list of the South Carolina attendees, with South Carolina Bar numbers and attendance totals indicated for each attendee. When submitting a list of attendees, or other correspondence, please refer to the course number(s) indicated above.

All programming is approved on a calendar year basis and expires annually on December 31 of the year in which the program was presented. Programming must be resubmitted (via a comprehensive application packet) in subsequent years to retain accreditation approval. Please note that an application for online, on-demand, teleconference, and in-house programming must be received and approved by the Commission prior to the presentation of the program.

Sincerely,

Commission on CLE
Accreditation Coordinator

Richland County Bar Association
Annual Ethics CLE

Friday, October 20, 2023

8:15 am – 12:15 pm

University of South Carolina School of Law

Hon. Karen J. Williams Courtroom

2023 Richland County Bar Association Annual Ethics CLE

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2023 Richland County Bar Association Annual Ethics CLE

Friday, October 27, 2023

Course # 933090

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8:30 – 9:15 am	***Ethics 2023 – Year in Review*** Michael J. Virzi, Esquire, University of South Carolina School of Law
9:15 – 10:15 am	***Professional Identity*** Lee Coggiola, former Office of Disciplinary Counsel
10:15 – 10:30 am	***Break***
10:30 – 11:15 am	***Stress, Anxiety & the Practice of Law – Tips to Help You Unwind in your Daily Practice of Law (and Life)*** Shannon Bobertz, Chief of Staff, SCDNR
11:15 – 12:15 pm	***Panel Discussion on the South Carolina Judicial Merit Selection Process*** Representative Beth E. Bernstein, District 78 Representative Micajah P. "Micah" Caskey IV, District 89 Representative Kambrell H. Garvin, District 77 Senator Richard A. "Dick" Harpootlian, District 20

Faculty Biographies

Beth E. Bernstein

Beth Bernstein graduated from the University of Georgia with a BA in Psychology in 1991 and graduated from the University of South Carolina School of Law in 1994. After law school, she and her brother, Lowell Bernstein, joined their father, the late Isadore Bernstein, in his law firm, and formed what is now known as Bernstein and Bernstein, Attorneys at Law. Her husband, Rip Sanders, joined the firm in 2010. Beth focuses her practice on residential real estate transactions and probate administration. She also represents clients in civil litigation actions. In November 2012, Beth was elected to the SC House of Representatives, and was re-elected in 2014, 2016, 2018 and 2020. Currently, she serves on the House Judiciary Committee, serving as Family and Probate Laws Subcommittee Chairwoman, the only female and Democrat to serve as a subcommittee chair. She also has been elected by the legislative body for four-consecutive terms to serve as one of ten members on the House Ethics Committee, and currently serves as its Secretary. She has been appointed by the Speaker of the House for three-consecutive terms to serve on the Joint Citizens and Legislative Committee on Children, and currently serves as its Chairwoman. In 2020, she received the Conservation Voters of South Carolina's coveted Green Tie Award and was selected as one of the Girl Scouts of South Carolina - Mountains to Midlands' 2020 Women of Distinction. In 2019, she received the Child Advocate Award from the SC Chapter of the American Academy of Pediatrics, and Legislator of the Year from SmokeFree SC, and previously has been awarded the Barbara Moxon Advocacy Award for championing women's issues; the Legacy of Caring award from USC College of Nursing; and the Sierra Club of SC Legislator of the Year award. In 2015, she received the John W. Williams, Jr. Distinguished Service Award from the Richland County Bar and the Legislative Champion award from SC Coalition for Healthy Families. Beth is a fellow in the Aspen Institute-Rodel Fellowships in Public Leadership Class of 2019. She also has participated in the Riley Institute at Furman DLI Lowcountry Class XIV and the 2017 Center for the Advancement of Leadership Skills (CALS) program sponsored by the Southern Legislative Conference and The Council of State Governments. She is a graduate of the 2015 Liberty Fellowship class. She is currently on Hammond School's Board of Trustees and is a sustaining member of the Junior League of Columbia. She is Past President of the Richland County Bar and was selected as The State's Top "20 under 40" in 2006. She has previously served on the following boards: University of South Carolina's College of Nursing Foundation Board, Palmetto Health Cancer Center Board, Three Rivers Heritage and Music Foundation, Columbia Jewish Federation, Beth Shalom Synagogue, Cutler Jewish Day School, South Carolina Philharmonic, and is a 1998 Graduate of Leadership Columbia.

Shannon Bobertz

Shannon Bobertz is Chief of Staff for the South Carolina Department of Natural Resources (SCDNR). Shannon started her career with SCDNR in 2013 as Assistant Chief Counsel and was appointed General Counsel in 2014 until she was appointed Chief of Staff in 2022. Shannon graduated from the South Carolina School of Law school in 2002, cum laude. While in law school Shannon was an Associate Articles Editor on the SC Law Review and a member of the Wig and Robe. After graduation, she clerked for Justice Costa Pleicones on the SC Supreme Court. After her clerkship, she went into private practice

focusing on civil litigation and municipal law with a private firm, where she was a partner. Shannon is a member of the American Board of Trial Advocates (ABOTA) and was chosen as a Rising Superlawyer in 2013. Shannon was awarded the Silver Compleat Lawyer Award by the USC School of Law in 2014. She was selected by The State Newspaper as a recipient of the "20 Under 40" award in 2015. She was also awarded the Meritorious Service Award in 2018 by the Director and Chairman of the DNR Board for her work for DNR. She served as a SCDNR Deputy Law Enforcement Officer from 2013-2019. Shannon completed the National Conservation Leadership Institute (NCLI) in 2019. She has also served as a Bar Examiner and an Adjunct Professor at the USC School of Law. Shannon serves as a part-time municipal judge for the City of Cayce, serves on the Richland County Bar Executive Committee, and is a regular practitioner of yoga and meditation.

Micah Caskey

Micajah P. "Micah" Caskey IV is a member of the South Carolina House of Representatives and the managing attorney at Caskey Law Firm, P.A. Rep. Caskey serves on the House Judiciary Committee and the House Ethics. His legal practice is a general litigation practice, both civil and criminal. Before his legislative service, most recently, Micah was a state criminal prosecutor. He prosecuted felony crimes that ranged from domestic violence to drug trafficking to murder, including several high profile trials. Prior to his tenure as a prosecutor, Micah worked in an international firm as a management consultant; his work in Alaska with Fortune 100 clients focused on operations improvement, safety culture implementation, and increasing profitability. Caskey served in the United States Marine Corps from 2003 to 2010, where he earned the rank of captain. His military service included combat deployments; deployed to Al Anbar Province, Iraq twice (2004 & 2006), and once to Helmand Province, Afghanistan (2009). Captain Caskey was a combat engineer officer and a civil affairs officer; he has been decorated with the Navy-Marine Corps Commendation Medal (x3), the Iraq Campaign Medal, the Afghanistan Campaign Medal, and the Combat Action Ribbon, among others. Micah holds a master's degree in International Business Administration from the University of South Carolina, where he also earned his law degree. His bachelor's degree is from the University of Florida. Micah studied abroad in Europe and Latin America and speaks Spanish. Micah is an Eagle Scout and enjoys spending time outdoors, whether fishing in his kayak or backpacking in South Carolina's state park system.

Lee Coggiola

Lee Coggiola was Disciplinary Counsel for the South Carolina Supreme Court before her retirement in 2018. Prior to that, she served as Chief Staff Attorney for the South Carolina Court of Appeals. Before coming to the Court of Appeals she served as the Chief Public Defender of Richland County. She is a 1967 graduate of the University of Miami and received her JD from the University of South Carolina School of Law in 1988. As chair of the Criminal Law Section, Lee served on the House of Delegates for the SC Bar. Additionally, she served on the Board of the South Carolina Association of Criminal Defense Lawyers, was former President of the South Carolina Public Defender Association, former member of the American Council of Chief Defenders, and a member of the Chief Justice's Commission on the Profession. She is a member of the John Belton O'Neall Inn of Court and serves as a mentor for incoming students at USC School of Law. Lee received the Gold Compleat Lawyer award from the University of South Carolina

School Of Law in 2008, the Rhodes McDonald Award from the John Belton O'Neall Inn of Court in 2014 and is the 2014 recipient of the Jean Galloway Bissell Award from the SC Women Lawyers Association. She is co-editor of the Fifth and Sixth Edition of The Criminal Law of South Carolina and is currently an adjunct instructor at USC School of Law. Lee is a founder and permanent Board member of The Women's Shelter in Columbia. She served on the Board of the Midlands Mediation Center (formerly the Community Mediation Center) for many years and is currently on the Board of Governors for the SC Academy of Authors and the Board of the Women's Rights and Empowerment Network (WREN).

Emma Dean

Emma Dean graduated from Washington and Lee University in 2003 with a double major in Economics and Politics. During law school at the University of South Carolina School of Law, Emma clerked at Baker, Ravenel, and Bender, and upon graduating in 2006, she began working at the South Carolina Court of Appeals as a Staff Attorney. Later, Emma clerked for Justice Kittredge at the Court of Appeals and then at the Supreme Court of South Carolina. Emma went into private practice at Nelson Mullins, specializing in Appellate Advocacy. In 2011, Emma became Assistant Chief Counsel to the House Judiciary Committee. Subsequently in 2015, Emma became Chief Counsel where she remained until 2023 when she was named Executive Director of the South Carolina Bar. Dean is a recipient of the Silver Compleat Lawyer Award from the University of South Carolina School of Law, has served on the Chief Justice's Commission on the Profession since 2010, is a member of the SC Supreme Court Historical Society Board, and serves on Trinity Cathedral's Vestry.

Kambrell H. Garvin

Kambrell Garvin was born and raised in Columbia by a single mom who instilled the importance of education, hard work and determination. At the age of 5, he was diagnosed with a speech impediment. It was then that his mom changed the trajectory of her career and pursued a career as a speech therapist to assist him in overcoming that challenge. As a result of her willingness to go above and beyond, today Kambrell speaks clearly and confidently turning what once was a weakness into strength and in the process, discovering the power of his voice. At an early age, Kambrell used his voice to serve as an advocate to move his community forward. As a young community leader, he organized his first voter registration campaign at the age of ten. While a student at Winthrop University, Kambrell served two terms as the Student Government President, ex-official member of the Board of Trustees, and voting member of the 10th Presidential Search and Selection Committee. He was named the recipient of Winthrop University's 2020 Outstanding Young Alumni Award.

A longtime equitable education advocate, Kambrell joined Teach for America, a non-profit organization dedicated to eliminating educational inequity. He spent three years as a public-school teacher in Walterboro, SC. While teaching, Kambrell spearheaded the first ever 6th grade overnight field trip, science fair and was actively engaged in the school and local community. As an educator, he used his voice and instilled in his students that they could achieve anything that they put their minds to and that their zip code would not limit their future success. Inspired by the example of his grandfather, who fearlessly served as the first African American on his local city council, Kambrell launched a grassroots campaign for the SC House of Representatives District 77. In June 2018, at age 26, Kambrell won the

Democratic Primary with nearly 70% of the vote and the subsequent general election with 85% of the vote – while still a student at the University of South Carolina School of Law. In 2022, he launched Kambrell Garvin Law Firm and continues to be a voice for those most in need of an advocate in their pursuit of justice. He is a member of the SC Association for Justice, the SC Black Lawyers Association and the Richland County Bar Association. He currently serves on the Legislative Oversight Committee and the Education and Public Works Committee. Kambrell served as Vice Chair of the Richland County Legislative Delegation and Parliamentarian of the SC Legislative Black Caucus.

While he has achieved many professional accomplishments and accolades, Kambrell takes the most pride in being a person of faith and committed family man. He is married to his college sweetheart, and they have one daughter. Kambrell is a member of First Nazareth Baptist Church, NAACP, Alpha Phi Alpha Fraternity, Inc. and the SC Education Association. When Kambrell is not practicing law, he enjoys traveling, grilling, brewing craft beer, swimming, weightlifting and off-roading.

Richard A. “Dick” Harpootlian

Richard “Dick” Harpootlian is one of South Carolina’s leading courtroom advocates with 30 years of trial experience as a prosecutor, defense attorney, and civil litigator. Mr. Harpootlian began his career as a prosecutor in the Fifth Circuit Solicitor’s Office. Within two years, he was named Deputy Solicitor and tasked with the administration and supervision of over 20 prosecutors and staff members. As the Fifth Circuit’s chief homicide prosecutor, Mr. Harpootlian personally prosecuted hundreds of murder cases, including 12 death penalty cases.

He defended one of those convictions on appeal before the United States Supreme Court. In 1983, Mr. Harpootlian earned a conviction in the prosecution of Donald “Pee Wee” Gaskins—South Carolina’s most notorious serial killer. In 1990, Mr. Harpootlian was elected as Fifth Circuit Solicitor, where he served from 1991 until 1995. As Solicitor, he personally prosecuted and obtained convictions in multiple high-profile murder, drug, and public corruption cases. For the last 20 years, Mr. Harpootlian’s private practice has earned him state and national recognition for his efforts on behalf of civil litigants and criminal defendants, including a number of multimillion-dollar verdicts and settlements.

In addition to his law practice, Mr. Harpootlian has been active in South Carolina politics. He was elected and served on Richland County Council from 1986 to 1991. He served as Chairman of the South Carolina Democratic Party from 1998 to 2003 and again from 2011 to 2013. During his first tenure as Chair, the Party elected Governor James Hodges, the first candidate to unseat an incumbent South Carolina governor, and five other Democrats to statewide office.

Mr. Harpootlian’s views as a commentator on law and politics are regularly sought by national news programs. He has appeared on 60 Minutes, Good Morning America, ABC Nightly News, NBC Nightly News, Dateline NBC, and various CNN, MSNBC, CNBC, and Fox News broadcasts. He is also frequently quoted in local, state, and national publications, including the New York Times, the Washington Post, the Boston Globe, the Los Angeles Times, and TIME Magazine.

Mr. Harpootlian has been invited to share his experience with SC Bar colleagues as a lecturer on topics including class action litigation and criminal defense. For the last 20 years, he has lectured newly barred

South Carolina lawyers during the Bridge the Gap Program. He is a former chair of the Criminal Law Section of the SC Bar and a past member of the SC Bar Board of Grievance and Discipline. He has served on the SC Chief Justice's Blue Ribbon Committee on Docketing and he is an adjunct professor at the University of South Carolina School of Law.

Michael Virzi

Michael Virzi teaches first-year Legal Writing at the USC School of law and has taught Professional Responsibility and Fundamentals of Law Practice and Professionalism. He also practices in the areas of lawyer ethics, discipline, and malpractice, and is a former Assistant Disciplinary Counsel. Prior to working for the Disciplinary Counsel, Michael practiced in the areas of commercial and business litigation and creditors' rights. He received his BA in Political Science from the University of South Carolina in 1991 and graduated cum laude from the University of South Carolina School of Law in 2000. He serves on the South Carolina Bar's Professional Responsibility and Ethics Advisory Committees, is a former Chair of each, and is a Fifth Circuit delegate to the South Carolina Bar's House of Delegates. Michael is a member of several state and national organizations involving legal ethics and is a frequent CLE speaker and law school guest lecturer on the topics of legal ethics and has been featured on HBO, Discovery, Oxygen True Crime, and Court TV.

Ethics 2023 – Year in Review

By Michael Virzi

RCBA Free Legal Ethics Seminar

October 27, 2023

I. Rule Changes & Proposals

Amended
RULE 1.15: SAFEKEEPING PROPERTY

(e)(1) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute. Disputed property shall be kept separate until one of the following occurs:

(i) the parties reach an agreement on the distribution of the property;

(ii) a court order resolves the competing claims; or

(iii) distribution is allowed under paragraph (e)(2) of this Rule.

(2) Where competing claims to property in the possession of a lawyer are between a client and a third party and disbursement to the client is not otherwise prohibited by law or court order, the lawyer may provide written notice to the third party of the lawyer's intent to distribute the property to the client, as follows:

(i) The notice must inform the third party that the lawyer may distribute the property to the client unless the third party files a civil action and provides the lawyer with written notice and a copy of the filed action within 90 calendar days of the date of service of the lawyer's notice. The lawyer's notice shall be served on the third party in the manner provided under Rules 4(c) and (d) of the South Carolina Rules of Civil Procedure.

(ii) If the lawyer does not receive written notice of the filing of a civil action from the third party within the 90-day period, the lawyer may distribute the property to the client after

consulting with the client regarding the advantages and disadvantages of disbursement of the disputed property and obtaining the client's informed consent to the distribution, confirmed in writing.

(iii) If the lawyer is notified in writing of a civil action filed within the 90-day period, the lawyer shall continue to hold the property in accordance with paragraph (e)(1) of this Rule unless and until the parties reach an agreement on distribution of the property or a court resolves the matter.

(iv) Nothing in this rule is intended to alter a third party's substantive rights.

Comment:

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim ~~is not frivolous under applicable law~~ has become a matured legal or equitable claim under applicable law and unless distribution is otherwise allowed under this rule, the lawyer must refuse to surrender the property to the client until the claims are resolved. Except with regard to the procedures set out in paragraph (e)(2) of this Rule, [a] lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party~~, but~~. Alternatively, when a lawyer reasonably believes there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Amended
Rule 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

Comment:

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). On the other hand, a lawyer admitted in another jurisdiction does not establish a presence in this jurisdiction for the practice of law when the lawyer is physically located in this jurisdiction, temporarily or permanently, if the lawyer's work is limited to that which the lawyer is authorized to perform by the jurisdiction in which the lawyer is admitted and the lawyer does not hold out to the public that the lawyer has a professional presence in this jurisdiction.

Proposal to amend Rule 7.1:
COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A communication violates this rule if it:
…

(f) contains a statement or implication that another lawyer or law firm is part of, is associated with, or affiliated with the lawyer when that is not the case, including contact or other information presented in a way that has the effect of misleading a person searching for information regarding a particular lawyer or law firm, to unknowingly contact a different lawyer or law firm.

- Rejected by the House of Delegates in January 2023 in favor of an outright ban on using another lawyer's name without that lawyer's consent.

II. Ethics Advisory Opinions

EAO 23-01
Charging client for fact testimony – 1.5

Lawyer would like to in a retainer agreement a provision providing that Lawyer is to be paid his or her hourly rate for time spent responding to discovery or testifying as a fact witness in the event such testimony is required after the lawyer's legal work is concluded.

Charging a reasonable amount for the lawyer's time performing non-legal services that may be compelled by and ancillary to the legal representation is not inherently unreasonable. Therefore, as long as the lawyer's hourly rate complies with the reasonableness requirement of Rule 1.5(a), this kind of charge is not categorically unethical, provided the client agrees to it when the lawyer's services are first engaged.

EAO 23-02
Out-of-state associate working on SC cases – 5.1 & 5.5

Lawyer inquired about what work an out-of-state associate in Lawyer's firm may perform on in-state cases and what, if any involvement or supervision is required of Lawyer (licensed in SC) to prevent the associate from engaging in the unauthorized practice of law.

Part 1(a) addresses in-state court appearances. Rule 404 governs and subsection (i) requires the associated in-state lawyer to "at all times be prepared to go forward with the case, sign all papers subsequently filed, and attend all subsequent proceedings in the matter." Rule 404(f) also prohibits pro hac vice admission to any lawyer who "is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina." Because this language is more restrictive than the Rule 5.5(b) prohibition on a "systematic and continuous presence," Rule 404

would prohibit pro hac vice admission if the associate "regularly" enters South Carolina to work on in-state cases even though that same regular, continual entry would not preclude Rule 5.5(c)(1) authorization to perform legal services in South Carolina that do not involve pro hac vice appearances.

Part 1(b) addresses out-of-court work on in-state matters. Rule 5.5(c)(1) allows Associate to practice law in South Carolina "in association" with Lawyer as long as Lawyer "actively participates in the matter." The Comments note that the associated in-state lawyer takes responsibility for the out-of-state lawyer's work. The Committee opined that active participation and taking responsibility mean something more than the Rule 404(i) requirement of being "prepared to go forward at any time" and essentially requires that an out-of-state lawyer be treated like a paralegal. That requires supervision by the in-state lawyer, which means instruction, review, and (when necessary) correction of Associate's work by Lawyer.

Lawyer specifically asked whether he or she must be physically present whenever associate is performing legal work. The Committee referred Lawyer to the Supreme Court for that question, noting that a lawyer's physical presence is required during some non-lawyer interactions with clients when those interactions inherently involve legal advice, as in a residential real estate closing or when a paralegal offers to answer a client's legal questions.

Part 2 addresses out-of-state (or cross-border) work on South Carolina cases. The Committee referred the inquirer to the Supreme Court for this answer as well, noting that the precise contours of providing legal services "in" a particular jurisdiction are the subject of much debate and are not defined simply by the physical location of the lawyer. The Committee reasoned that the recent amendment to the Comments to Rule 5.5 (regarding an out-of-state lawyer working remotely from a South Carolina home office) essentially acknowledges that a lawyer's "presence" for Rule 5.5(b) purposes is where the predominant effect of the work occurs and where the clients or forum are located. Similar reasoning could support the conclusion that the reverse is also true when the lawyer and the client switch sides of the state line.

ABA Formal Opinion 503 (Nov. '22)
Reply-all – 4.2

Lawyers who copy their clients on an email to other counsel in the matter are presumed to have impliedly consented for Rule 4.2 purposes to counsel's "reply all" to the communication. Thus, unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients. The presumption of implied consent is overcome if the sending lawyer communicates in advance to the receiving lawyer that they do not consent to a reply-all.

III. Discipline Cases

https://abovethelaw.com/2022/11/lawyer-faces-ethics-complaint-for-pooping-in-pringles-can-flinging-it-into-victims-advocacy-center-parking-lot/

PROFESSIONAL IDENTITY

LEE COGGIOLA
ATTORNEY AT LAW

OCTOBER 27, 2023

PROFESSIONAL IDENTITY

What is Professional Identity?

Professional identity versus Legal Professionalism

American Bar Association requirements in the Program of Legal Education

Building your Professional Identity

Five benefits of building your Professional Identity

1) **You have a strong elevator pitch**

2) **Your identity guides your career goals and development**

3) **It builds your enthusiasm and confidence**

4) **You become "attractive" to the people around you**

5) **It guides your professional interactions**

How does Professional Identity formation make you more of an insider in your legal career?

Professional Identity and Professionalism

Benjamin V. Madison III

Benjamin V. Madison III is a Professor and Director of the Center for Ethical Formation and Legal Education Reform at Regent University School of Law.

I thank John Berry for organizing this panel and for reviewing and offering comments on this piece. I also thank the other members of the panel, identified in note 5 below, each of whom spent considerable time preparing for our presentation.

"This is a battle for the soul of the legal profession." [1] Moderating a panel on professional identity formation at the recent Annual Professional Responsibility Conference, John Berry's opening comment appropriately captured what many of us believe the professional identity movement is all about. The panel, entitled "Professional Identity Formation in Public and Faith-Based Legal Education," demonstrated the growing number of schools innovating in methods that go beyond traditional approaches to professionalism. The phrase "professional identity" had been used by legal scholars before the publication of the Carnegie Institute for the Advancement of Teaching and Learning entitled *Educating Lawyers* (Carnegie Report), [2] and the virtually simultaneous release by the Clinical Legal Education Association in *Best Practices for Legal Education* (Best Practices Report). [3] However the Carnegie Report and the Best Practices Report, now ten years old, have brought the concept of professional identity formation to a place of deserved attention in legal education. [4]

In preparation for the panel, and during the conference, the panel [5] agreed that perhaps the first step in addressing this topic is to distinguish "professional identity" from professionalism and the professionalism movement. In the chapter on professional identity formation in *Building on Best Practices: Transforming Legal Education in a Changing World*, Dean Natt Gantt and I offered the following distinction between professional identity and professionalism:

> Lawyer professionalism has often referred to adherence to standards or norms of conduct beyond those required by the ethical rules, and the focus of the current discussion of professionalism largely remains on outward conduct like civility and respect for others. Civility and respect for others are foundational to emerging lawyers' understanding of professional conduct, but professional identity engages students at a deeper level by asking them to internalize principles and values such that their actions flow habitually from their moral compass. [6]

In this concept, we have struck upon a truth that I believe is a universal one—a principle that can help each person, in his or her chosen job, to understand, perform, and enjoy that job more. That is why I found the story of Steve Kerr's search for his "coaching style" so helpful and related that story in my segment at the conference. Kerr, formerly a National Basketball Association (NBA) player who won cham-

pionships with Michael Jordan on the Chicago Bulls, later became an NBA coach. His mentors include some of the greats of NBA coaching, including, for instance, Greg Popovich, longtime coach of the San Antonio Spurs, as well as National Football League coach Pete Carroll. Kerr wanted to avoid being a "clone" of Popovich—to find his own approach. He talked with his mentors about how to do that. One of his mentors told him that his coaching style had to come from his "identity." Then the mentor asked a telling question: "Give me one of your core values." After pondering the question, Kerr responded: "Joy." His mentor replied: "O.k., joy. That has to be reflected in your practices every day." [7]

Although at first I was a bit surprised to read about a basketball coach applying principles that mirror what we are seeking to do in professional formation, I recognize now that it makes sense for the approach to apply in any profession. Indeed, it is no coincidence that the Carnegie Institute has chosen to emphasize professional identity beyond law teaching. In studying education of other professions Carnegie has stressed development of professional identity as an integral part of students' professional training. [8] These studies consistently show, in each profession, teaching that leads students to explore their core values. [9] The problem with lecturing students (or lawyers) to "be civil" or "be honest" is that we expect people to follow an external ideal without reflecting on *why* such conduct is likely to be consistent with his or her own value system. Professional identity formation presents students instead with a scenario in which they can act either in a civil way or badly, or in which the person can be honest or deceptive. Then the student reflects, ideally in writing, on the values that are implicated by the scenario, the available courses of action, and the consequences likely to flow from each course of action. [10] Such reflection leads, at worst, to a decision that is at least a considered one and, at best, to a habit of acting ethically. It should be no surprise that a reflect-before-acting approach leads to better choices—and, ultimately, to more professional behavior. [11] The result of this process is usually the same as that promoted by the professionalism movement. The difference is that lawyers are more likely to act in line with professional values when they realize they are following principles in which they are invested.

One of the telling lessons of our panel was that, though two of our members were from law schools with faith-based missions, the two other panelists from public law schools and the one panelist who now works for the Department of Justice (formerly with the Army JAG) all agreed on values that they believed—if students or lawyers were prompted to search themselves—they would find. Some would call these universal values. Thus, Professor Hamilton and I can point to what our faith traditions refer to as "revealed truth," in the Bible and/or in Church teaching for a value. Our colleagues at public universities or in military law teach the same values in different ways. For instance, the virtue ethics of Aristotle provide a rich source for defining values, as Professor McGinnis showed in our panel discussion. [12] Although for reasons of separating church and state, professors in public universities are not advocating any particular faith tradition, the reality seems to be that all students come to law school with some value system. The challenge is to help students, each at different levels of sophistication in their ethical development, to grow as decision-makers guided by a sense of conscience. By pointing students to their internal values, the professional identity movement encourages ownership of one's decisions. Students learn that their decisions have consequences, not only for clients and others in the legal system, but also for the students' own self-respect.

Another important contribution of the panel was to reveal some common misconceptions. The first misconception is that faith-based schools approach this subject rigidly. Professor Neil Hamilton and I explained that our schools relied primarily on Judeo-Christian values, but that we have students consider and discuss the principles at the root of other faith traditions and philosophical systems, including, for instance, virtue ethics of classical philosophers such as Aristotle. Indeed, the panel recognized that Professor Hamilton's article on the manner in which all major faith traditions and virtue ethics emphasize the responsibility of each person to one's fellow human beings is perhaps one of the best examples in scholarship of the breadth of sources available to encourage formation of values. [13] The second misconception is that any of us teaching in this field believe that pointing students to external sources alone will do any good. Instead, the whole point is to have the students reflect on his or her own values and whether they align with these core values. Thus, those of us at faith-based schools have as much of a challenge in cultivating professional identity as those teaching in public schools. If a law student knows biblical passages, he or she has not necessarily (and likely has not by law school) internalized those values. Indeed, most students by the time they reach law school, regardless of whether it is a faith-based or public school, are at an early stage of moral development. [14] Our job is to use the innovative approaches growing out of the professional identity movement to help them progress. We are seeking to spur students to reflect, to look inside, and to internalize values. As Dean Debra Curtis, Professor McGinnis, and Mr. Ben Grimes demonstrated in their remarks, public schools and the military are likewise cultivating reflection on, and internalization of, values.

The recognition that professional identity formation comes from the inside out thus represents its greatest contribution. In opining that the Carnegie Report would likely have a greater impact on legal education than the well-known MacCrate Report, Dean Bryant Garth recognized that "the most important innovation in the *Carnegie Report* is the focus on the third apprenticeship [i.e., the 'professional identity' apprenticeship]." [15] Dean Garth realized that the professional identity component was developing a meaningful approach to helping ethical growth. Dean Garth's prediction, we hope, is starting to become a reality.

An unexpected reward of this movement ought not to be overlooked. Our panel saw in the professional identity movement hope for problems that have long plagued the profession. Anyone who has paid attention to the statistics on lawyers' substance abuse, depression, and suicide ought to wonder why the rates for these ailments are so much higher for lawyers than the general population. These troubling symptoms, observers have opined, could result from the disconnect between lawyers' internal values and their actions. [16] Unless someone is intentional about reflection, he or she can act in ways that create the disconnection without even realizing what damage it is doing. The theory that lawyers' mental, emotional, and addiction issues derive solely from stress ought to be thoroughly reviewed. Sufficient research and discussion suggest that the lack of internalized and intentional commitment to one's values plays a part in this troubling phenomenon. [17] It may take time for the effect of the professional identity movement to begin showing an impact on lawyer well-being. It does, after all, require a commitment—a commitment to greater reflection, to acting consistently with one's values, and ultimately to be true to oneself. Such is not a quick fix. Yet, as our panel maintained, the internal awareness we are advocating may in time be one of the most significant steps toward improving lawyer well-being in recent memory.

My fellow panelists and I appreciated the opportunity to engage in conversation on this important topic. Some have been part of this movement since even before the 2007 Carnegie and Best Practices Report. The movement has gained a foothold in legal education and we appreciate the American Bar Association providing an opportunity to expose more leaders in the profession to it. My hope is that, through such discussions, the profession will appreciate increasingly the innovation that this concept—and relevant teaching tools—represents.

Endnotes

1 The quote derives from JUSTICE E. NORMAN VEASEY, THE ROLE OF STATE SUPREME COURTS IN ADDRESSING PROFESSIONALISM OF LAWYERS AND JUDGES, KEYNOTE ADDRESS AT ABA CONFERENCE: REGULATORY AUTHORITY OVER THE LEGAL PROFESSION AND THE JUDICIARY: THE RESPONSIBILITY OF STATE SUPREME COURTS (March 14-15, 1997).

2 WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS (2007) [hereinafter EDUCATING LAWYERS in notes and "Carnegie Report" in text].

3 ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES in notes and The Best Practices Report in text].

4 At this point, more than 25 schools have curricular initiatives that address cultivation of professional identity. *See* L.O. Natt Gantt, II, and Benjamin V. Madison, III, *Self-Directedness and Professional Formation: Connecting Two Critical Concepts in Legal Education*, 13 UNIV. ST. THOMAS L. J. n.99 & accompanying text (forthcoming 2017) (listing the schools that now have such curricular initiatives). The Institute for the Advancement of the American Legal System, encouraged by Carnegie lead author William Sullivan, established an initiative called Educating Tomorrow's Lawyers. The criteria for membership require schools to demonstrate a commitment to implement the three apprenticeships recommended in Carnegie. *See* Institute for the Advancement of the American Legal System, *Consortium Information* (Criteria for Membership), http://educatingtomorrowslawyers.du.edu/about-etl/about-our-consortium/consortium-member-criteria/ (last visited June 20, 2017). In short, these schools are among those who have formally declared their agreement with Carnegie's recommendations.

5 In addition to John Berry, who served as moderator, and the author, the following educators spoke on the panel: Deborah Moss Curtis, Associate Dean for Academic Affairs and Professor of Law, Shepard Broad College of Law, Nova Southeastern University; Benjamin K. Grimes, Deputy Director of the Department of Justice Professional Responsibility Advisory Office; Neil W. Hamilton, Holloran Professor of Law at St. Thomas University School of Law and Director of Holloran Center for Leadership in the Professions; Michael S. McGinnis, Associate Professor of Law at North Dakota School of Law.

6 L.O. Natt Gantt II & Benjamin V. Madison, III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation*, *in* BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 253, (Deborah Maranville et al. eds ., 2015).

7 Chris Ballard, *The 25 Leadership Lessons of Steve Kerr*, SPORTS ILLUSTRATED (May 16, 2017).

8 The professions studied in the five Carnegie reports are clergy, engineering, medicine, nursing, and lawyering. *See* Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Five Carnegie Foundation's Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763 (2012).

9 *See id.*

10 Gantt & Madison, *supra* note 7, at 265-70.

11 Conversely, lawyers who do not stay in touch with their values will often experience the disintegration that occurs when he or she believes that when taking on the "role" of advocate allows the lawyer to discount his or her internal values. Indeed, one scholar has described the kind of disintegration of self (or "dissonance") that occurs when lawyers act according to the belief that they can separate their personal and professional values:

> The lawyer who suppresses moral scrutiny can fall prey to a kind of self-loathing that those with integrity can resist. By ignoring early dissonance, a lawyer suppresses her moral identity instead of silencing it. She may overcome alienation by subtly reshaping who she is as a person. Incrementally, these changes are almost imperceptible. This is human character in moral drift. Although personal change can signify moral progress, not all fluidity is compatible with integrity. Moral development emerges from braving the discomforts of self-scrutiny. It arises from caring about personal betterment and moral knowledge. Self-protective maneuvers produce dissonance and alienation instead. Eventually, the lawyer adapts to avoid discomfort and remove moral impediments. Instead of humble, she becomes servile. What was at first professional inauthenticity slips into a newly authentic, lesser self. Self-loathing emerges because squelching the moral self leaves lingering guilt and regret.

Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 877 (2002); *see also* L.O. Natt Gantt II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 REGENT U. L. REV. 233, 251 (2004) (offering evidence of how "sharp separation between lawyers' professional and personal identities can actually lead to emotional maladjustment.").

12 Michael S. McGinnis, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 TEXAS A & M L. REV. 1 (2013).

13 *See* Neil Hamilton, Madeline Coulter & Marie Coulter, *Professional Formation/Professionalism's Foundation: Engaging Each Student's and Lawyer's Tradition on the Question "What Are My Responsibilities to Others?,"* 12 U. ST. THOMAS L.J. 271 (2016).

14 Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325 (2011) (relying on renowned psychologists Lawrence Kohlberg, James Rest, and others to show that the process of forming one's ethical professional identity is not likely to be fully developed in law school, but that law school can have a significant impact spurring the person to grow).

15 Bryant G. Garth, *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 17 J. LEGAL WRITING INST. 261, 267 (2011).

16 Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (Spring 2005).

17 *See, e.g.*, JOSEPH ALLEGRETTI, THE LAWYER'S CALLING 19, 68 (1996) (contending that lawyers who separate their personal morality from their professional role suffer from "a kind of moral schizophrenia," which ultimately causes the lawyers' professional amorality to "infect" their personal life).

Teaching Professional Identity in Law School

by Martin J. Katz

Many stakeholders in the legal system believe that law schools need to place greater emphasis on teaching practice skills and professional identity. This article focuses on the role of law school curriculum in shaping professional identity.

Law schools are in the business of teaching students legal doctrine. Since the introduction of the case method at Harvard Law School in the late 1800s, law schools regularly have taught students how to find doctrine (research); how to identify doctrine (reading cases and other legal texts); how to understand doctrine (exploring the limits of legal texts, and applying rules from old texts to new facts); and how to critique doctrine (discussing whether a particular rule is a good one, based on the goals the rule might seek to accomplish).

In more recent times, law schools' stakeholders—including clients, firms, judges, bar associations, and students themselves—have called on law schools to do more than merely teach doctrine.[1] These stakeholders have asked (or demanded) that law schools do a better job of preparing their graduates for practice.[2] Specifically, there have been numerous calls for law schools to teach more about practice skills and professional identity.[3] This article focuses on the role of law schools in teaching professional identity.

Professional Identity Defined

Professional identity is more than simply ethics or professionalism—or even both together. Although professional identity includes these two issues, it is a broader concept. Professional identity is the way a lawyer understands his or her role relative to all of the stakeholders in the legal system, including clients, courts, opposing parties and counsel, the firm, and even the legal system itself (or society as a whole).

In an ideal world, lawyers come to understand their duties to each of these stakeholders and how to navigate tensions between those duties. Ethical rules and precepts of professionalism may help navigate those tensions. Professional identity goes beyond those rules and precepts to encompass the ideals each of us holds regarding our professional roles, and how we apply those ideals to the complex situations we encounter in our professional lives.

Professor David Thomson describes the distinction well:

> *Professionalism* relates to behaviors, such as timeliness, thoroughness, respect towards opposing counsel and judges, responding to clients in a timely fashion. . . . *Professional identity* relates to one's own decisions about those behaviors (which sounds like overlap, but it's not), as well as a sense of *duty* as an officer of the court and *responsibility* as part of a system in our society that is engaged in upholding the rule of law.[4]

The challenge, then, is how to teach professional identity.

How Students Learn Professional Identity

Students typically learn legal ethics in courses that focus on the rules that guide professional responsibility. Many schools, including the University of Denver Sturm College of Law (Denver Law), teach ethics "across the curriculum," raising ethical issues in classes other than those wholly dedicated to legal ethics. This enables students to confront ethical issues in the context of particular areas of practice.[5]

Similarly, students learn professionalism not just through curriculum, but through rules imposed and behaviors required, such as punctuality, courtesy, respect, and decorum. As Professor Thomson notes, "We expect certain behaviors (often we define them in our course policies documents, and certainly they are defined in the student handbook), and for the most part we get them."[6]

What about the larger concept—professional identity? As Professor Thomson points out,

> [Y]ou cannot teach someone to form their identity. Rather, we as teachers need to create "situations" in which our students can be confronted with ethical questions and reflect on the decisions they make, and be guided by us as they form their own professional identities.[7]

He puts it this way:

> For me, "teaching" Professional Identity means we ask the student to finish this sentence: "I am a lawyer, and that means, for me that I will resolve this ethical dilemma as follows . . ."[8]

About the Author

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The key is creating situations where students will be confronted with, and pushed to reflect on, questions of professional identity. The best questions are those that go beyond a particular ethical rule or a particular behavior associated with professionalism. The best questions for teaching address the complex interplay of our various roles and duties as lawyers.

Experiential education is perfectly suited to this type of training. Experiential education puts students in the shoes of lawyers in real or simulated legal settings so that they can see first-hand how the law works and how complex ethical and professional issues arise. Students are pushed to reflect on those issues and are guided as they form their own professional identities.[9]

Because experiential education provides such good opportunities for the development of both skills and professional identity, Denver Law provides a substantial experiential curriculum, in addition to its more traditional curriculum. At a minimum, students must take Lawyering Process, a simulated practice course, during both semesters of their first year, and at least one additional experiential learning course after their first year. In addition, Denver Law recently announced the new Experiential Advantage™ Curriculum, which allows any student to dedicate a third of his or her law school career to experiential learning. This provides students with deep exposure to doctrine, skills, and professional identity development in the context of real or simulated legal practice.

The Experiential Advantage Curriculum combines three core types of experiential education: clinics under the supervision of experienced full-time professors, externships where students work with practicing lawyers on real legal matters, and legal simulation courses where students role play as lawyers in simulated legal matters under the tutelage of full-time professors and/or practitioners. Students who opt into the Experiential Advantage program gain an entire year of valuable exposure to situations in which they can start developing their professional identities under the guidance of experienced professionals.

Challenges to Developing Experiential Learning Curricula

There are three main challenges to developing experiential learning curricula designed to facilitate the development of professional identity. These are explained below.

Cost

Experiential learning is effective only when done in small group settings with low student–faculty ratios. Clinics generally are taught at a ratio of eight students for each professor. This is far more costly than putting eighty students in front of one professor in a lecture class. In matters that involve actual clients in actual litigation, there are costs, including fees for expert witnesses, depositions, and other forms of discovery. Thus, although experiential learning has great benefits, it has the potential to increase the cost of law school at a time when that cost is already quite high. However, there are less expensive ways to increase experiential learning capacity. Externships provide cost-effective partnerships with practicing lawyers and externship faculty, and are far less expensive than clinics. Similarly, faculty members who teach small courses often can shift that teaching to course simulations, or add small-group course simulations to large courses. Course simulations often can be done effectively at ratios of 15-1 or 20-1. In addition to having different cost profiles, each type of experiential learning forum has its own advantages. Mixing clinics, externships, and course simulations provides these advantages to students and builds capacity to offer a full year of experiential learning in a cost-effective way.

Special Expertise of Faculty

Generally, law schools hire clinicians who are already experts in managing cases with student lawyers and supervising those students. Similarly, externship professors excel at setting up high-quality externships and helping students get the most out of that experience. However, very few classroom faculty come with expertise at developing and managing course simulations. To expand the capacity to offer course simulations, Denver Law has offered incentives and training to our faculty, which have resulted in several excellent new course simulations. One of the highlights of our faculty training program was a series of sessions with experts from NITA (National Institute for Trial Advocacy), which develops some of the best course simulations in the business.

Assessment

In a typical doctrinal class, the professor gives a test on the material and grades the test according to how well the student has learned the material. Grading the development of professional identity is much more complicated. For example, it is not obvious how to grade a student's reflections on how to balance the duty of candor to a court with his or her duty to zealously represent the client. More thinking needs to be done on this subject. Denver Law has helped start a national dialogue on this issue, working

with the Educating Tomorrow's Lawyers initiative[10] to host the first conference ever on the topic of assessing the development of professional identity.[11] As more professors help students develop their professional identities and start to think about assessment, we will gain more expertise in measuring such development.

Conclusion

At this point, there is not much data available to evaluate how successful schools have been in teaching professional identity development; however, the anecdotal reports from both students and employers are encouraging. It appears that law schools can in fact help students begin to develop strong professional identities as lawyers.

The primary tool Denver Law uses to foster professional identity formation—experiential education—has an additional benefit: employers often note that students who have had substantial experiential learning opportunities are more thoughtful, more flexible, and better adapted to the complexities of law practice. Early indications are that this type of education creates lawyers who are both better suited for practice and more thoughtful about their roles. It is a win–win proposition.

Notes

1. *See, e.g.*, Barry, "Practice Ready: Are We There Yet?" 32 *Boston College J.L. and Social Justice* 247 (March 2012); Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession," 91 *Michigan L.Rev.* 34 (Oct. 1992); Lloyd, "Hard Law Firms and Soft Law Schools," 83 *North Carolina L.Rev.* 667 (April 2005). *See also* Caplan, "An Existential Crisis for Law Schools," *The New York Times* SR10 (July 15, 2012) ("[Law schools'] missions have become muddled, with a widening gap between their lofty claims about the profession's civic responsibility and their failure to train lawyers for public service or provide them with sufficient preparation for practical work."); Jones and Palazzolo, "What's A First-Year Lawyer Worth?" *Wall Street J.* B1 (Oct. 17, 2011) ("[T]here is still a gulf between a newly minted lawyer and one who can provide value to a client."); Segal, "What They Don't Teach Law Students: Lawyering," *The New York Times* A1 (Nov. 20, 2011) ("The fundamental issue is that law schools are producing people who are not capable of being counselors." (internal quotation marks omitted)).

2. Discussion of the causes of this trend is beyond the scope of this article. Among the possible causes, though, are that clients, under pressure to reduce their legal spending, are pressuring firms to reduce lawyer training. Additionally, lawyers tend to remain with firms for shorter periods, reducing employers' incentives to spend resources on training.

3. The 2007 report by the Carnegie Foundation suggested that there are three basic types of learning for professionals of any type: specific knowledge (doctrine, in the case of law); skills; and professional identity. *See* Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007).

4. Thomson, "Teaching Professional Identity with Skills and Values Texts," Law School 2.0 (Jan. 21, 2012), available at www.lawschool2.org/ls2/2012/01/teaching-professional-identity-with-skills-values-discovery.html. (Emphasis in original.)

5. The University of Denver Sturm College of Law has a public service requirement for graduation, designed to help students form a habit of performing *pro bono* legal work, as required by the Colorado Rules of Professional Conduct (and part of good lawyers' professional identity).

6. Thomson, *supra* note 4.

7. Thomson, "'Teaching' Formation of Professional Identity," Law School 2.0 (July 24, 2012), available at www.lawschool2.org/ls2/2012/07/formation-of-professional-identity.html.

8. Thomson, *supra* note 4.

9. Note that not all experiential education does this. For example, trial competitions are experiential, but often focus more on practical skills than on professional identity. However, the better trial competitions focus on both.

10. *See* educatingtomorrowslawyers.du.edu. Educating Tomorrow's Lawyers is an initiative of the Institute for the Advancement of the American Legal System (IAALS), which is located on the University of Denver's campus. For more information about the initiative, visit the IAALS website at iaals.du.edu.

11. The post-conference report is available at educatingtomorrows lawyers.du.edu/images/wygwam/events/Report_on_the_2012_Conference.pdf. ■

Stress, Anxiety and the Practice of Law- Tips to Help You Unwind in your Daily Practice of Law (and Life)

October 2023

Shannon Furr Bobertz
Chief of Staff

KEEP CALM AND NO CELL PHONES

SC Bar Task Force on Attorney Wellness

What is it?

Focus on:

- Health
- Wellbeing
- Mindfulness
- Overall Health
- Changing stressors in the practice

South Carolina Bar

What is wellness?

Wellness is a state of complete physical, mental, and social well-being that is achieved through an active process of becoming aware of and making choices toward a healthy and fulfilling life.

We are hoping to catch attorneys before they get to the point of depression/substance abuse.

And, hoping to keep attorneys in the practice of law.

I was kicked out of the Bar for spending too much time at the bar.

Who am I and why am I here?

Lawyers In Distress in SC

2000 Lawyers are impaired

14 attorney suicides in S.C. the last few years

We will talk about:

- Reasons people leave the practice of law
- Reasons you love the practice of law
- Problems inherent in the system that could be changed
- Compassion Fatigue
- Sleep/good sleep hygiene
- Anxiety and Control
- Cultivating Happiness/Purpose
- Mindfulness
- Breathing Exercise

The most miserable job in America?

Does the cycle of anxiety and stress start in law school?

- First, law students come into the profession expecting success—and then 90 percent are disappointed when they don't rank in the top 10 percent.
- Students are thrust into an unfamiliar learning environment in which the predominant Socratic teaching method undermines self-esteem.
- Between 20 and 40 percent of law students suffer from clinical depression by the time they graduate;
- The incidence of clinically elevated anxiety, hostility and depression among students is eight to 15 times that of the general population; and that, out of 104 occupational groups, lawyers rank the highest in depression and fifth in incidence of suicide.
  - ABA Journal

What makes you unhappy in the practice of law?

- Crippling student debt
  - Right now at the state schools it costs approx. $71,000 (IS)/$124,500 (OS) to go to law school
- Law can be boring
  - Doesn't encourage creativity, instead consistency is good.
- Veers between periods of high anxiety and down time
  - A lot of sitting.
- Many people go to law school for lack of a better thing to do

What makes you unhappy in the practice of law?

- Lawyers are paid to be cynical
  - Paid to see the weakness in things, or brought in to clean up a mess.
- Clients!
  - We are in a service industry.
- Billing
  - Lawyers can be driven by time, overbooked.
- Lawyers are judgmental

Stressors Inherent in the Practice

- What are they for you? And how do you mitigate them?
  - Change depending on your area (geographic and practice)
  - Do you have ideas on how the court system can change things to make life easier on you?

How has the practice of law changed your view of the world?

What makes you satisfied in your practice?

- Money
- Helping people
- Hanging out with other lawyers
- Success in practice does not equal how successful you were in law school
- Winning a case
- Intellectually challenging
- Always learning
- What else?

- What makes a lawyer satisfied?

  Interestingly, the **higher rank** your law school, the less satisfied you are with your career choice. 27 percent of top-10 law schools call themselves very satisfied with their career choice vs. 43 percent of graduates from 4th tier law schools.

  More money doesn't always need to satisfaction- studies show that beyond a salary of $95,000 that additional income does little to improve happiness.

  Lawyers report the **intellectual challenge** of the law is what gives them satisfaction- that the reality of the challenge of a law practice most closely matches the expectations of law students.

  Government lawyers are happiest- they report 68 percent satisfaction, big firm lawyers are least satisfied (as time goes on) with 44 percent satisfaction with their careers, and solo and small firm lawyers are between the two who report their work autonomy adds to their satisfaction with their job.

  Happiness can peak at first, then slowly increase over time- explanations include feeling better about one's own competence, finding a "niche" that is satisfying, and developing ways to cope with the frustrating parts of the job.

  The **following factors correlate with lawyers feeling higher levels of career satisfaction**: degree that lawyers see their work as contributing to the betterment of society, latitude of attorney to make key decisions about the shape of work products and services, creative challenge that your work affords, frequency and quality of interactions in the lawyer's work. – ABA Journal, Jill Chanen, Are You Happy Now?

Compassion Fatigue – What is it?

-the cumulative physical, emotional and psychological effect of exposure to traumatic stories or events when working in a helping capacity, combined with the strain and stress of everyday life.

Regularly exposed to

-human-induced trauma

-victim's stories and read reports and descriptions of traumatic events

- crime/accident scenes

-graphic evidence of traumatic victimization

Do you have a high caseload and a high capacity for empathy?

More at risk

Treatment of compassion fatigue and ways to mitigate it

- Awareness
  - Understand what it is and self-assess for it periodically
- Debriefing
  - Talk with another practitioner who understands and is supportive

Tips to deal with anxiety and unhappiness…

Tip 1: Changing Bad Habits/ Developing Good Habits

- Changing bad habits- lower **activation energy** for habits you want to drop (take the battery out of your TV remote) and **raise activation levels** for habits you want to reinforce (keep a book you want to read on the coffee table with your remote)

Tip 2: SLEEP

- Why is it important?
  - Need to get 7-10 hours ideally
  - Lack of sleep linked to obesity, diseases, stress, depression
  - Brain actually cleanses itself of toxins while you sleep, lack of sleep is also linked to MS, Alzheimer's and Parkinson's
  - New study showed that lack of sleep has effects on the brain similar to a concussion

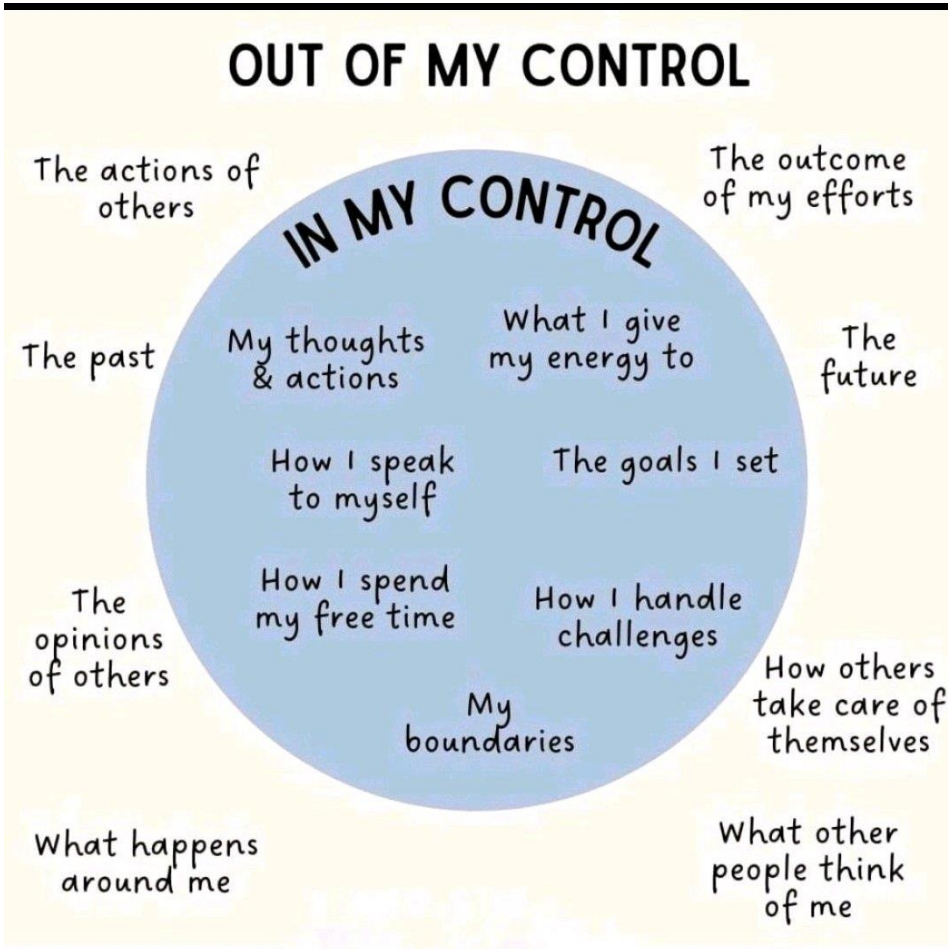
Sleep Hygiene

- Go to bed at the same time every night, get up at the same time every morning
- Avoid caffeine/nicotine/alcohol for 4-6 hours before bedtime
- Use your bed for sleeping (don't work/watch TV in the bed)
- If you need to nap during the day, do it for 20 minutes (NYT article)
- Make your bedroom sleep friendly- no TV, no lights, no phones, close the shades, make it dark and quiet
- Develop a sleep ritual so your body and mind know what's coming

Tip 3: Control and Anxiety

- Anxiety can be caused by a perceived lack of control.
  - Make a list of stressors before bed
- Separate into two categories
    - What you have control over (Focus on these)
    - What you do NOT have control over (Let this go)

Control and Anxiety




relax
nothing is under control
600 × 358

Tip 4: Cultivate a Positive Outlook

- Find something to look forward to (even if it's a vacation 6 months away)
- Commit CONSCIOUS acts of kindness (deliberate things, pay for the coffee for the person behind you in line)
- Exercise
- Infuse positivity into your surroundings, savor everything (put things that bring you joy in your office- flowers, art, photos of loved ones, open the shades for light, etc.)
- Spend money- but not on stuff (on others, or experiences, or to give you time affluence)

Tip 5: Social Support

- Number One Predictor of Happiness- Social support
- Make time for friends and family- PRIORITIZE, BOUNDARIES!
- When things are stressful and hard, do not turn into yourself, but open to the people around you to help you through it. Usually, a really difficult issue makes a team stronger rather than weaker.
  - Make a list every day of three things that made you happy that day. (If you are a pessimist, can help turn that frown upside down)- retrains your brain.

Tip 6: Setting Boundaries

- Set boundaries around work and home that align with your purpose
  - Bedtimes
  - Foods/Drink/News/Movies/Books/Shows (what do you want to consume!)
  - Say no!
  - Say yes!

Tip 7: Art

- New studies showing art can affect your mental health
  - Includes both creating and taking in
  - Recommendation is 20 minutes a day to make art (Doesn't have to be good!)
  - At least once a month, take in art for at least an hour
  - Good for Alzheimer prevention, dementia and Parkinson's prevention
  - JUST AS IMPORTANT AS SLEEP AND EXERCISE FOR YOUR BRAIN!

Tip 8: Mindfulness

- What is it?
  - Being still within ourselves, paying attention. Cultivate clarity, calmness and insight. Being sensitive and kind to yourself and others. It increases self-regulation, self-knowledge and self-awareness.
  - Can help you let go of unproductive, unhelpful thoughts.
  - Understand and manage yourself and your reaction to others
- How are you not mindful?
  - Multitasking
  - Constantly agitating your mind (phone/computer/TV/even reading)
  - Not slowing down to recognize when things are not going well in your life before it is too late.

Why practice mindfulness?

- Meditation helps you cope.
  - 2013 study between researchers in Spain and France and U. of Wisconsin study
    - Leisure day v. meditation and mindfulness day
    - Blood concentrations of enzymes in blood of meditators showed that the stress hormones dissipated quicker than in the leisure activity participants.
    - Not enough to just take a break and do something fun, but need to be mindful.

Mindfulness Exercise

YOGA/ MEDITATION

Resources

- *The Happiness Advantage: How a Positive Brain Fuels Success in Work and Life* by Shawn Achor
- *Essentialism: The Disciplined Pursuit of Less* by Greg McKeown
- *Big Potential: How Transforming the Pursuit of Success Raises Our Achievement, Happiness, and Well-Being* by Shawn Achor
- The Happiness Course at Yale (Coursera.com)
- Yogaglo.com (stream yoga/meditation)
- *Your Brain on Art: How the Art Transforms Us* by Susan Magsamen and Ivy Ross

Secure Leave

- "The purpose of adopting these procedures is to allow lawyers to schedule times when they are free from the urgent demands of professional responsibility in the legal profession, which may serve to enhance not only the overall quality of their personal and family lives, but also permit lawyers to better fulfil their professional obligations.“ SC Supreme Court
- You are protected from being called for trials or hearings in all South Carolina courts, rather than only in the court where a judge signs an order or letter of protection.
- You are not required to obtain the approval from any court to obtain secure leave or provide the reason you are seeking secure leave. Instead, you can enter secure leave in AIS and, except for the family court and the probate court, your secure leave will be electronically shared with court clerks. That means you don't have to file anything with the court, except with the probate and family courts, if you practice there.

Secure Leave Rules

- You can designate up to three (3) calendar weeks of secure leave during a calendar year.
- A secure leave period must be designated in AIS at least ninety (90) days in advance.
- A secure leave period must be designated in AIS before any trial, hearing, or other proceeding has been scheduled. You must certify this is correct.
- Since secure leave data will be electronically shared with courts that rely on these designations in scheduling proceedings, a designation may not be withdrawn or amended once the designation is final—The designation will become final at midnight on the day it is entered.
- An attorney is required to submit a secure leave designation to the family court in which the attorney predominantly practices, and to any probate court in which the attorney has a pending matter. There is a form available for each court.

Breathing Exercise

Questions/Comments?

Panel Discussion on the South Carolina Judicial Merit Selection Process

Richland County Bar Association Ethics CLE

Friday, October 27, 2023

The Honorable Beth E. Bernstein
House District 78

The Honorable Micajah P. "Micah" Caskey IV
House District 89

The Honorable Kambrell H. Garvin
House District 77

The Honorable Richard A. "Dick" Harpootlian
Senate District 20

Background of the Judicial Merit Selection Commission and Process

Two states use a process where the Legislature appoints Judges, South Carolina and Virgina. The South Carolina Judicial Merit Selection Commission screens and selects candidates for judgeships before submitting a list of three names to the South Carolina General Assembly for consideration. The joint General Assembly then votes on the candidates, either choosing one of the three recommendations by a majority vote or rejecting the entire slate.

This process was implemented in 1997, changing the selection process by adding the assistance of the Judicial Merit Selection Commission to screen the candidates, determine if they are qualified and then nominating the three most qualified candidates to the General Assembly for their vote.

Prior to 1997, the South Carolina General Assembly had statutory authority to elect and re-elect the state's judges and justices. Through a joint committee, members of both houses of the legislature reviewed the qualifications of all applicants. However, the statutes enabling the committee to review the candidates did not define the qualifications to be reviewed or how they were to be weighed. Moreover, the committee lacked authority to remove an applicant's name from consideration. Therefore, unqualified applicants remained eligible for appointment. This process at times resulted in unqualified applicants being elected to the bench because members of the General Assembly, provided with little external guidance on the qualifications of the candidates, often elected sitting or former legislators, with whom they had experience. In fact, from 1995 until 2000, all five South Carolina Supreme Court justices had previously served in the General Assembly.[1]

[1] THE UNTOUCHABLES: THE IMPACT OF SOUTH CAROLINA'S NEW JUDICIAL SELECTION SYSTEM ON THE SOUTH CAROLINA SUPREME COURT, 1997-2003, Kimberly C. Petillo, Albany Law Review, June 30, 2004

South Carolina Code Ann. § 2-19-10 provides for the manner in which justices and judges of the courts of this State, including Administrative Law Judges, are selected by the General Assembly. Five members are appointed by the Speaker of the House of Representatives and of these appointments, three must be serving members of the General Assembly and two members must be selected from the general public. Three members are appointed by the Chairman of the Senate Judiciary Committee and two members appointed by the President Pro Tempore of the Senate. Of these appointments, three must be serving members of the General Assembly, and two members must be selected from the general public.

The mission of the Judicial Merit Selection Commission is to screen candidates for judicial office and report the findings to the General Assembly. The Senate and the House of Representatives are charged with electing justices to the Supreme Court, and judges to the Court of Appeals, to the Administrative Law Judge Division, to the Circuit Court, and to the Family Court. Legislative delegations confirm the gubernatorial appointments of Masters-in-Equity. Only those candidates found qualified by the Judicial Merit Selection Commission can be nominated for judicial office.

The duties of the Judicial Merit Selection Commission consist of:

- Publishes upcoming judicial vacancies, including judgeships where the judicial term is expiring and the incumbent judge is being screened for reelection. This list is sent to the media in South Carolina.

- Publishes the list of candidates who have completed applications to run for judicial vacancies thirty days after the vacancy is announced. This list is sent to the South Carolina media. Published at the same time is the cutoff date for members of the public to file a complaint in the form of an affidavit in opposition to a judicial candidate.

- Requests all members of the South Carolina Bar to return questionnaires (a BallotBox survey) on the performance and qualifications of sitting judges and attorneys running for judicial vacancies.

- Arranges for members of the local Citizens Committee to interview the judicial candidates residing in the same geographic area. There are five volunteer Citizens Committees on Judicial Qualifications across the State. These Citizens Committees investigate candidates within the community.

- Arranges for judicial candidates to attend interviews with counsel to the Commission.

- Investigates and summarizes the qualifications of judicial candidates as determined from:
  - written responses by the judicial candidate on a personal data questionnaire (PDQ);
  - the BallotBox questionnaire results;
  - a SLED check;
  - a financial and credit check;

- a statement of economic interest check;
- grievance/reprimand check from the Commission on Judicial Conduct and the Commission on Lawyer Conduct;
- reports of the local Citizens Committees on Judicial Qualifications;
- report of the SC Bar Judicial Qualifications Committee;
- results of ethics questionnaire and campaign expenditures;
- result of newspaper article search;
- copies of previous screenings;
- letters of reference;
- results of case study search for patterns of error and research on appeals (for sitting judges);
- personal interviews by counsel to the Judicial Merit Selection Commission;
- an investigation of any affidavits received from the public.

- Holds the public hearing before the Commission to record testimony of candidates on any matters revealed in the investigation.

- Issues a Draft Report on Judicial Qualifications to the General Assembly after the public hearing.

- Forty-eight hours after the Draft Report is issued, the Report on Judicial Qualifications becomes final. At the time the report becomes final candidates are free to seek the support of members of the General Assembly and legislators are free to give pledges of support to candidates.

The Chairman of the Judicial Merit Selection Commission drafts a Concurrent Resolution to schedule a Joint Assembly. When both the Senate and the House of Representatives have concurred on the date, a Joint Assembly is held in the House Chamber to elect members of the judiciary.

Pros and Cons of the Merit Selection Process

Some positives regarding the merit selection—particularly the three-step version—addresses each of these concerns. It eliminates the role of money and significantly reduces the role of politics in judicial selection, and it negates the possibility of conflicts of interest that arise when a campaign contributor (whether lawyer or client) appears before the judge. It provides for selection of highly-qualified judges by representatives of diverse groups of people – legal professionals, members of government, and ordinary citizens, including those who can provide the valuable "outsider's" view of the non-lawyer. Finally, it promotes diversity, which is healthy not only for society generally but for all users of the justice system – judges, lawyers, litigants, witnesses, victims.

Many criticize the very concept of merit selection as fundamentally flawed and elitist. Given the fact that we adhere mostly to a representative form of government, such a reaction is understandable.

Some opponents of merit selection argue that it removes from the people the right to elect their judicial representatives. This language begs a very fundamental question: Under our system of government, are judges truly "representatives," in the sense that members of the legislative and executive branches are? The legislative branch is certainly designed to represent specific constituencies; to a lesser degree, the executive performs a similar function. But judges, who must apply impartially the laws created by the other two branches—laws that affect opposing constituencies—are expected to remain above the fray. Canons of judicial ethics require them to remain objective, free of political influences, and unfettered by financial concerns.

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Judicial Selection in South Carolina: Is the Time Ripe for Systematic Restructuring and Improvement: You Be the Judge

Ronald T. Scott

JUDICIAL SELECTION IN SOUTH CAROLINA: IS THE TIME RIPE FOR SYSTEMATIC RESTRUCTURING AND IMPROVEMENT? YOU BE THE JUDGE.

Ronald T. Scott*

I. INTRODUCTION

The black robe, pounding gavel, and austere judicial ceremonies all combine to make the role of a judge one of the most revered and powerful positions in our democratic society. Judges likely fulfill the highest form of legal public service in the United States. Judges render decisions impacting our family life, our professional careers, our finances, our criminal justice

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system, our overall system of governance, and numerous other important aspects of daily life. Judges are expected to have a level of independence and impartiality regarding the executive branch of government, the legislative branch of government, and politics in general. In consideration of the weighty role judges fulfill in our society, how should we select these individuals who wield considerable control over society in general and our lives in particular? Today, the process of judicial selection differs from state to state, with common criticism for all methods of judicial selection. With various options for judicial selection, questions and criticisms will always remain as to what method renders the best outcome.

South Carolina's present judicial selection process is used by a minority of states, with only Virginia employing a similar system.[1] South Carolina's State Constitution stipulates that a specific segment of state judges are to be selected by the South Carolina General Assembly with the assistance and initial review by a Judicial Merit Selection Commission (JMSC).[2] The JMSC, comprised of ten members, is empowered by state law to evaluate the qualifications and fitness of individuals desiring appointment to various judicial vacancies.[3] The Commission consists of five members appointed by the Speaker of the House of Representatives, three members appointed by the Chairman of the Senate Judiciary Committee, and two members appointed by the President Pro Tempore of the Senate.[4] South Carolina's process has been criticized largely due to concerns regarding diversity among the judiciary, lack of impartiality, separation of powers, and public confidence in the system.[5]

This Note asserts that, in spite of common criticisms, South Carolina's present system and process for judicial selection has improved since the reforms of 1996 and is now structured to better serve the State's needs. South Carolina's process for judicial selection, though not without flaws, has produced a highly-qualified judiciary that is now more diverse and operates effectively and independent of legislative control. Part II of this Note provides a succinct background and history of judicial selection in South Carolina and the events giving rise to the 1990s reforms to the state's process of judicial selection. Part III of this Note briefly examines common

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1. Carl W. Tobias, *Reconsidering Virginia Judicial Selection*, 43 U. RICH. L. REV. 37 (2008).

2. S.C. CONST. art. V, § 27.

3. S.C. CODE ANN. § 2-19-10(A) (Supp. 2016).

4. § 2-19-10(B).

5. Samantha R. Wilder, *The Road Paved with Gravel: The Encroachment of South Carolina's Judiciary Through Legislative Judicial Elections*, 65 S.C. L. REV. 639, 652–60 (2014).

forms of judicial selection methods throughout the United States, exploring both their strengths and weaknesses. Part IV of this Note will discuss the strengths and weaknesses of South Carolina's current system of judicial selection. Part V of this Note will offer limited recommendations for improvement to South Carolina's present system.

II. BACKGROUND

The South Carolina State Constitution confers upon the South Carolina General Assembly sole authority and responsibility to elect members of the South Carolina Supreme Court, the South Carolina Court of Appeals, South Carolina Circuit Court judges, and South Carolina Family Court judges.[6] Over the years, the process was viewed as inherently partisan, often resulting in a significant number of judicial appointments filled by former members of the General Assembly[7] and those who were perceived to be part of the "good-old-boy system."[8] Many public, and arguably petty, battles were fought over who would win the necessary votes to fill vacancies within the judiciary.[9] After wide criticism concerning the lack of diversity,[10] the number of former legislators selected to fill judicial vacancies,[11] and perceptions of political influence and political corruption overriding qualification and fitness to serve,[12] South Carolina passed a state constitutional amendment in 1996 establishing a Judicial Merit Selection Commission (JMSC) to screen and exclusively nominate qualified individuals from whom the General Assembly may fill judicial vacancies.[13] These changes came on the heels of an especially bitter fight for a South Carolina Supreme Court seat in 1996.[14]

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6. S.C. CONST. art. V., §§ 3, 78, 13 (Supreme Court, Court of Appeals, Circuit Courts, and "other courts"); S.C. CODE ANN. § 2-19-80(A) (2005) (specifying family court).

7. Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1227 (1998).

8. Kevin Eberle, *Judicial Selection in South Carolina: Who Gets to Judge?*, S.C. LAW., May/June 2002, at 20, 22 (observing also that legislators who directly elect judges "answer directly to the public").

9. Driggers, *supra* note 7, at 1218.

10. *See* Wilder, *supra* note 5, at 652 (noting that lack of diversity was a major theme underlying the 1996 reforms).

11. Driggers, *supra* note 7, at 1228.

12. Eberle, *supra* note 8, at 22.

13. S.C. CONST. art. V, § 27. *See also* Driggers, *supra* note 7, at 1230 (discussing the circumstances surrounding the creation of the JMSC).

14. *See* Driggers, *supra* note 7, at 1217–18 (referencing the contentious reelection of Justice Jean Toal to the South Carolina Supreme Court by the South Carolina General Assembly).

Among the notable changes adopted in the 1990s, members of the General Assembly were prohibited from being selected to serve in the judiciary while serving in General Assembly and for one year after ceasing to be a member of the General Assembly or failing to file for re-election.[15] Principally, the most significant reform of 1996 came with the establishment of the JMSC to assist the South Carolina General Assembly in selecting judges.[16] The JMSC is responsible for conducting preliminary screening for South Carolina Supreme Court judges, South Carolina Court of Appeals judges, Circuit Court judges, Family Court judges, and Administrative Law Court judges.[17] The South Carolina State Constitution stipulates that judges elected by the General Assembly must be at least thirty-two years of age, be licensed to practice law for at least eight years, and be a resident of South Carolina for at least five years prior to consideration by the JMSC.[18] The JMSC conducts a thorough review, both privately and publicly, of each candidate, during which it evaluates candidates based on the following criteria as mandated by state law: constitutional qualifications, ethical fitness, professional and academic ability, character, reputation, physical health, mental stability, experience, and judicial temperament.[19] In addition to these nine criteria, state law stipulates that the JMSC must consider race, gender, national origin, and other demographic factors to ensure nondiscrimination to the greatest extent possible as to all segments of South Carolina's population.[20] A committee of citizens, reflective of a broad range of professional experience and racial backgrounds, also evaluates judicial candidates as required by South Carolina law.[21]

After the evaluation process is completed, the JMSC prepares a written report to the General Assembly on each candidate as relates to the nine criteria.[22] From there, the JMSC submits to the General Assembly a list of usually three candidates it finds qualified for judicial service.[23] The General Assembly may only elect judges from the individuals nominated as qualified by the JMSC.[24] State law was also modified to limit the ability of candidates to seek support from sitting members of the South Carolina General Assembly until formally nominated as a qualified judicial candidate by the

15. S.C. CODE ANN. § 2-19-70(A) (2005).
16. Driggers, *supra* note 7, at 1230 (citing S.C. CODE ANN. § 2-19-80(B) (2005)).
17. S.C. CODE ANN. § 2-19-80(A) (2005).
18. S.C. CONST. art. V, § 15.
19. S.C. CODE ANN. § 2-19-35(A) (2005).
20. § 2-19-35(B).
21. § 2-19-120(A).
22. § 2-19-80(D).
23. § 2-19-80(A).
24. § 2-19-80(B).

JMSC.[25] Judicial elections are held during the legislative session.[26] In spite of these changes and the establishment of the JMSC to perform official vetting of judicial candidates, criticism still remains that South Carolina's process needs reform.[27]

III. ANALYSIS

A. Criteria for Evaluation of Judicial Candidates

Many evaluation factors can aid states in vetting qualified candidates for judicial selection.[28] Although these factors vary from state to state, there are several common factors in judicial selection processes throughout the country.[29] Some states set forth general qualifications within the state's constitution or through enactment by state law, setting the minimum criteria a candidate must possess for judicial appointment.[30] These characteristics may address a candidate's age, number of years as a licensed attorney, residency requirements, and other requirements deemed appropriate for judicial service.[31] In addition to these constitutional or statutory requirements, judicial candidates are often subjected to an evaluation process involving a comprehensive review of their ethical fitness, professional and academic abilities, character, reputation, and other factors.[32] Candidates for judicial appointment are commonly required to provide details of their general work history, legal experience, memberships in specific organizations or associations, and even their writings that may have been published in journals, books, newspapers, or periodicals.[33] Candidates for judicial appointment are also regularly subjected to comprehensive scrutiny of their past actions and statements, both personally

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25. § 2-19-70(C).

26. § 2-19-90.

27. *See* Driggers, *supra* note 7, at 1231 (noting that the remaining legislative control over the JMSC creates the potential for abuse even within the current system).

28. See, for example, Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1225–26 (2000), for a discussion exploring common criteria used in evaluating potential judges, including, but not limited to, minimum education and experience, moral character, intelligence, impartiality, maturity, emotional stability, courtesy, decisiveness, and administrative ability.

29. *Id.*

30. *Id.* at 1201.

31. *Id.* at 1237.

32. *Id.*

33. *See* Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 102–12 (2007) (noting various methods for reviewing a judicial candidate's qualifications).

and professionally, and are often required to provide references attesting to the soundness of their character and reputation in the legal profession and in their community at large.[34] Such comprehensive reviews of one's past can be both daunting and stressful, and may deter otherwise well qualified candidates from seeking appointment to judgeships.[35] Other soft factors may also be used to evaluate judicial candidates, dependent upon the method of selection. In states where there is direct election by the general public, a candidate may be evaluated on the level of accountability he or she will have, first to the law, and secondly to the community pertaining to judicial decisions rendered.[36] Accountability for decisions rendered is often an important factor when reelecting existing judges.[37] Separately, in recent years, diversity in gender and ethnicity has more commonly become a factor of evaluating judicial candidates.[38] A study published by the American Bar Association noted that, "[m]ost Americans would agree that, racial and gender diversity is an important quality for our nation's courts."[39] Discussions about diversity and awareness of the need for diverse judicial candidates who offer differing perspectives, backgrounds and experiences, will likely continue to grow as the country's general population becomes more diverse.

B. Common Methods of Judicial Selection

The specific process of judicial selection differs from state to state and often varies based upon the type of judicial vacancy.[40] The more common forms of judicial selection include selection by direct election of state voters through partisan or non-partisan elections, selection by direct election of the state legislature, selection by gubernatorial appointment, and, in recent years, hybrid forms of the aforementioned methods that involve the use of a

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34. Maute, *supra* note 28, at 1225–26.

35. See, for example, Colquitt, *supra* note 33, at 102–20, for a discussion regarding the comprehensive and far-reaching nature of evaluating judicial candidates.

36. Maute, *supra* note 28, at 1203–07.

37. See, for example, Colquitt, *supra* note 33, at 113–15, for a discussion of common evaluation processes for the reappointment or reelection of sitting judges.

38. Malia Reddick, Michael Nelson, & Rachel Paine Caufield, *Racial and Gender Diversity on State Courts*, 48 THE JUDGES' J. 3, 28 (2009).

39. *Id.*

40. See, for example, *Methods of Judicial Selection*, NAT'L CTR FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Jan. 20, 2017), which highlights the various forms of judicial selection throughout the United States.

committee, commission, or board to vet judicial candidates.[41] Each method of judicial selection has its praises and its criticisms. Generally, each state must settle on the process that it deems will best serve its citizens.

1. Judicial Selection by Executive Appointment

Today, several states select judges solely through executive appointment by the governor.[42] By some accounts, executive appointment is the quickest and most efficient process for judicial selection.[43] Arguments in favor of this system reason that the state's highest ranking executive, elected by the citizens of the state, should have the power to appoint state judges.[44] The citizens, by power of their vote on a gubernatorial candidate, can effectuate judicial accountability and changes in judicial philosophy by voting to change the executive with judicial appointment power. This system of judicial selection is commonly understood by citizens in states where it is practiced because it mimics the system of judicial selection for many federal judgeships appointed by the President of the United States.[45] Critics of gubernatorial power to appoint judges often argue that the process is politicized, much like the process of appointing federal judges, rather than simply seeking the most qualified judges.[46] Most governors align themselves with a political party and have openly expressed political opinions on judicial philosophy.[47] These philosophies, which are quite often political, are bound to guide the subjective criteria governors will use to select an individual to fill a judicial vacancy. Flowing from that reasoning, critics argue that judges may lack true judicial independence unless they are appointed to lifetime judgeships, which is less common among the state judiciary.[48] Other criticisms of the gubernatorial appointment process lie in the perception that gubernatorial appointments may lack diversity in gender and ethnicity that would otherwise reflect the population of a state and

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41. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States,* 75 MICH. B.J. 904 (1996).

42. *Id.*

43. Colquitt, *supra* note 33, at 77.

44. *Id.* at 79.

45. See U.S. CONST. art. II, § 2, cl. 2. For example, most Americans are familiar with the constitutional authority granted to the President of the United States to appoint judges to the United States Supreme Court with the advice and consent of the United States Senate.

46. Colquitt, *supra* note 33, at 77–79.

47. *Id.* at 77–78.

48. *See* Wilder, *supra* note 5, at 647 (contrasting state systems for judicial selection against the federal system of judicial selection, which provides for lifetime appointment of some judges and a safeguard against salary reduction).

perhaps the will of the voters.[49] This criticism is not singular to gubernatorial appointment of judges and is leveled at many judicial selection processes.[50]

2. Judicial Selection by Popular Vote

A more widely utilized method of judicial selection is by direct vote of the electorate through partisan and non-partisan elections.[51] Some assert that direct election allows the general population to have the greatest level of influence in selecting state judges.[52] Much like electing individuals to political office, voters have the opportunity to consider a judicial candidate's qualifications for a judgeship, professional history, personal history, political affiliations, and judicial philosophy as stated directly by a candidate, thereby allowing voters to make an informed decision on candidates the voter deems best suited to be a judge. For judges running to be reelected to a specific judicial post, voters can directly examine the record of decisions rendered by a judge, a judge's personal life while occupying judicial office, a judge's temperament, and other subjective factors a voter may deem important.

Though direct election may offer voters the greatest level of participation in selecting state judges, this process is not without criticism. Although several states have non-partisan judicial elections, some do have partisan elections.[53] Although enforcement and judicial interpretation of laws should be blind to politics, partisan campaigns for judicial election can serve to cast a negative light on a judicial candidate's ability to render rulings without regard to political affiliation.[54] Additionally, partisan campaigns can become extremely expensive and can result in highlighting party affiliation as a qualification that should supersede a candidate's legal experience and ability to serve as a fair and impartial judge and interpreter of the law.[55] Perhaps most significant is the concern that direct election can

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49. *See, e.g.*, Reddick et al., *supra* note 38, at 30 (highlighting the influence of politics in gubernatorial appointment of judges and observing that, "[n]ationwide, Democratic governors appointed slightly higher percentages of minority (14.7%) and women (27.9%) judges than did Republican governors (11.0% and 23.6%, respectively). The largest discrepancies between Democratic and Republican governors are found for minorities on courts of last resort (17.4% vs. 8.8%) and women on intermediate appellate courts (31.2% vs. 23.3%)").

50. *See generally id.* (highlighting concerns over diversity among all methods of judicial selection).

51. Driggers, *supra* note 7, at 1223.

52. *See id.* (noting that direct election of judges "enshrines" the fundamental right of citizens to vote).

53. Maute, *supra* note 28, at 1203.

54. *Id.* at 1204–05.

55. *Id.*

have the perception of interference with judicial independence.[56] Judges subjected to reelection may fear that their decisions will be evaluated in the court of public opinion and that their chances for reelection may be determined by their political popularity rather than the merits and legal grounds for decisions rendered.[57] For these reasons, it is possible that many well-qualified judicial candidates will not seek office in states that select judges by popular election.[58]

3. *Judicial Selection by Legislative Election*

Another much less commonly used method of judicial selection is through election by a state's legislature.[59] Only South Carolina and Virginia use this method of judicial selection.[60] Through this method of judicial selection, legislators, as direct representatives of the citizens, indirectly represent the interests of their constituency in selecting judges.[61] For many years in South Carolina, legislative election of judicial candidates was done with each legislator employing his or her own subjective criteria to evaluate candidates vying for judicial appointment.[62] In a 2015 legislative election for judicial candidates in South Carolina, a member of the General Assembly chided his fellow lawmakers that they should not elect judges based on the mere qualification of, "I knew them in kindergarten, or something."[63] Judicial selection by legislative election is widely condemned based on a combination of the criticisms hailed at the other more common forms of judicial selection.[64] Judicial selection by legislative election is deemed as inherently political, perceived as lacking judicial independence, viewed as valuing relationships over qualification for judicial service, and criticized as

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56. *Id.* at 1204–07.
57. Wilder, *supra* note 5, at 644.
58. Maute, *supra* note 28, at 1205.
59. Driggers, *supra* note 7, at 1222.
60. *Id.*
61. *See* Eberle, *supra* note 8, at 22 (observing that legislators who directly elect judges "answer directly to the public").
62. *See* Wilder, *supra* note 5, at 648–51 (noting that, prior to 1996, the process for selection of state judges was much less formal, allowing members of the General Assembly to select judges under their own subjective criteria).
63. Jamie Self, *S.C. Lawmakers Hear Calls to Change the Way SC Elects Judges*, STATE: THE BUZZ (Feb. 7, 2015), http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13948829.html.
64. *See* Wilder, *supra* note 5, at 652–58 (highlighting concerns over judicial selection in South Carolina even after the 1996 reforms).

lacking diversity in gender and ethnicity.[65] This process often is also perceived as creating a disproportionate share of former legislators who, through their well-established relationships with sitting members of the legislature, are able to secure widely coveted judicial appointments.[66] Examples abound of bitterly fought battles by judicial candidates vying to secure the backing of legislators, and the process is sometimes perceived as corrupt.[67] It is likely for these reasons that this method of judicial selection is uncommon throughout the states.

4. Judicial Selection through a Merit Commission

In the wake of criticisms of each of the aforementioned processes, many states have established a hybrid form of judicial selection through which a separate body of individuals is impaneled to evaluate candidates for judicial appointment by the governor or for judicial election by a state legislature or by voters.[68] Though the process differs in each state, most merit selection commissions are composed of attorneys and non-attorneys who evaluate candidates and provide recommendations or nominations from a general pool of candidates seeking judicial office.[69] Merit selection commissions do not have the final authority to select judges, but rather should exist to provide a conceivably apolitical and thorough vetting process.[70] Merit selection commissions, when paired with selection by executive appointment, public election, or legislative election, offer an effective method to legitimize the judicial selection process by limiting political interference and by creating a more objective process to evaluate judicial candidates.[71] Critics of merit selection commissions argue that these review panels often exclusively consist of gubernatorial or legislative appointees and are neither directly accountable to the public nor representative of the public.[72] Other critics argue that individuals appointed to merit selection

65. *See id.* at 652–58 (highlighting concerns over judicial selection in South Carolina even after the 1996 reforms).

66. Driggers, *supra* note 7, at 1227–28.

67. *See id.* at 1227–28 (highlighting perceived corruption associated with judicial selection by legislative election).

68. *Id.* at 1224–25.

69. *Id.* at 1225.

70. *See* Deja, *supra* note 41, at 907 (discussing purpose of nominating commission).

71. *See* Colquitt, *supra* note 33, at 81 (noting the opinion that properly crafted merit selection commissions enhance the judicial selection processes because they can be somewhat independent of the political process and can adhere to democratic ideals).

72. *See* Driggers, *supra* note 7, at 1226 (discussing how committees are sometimes controlled by elected officials appointed members).

commissions often represent the "educational and occupational elite" of society and do not adequately represent the public.[73] Conversely, it can be argued that the capability to evaluate and recommend qualified candidates for judicial selection requires a developed and experienced skill set that inherently is not possessed by the general public.

IV. AN ASSESSMENT OF SOUTH CAROLINA'S CURRENT PROCESS OF JUDICIAL SELECTION

Like many other states, South Carolina's process for judicial selection can be described as a hybrid system even though it ultimately is driven by legislative election.[74] After nearly twenty years of operation, South Carolina's JMSC provides a meaningful safeguard to constrain the General Assembly to select only candidates who are actually fit and qualified to serve in the state judiciary. Additionally, data shows that South Carolina has made some progress in either maintaining or improving the racial and gender diversity of the state.[75] For example, in 2007, three of the nine members of the South Carolina Court of Appeals were female and one was African-American, which is identical to the racial and gender make-up of the court in 2017.[76] In 2007, of the forty-nine state circuit court judges, four were African-American and seven were female.[77] In 2017, of the forty-nine state circuit court judges, six are African-American and eleven are female.[78] In 2007, eight of the fifty-nine South Carolina Family Court judges were African-American and nineteen were female.[79] In 2017, nine of the fifty-nine South Carolina Family Court judges are African-American and twenty-five are female.[80] In 2007, one of the six South Carolina Administrative Law Court judges was African-American and two were female, which is also identical to the racial and gender make-up of the court today.[81]

Most notably, in 2016, the General Assembly elected South Carolina Supreme Court Associate Justice Donald Beatty to become the second African-American since Reconstruction to serve as Chief Justice of the

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73. *Id.*
74. Wilder, *supra* note 5, at 648.
75. E-mail from Y. Elizabeth Wellman, Staff Attorney, S.C. Court Administration, to author (Oct. 25, 2016, 11:27 AM) (on file with author).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

South Carolina Supreme Court.[82] Arguably African-Americans and females, in particular, may not have experienced the same level of representation within the state judiciary without the process of judicial merit screening prior to legislative elections. In spite of these positive strides, arguments remain that the current process in South Carolina does not create enough opportunities for expanded diversity in the judiciary.[83] Critics assert that changes to the current process are necessary to invite and encourage more minority candidates to seek judicial office in South Carolina.[84]

Critics will contend that in spite of the JMSC's independent role in the screening process, the South Carolina General Assembly maintains heavy influence and control in the process because the JMSC is solely appointed by the General Assembly.[85] For example, in *Segars-Andrews v. Judicial Merit Selection Commission*, a South Carolina Family Court Judge challenged the JMSC's decision not to nominate her for reelection by the General Assembly.[86] In its ruling to dismiss the judge's complaint against the JMSC, the South Carolina Supreme Court agreed with an assertion by the JMSC in its brief to the Court that "the Court is being asked to delve into the subjective decision making process of the JMSC which is political in nature."[87] In rendering the decision, the Supreme Court essentially acknowledged the political nature of the JMSC.[88]

Perceptions remain that former legislators and family members of sitting legislators have an advantage over other candidates in the judicial selection process.[89] In 2015, many individuals, including the sitting governor, publicly questioned the candidacy of Bill Funderburk for a seat on the State Administrative Law Court because his wife was a sitting member of the South Carolina General Assembly.[90] Although Mr. Funderburk's legal

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82. John Monk, *Beatty Wins S.C. Supreme Court Justice Post*, STATE (Columbia, S.C.) (May 25, 2016), http://www.thestate.com/news/local/crime/article79793222.html.

83. Wilder, *supra* note 5, at 652.

84. *See* Kathryn M. Cook, *Judicial Selection: Lack of Women in Judiciary is Disturbing*, HERALD-JOURNAL (Aug. 29, 2004), http://www.groupstate.com/news/20040829/judicial-selection-lack-of-women-in-judiciary-is-disturbing (observing that in spite of reforms to the judicial selection process, more female and minority appointments are needed).

85. S.C. CODE ANN. § 2-19-10(A) (2005); *see also* Self, *supra* note 63 (noting concerns over the South Carolina General Assembly's control over the nomination and election process for state judges).

86. Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 115–16, 691 S.E.2d 453, 456–57 (S.C. 2010).

87. *Id.* at 459.

88. *Id.*

89. Self, *supra* note 63.

90. *Id.*

credentials and experience arguably rendered him well-qualified and fit for judicial office, his marriage to a sitting legislator cast a negative cloud upon his candidacy and subsequent election. [91] Moreover, some reasoned that the party affiliation and political positions taken by his wife would, on its own merits, impact the success of his candidacy.[92]

More notably, arguments about legislative encroachment into judicial authority surfaced during hearings in 2016 for a vacancy on the South Carolina Supreme Court.[93] A decades old court battle between South Carolina school districts and the State of South Carolina ended in a ruling by the Supreme Court concluding that the State had not fulfilled its role of providing a minimally adequate education for students in some rural and poor areas of South Carolina.[94] A split Supreme Court ordered the General Assembly to take proactive measures by developing a plan of action to improve public education in compliance with its ruling.[95] In a rare act of defiance, the South Carolina General Assembly flexed it muscles against the timing requirements stipulated in the Supreme Court's ruling.[96] In a public show of the General Assembly's displeasure with the Supreme Court's ruling, the issue became a key point of questioning regarding judicial philosophy in the selection for a Supreme Court vacancy during hearings conducted by the South Carolina General Assembly.[97] Some contended that the line of questioning for a judicial candidate posed by members of the General Assembly reflected clear legislative control of the judicial selection process and the potential for encroachment into the judicial decision making process.[98]

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91. *Id.*

92. *See id.* (noting concerns by a state representative that the political affiliation of Mr. Funderburk's wife was the source of opposition against his candidacy).

93. *See* John Monk, *SC Supreme Court Race: Lawmakers Fishing for Anti-Abbeville Sentiment*, STATE (Columbia, S.C.) (Jan. 29, 2016), http://www.thestate.com/news/local/article57431843.html (observing that members of the General Assembly specifically questioned justice candidates for the South Carolina Supreme Court about their opinion on the recent *Abbeville* case ruling).

94. Abbeville Cty. Sch. Dist. v. State, 410 S.C. 619, 662, 767 S.E.2d 157, 180 (2014).

95. *See* Carolyn Click & Dawn Hinshaw, *SC Supreme Court Finds for Poor Districts in 20-Year-Old School Equity Suit*, STATE (Columbia, S.C.) (Nov. 12, 2014), http://www.thestate.com/news/politics-government/article13911206.html (discussing the historic nature of the South Carolina Supreme Court's ruling in the *Abbeville* case).

96. *Id.*

97. *See* Monk, *supra* note 93 (noting how some members of the General Assembly sought judicial candidates who would not have agreed with the South Carolina Supreme Court's ruling in the *Abbeville* case).

98. *Id.*

On the other hand, there are clear examples of the independence of South Carolina's judiciary even in the face of legislative control over the judicial selection process. In 2014, the South Carolina Supreme Court issued a ruling against the Speaker of the South Carolina House of Representatives in an ongoing battle against the South Carolina Attorney General over an investigation into alleged ethics violations by the Speaker.[99] The Speaker has authority to personally appoint half of the JMSC members and therefore has considerable authority and influence in the judicial selection process, including the selection of South Carolina Supreme Court Justices.[100] In spite of the Speaker's considerable power to influence the nomination and election process, the South Carolina Supreme Court demonstrated its independence and a dedication to the rule of law when it ruled against the Speaker and essentially allowed the ethics investigation to proceed.[101] The case represented a significant display of the judicial branch's authority and independence from the legislative branch. Moreover, within the past year, the South Carolina Supreme Court issued a sharp rebuke in its ruling against the sitting South Carolina Attorney General in a case involving the authority of a special prosecutor to investigate allegations of ethics violations and misconduct among members of the South Carolina General Assembly.[102] When the Attorney General attempted to intervene in the investigation and remove the special prosecutor, the South Carolina Supreme Court ruled that the Attorney General could not interfere with the ongoing investigation and allowed the investigation or certain members of the General Assembly to proceed.[103] After the South Carolina Supreme Court's ruling, the ethics investigation continued and has resulted in criminal charges brought against a powerful member of the General Assembly.[104] The aforementioned two

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99. *See generally* Harrell v. Attorney Gen. of State, 409 S.C. 60, 70, 760 S.E.2d 808, 813 (2014) (opining that the South Carolina Attorney General's Office did not have authority to proceed with an investigation of the Speaker of the South Carolina House of Representative).

100. S.C. CODE ANN. § 2-19-10(B)(1) (2005).

101. *See generally Harrell*, 409 S.C. at 71, 760 S.E.2d at 814 (reversing a lower court's ruling to end an ethics investigation into actions by the Speaker of the House of Representatives by the South Carolina Attorney General, the South Carolina Supreme Court's decision ultimately allowed the case to be remanded to the lower court and the investigation continued, resulting in criminal charges and the subsequent resignation of the Speaker).

102. *See* Pascoe v. Wilson, 416 S.C. 628, 647, 788 S.E.2d 686, 696 (2016) ("[T]he Attorney General's purported termination of Pascoe after the initiation of the state grand jury was ineffective.").

103. *Id.*

104. *See* Clif LeBlanc, Cassie Cope & Avery G. Wilks, *Lowcountry Legislator Accused of Misconduct in Office Violating Ethics Law*, STATE (Columbia, S.C.) (Dec. 14, 2016), http://www.thestate.com/news/politics-government/article120875808.html (providing

cases represent a strong argument for effective judicial independence under the current method of judicial selection in spite of the role that the South Carolina General Assembly plays in electing many state judges.

V. RECOMMENDATIONS

A. Increase the Number of Nominees the JMSC May Submit to the South Carolina General Assembly for Election

One area that offers potential for improvement is increasing the number of nominations allowed after screening by the JMSC. Although state law limits the JMSC to three nominations for a judicial vacancy, the process through which the JMSC arrives at its three nominees remains subjective.[105] Several candidates may be found "qualified" and "fit" to serve, yet the JMSC can exercise its authority to choose which of those qualified and fit candidates are nominated.[106] This process leaves open the possibility for criticism that outside influence, including undue legislative influence, may be brought to bear in determining which candidates are nominated. The process also leaves many unanswered questions about why certain judicial candidates who are deemed qualified and fit are not nominated. Arguably, an unlimited number of judicial nominees would present an unmanageable challenge for the General Assembly to consider. However, a modest increase to allow up to five nominees could create greater opportunities for diversity among the state's judiciary and may give rise to a more thorough review and deliberate consideration of a larger group of candidates by members of the General Assembly.

B. Establish Statutory Authority for the Governor to Have Formal Participation in the Judicial Selection Process

One glaring absence from South Carolina's process is the participation of the state's chief elected officer, the governor. South Carolina's governor is elected by the majority of voters in the state and arguably represents the political and philosophical beliefs of the majority of the state's voters. Yet, the governor currently has no constitutional or statutory authority to appoint

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overview of the ongoing investigation of a state special prosecutor and criminal charges brought against South Carolina State Representative Jim Merrill for various violations of state laws).

105. S.C. CODE ANN. § 2-19-80(A) (2005).

106. *Id.*

judges, fill judicial vacancies, or appoint members of the JMSC.[107] In South Carolina, the absence of gubernatorial participation in the judicial selection process is by design and not by mistake.[108] South Carolina has a long history of power struggles between the executive and legislative branches of government.[109] Consequently, the South Carolina General Assembly likely has little appetite for expanding gubernatorial power. South Carolina's executive and legislative branches would be well served to consider amending the current judicial selection process to, at a minimum, provide the governor with authority to appoint some members of the JMSC. Similar proposals by members of the General Assembly have gone unheeded.[110] Such an amendment to the current process would allow the state's chief elected officer to ensure that the philosophical qualifications expressed by a majority of the state's voters are represented when evaluating judicial candidates. Additionally, in realization that the General Assembly would likely be unwilling to completely transfer its power to elect judges, consideration should be given to empowering the governor with authority to fill any mid-term judicial vacancies rather than requiring a new election by the General Assembly. Allowing the governor to fill interim judicial vacancies, as is the process in some other states, provides a balanced approach to power sharing between the executive and legislative branches of state government.[111]

C. *Establish a Statutory or Regulatory Requirement for a Creation of a Historical Demographic Data Collection System on All Candidates Seeking Judicial Office in South Carolina*

Increasing diversity in the state judiciary, particularly among women and minorities, was impliedly a goal of the 1996 reforms to judicial selection

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107. *See* Self, *supra* note 63 (discussing legislative control over the judicial selection process in South Carolina and the absence of gubernatorial involvement in the process).

108. *See id.* (highlighting numerous failed legislative proposals seeking to formally include the governor in South Carolina's judicial selection process).

109. See, for example, Gina Smith, *High Court Rules Against Haley*, STATE (Columbia, S.C.) (June 6, 2011), http://www.thestate.com/news/local/article14393663.html, which notes the history of public court battles and power struggles between the South Carolina Governor and the South Carolina General Assembly.

110. *See* Self, *supra* note 63 (discussing proposals by various members of the General Assembly to consider changes to the judicial selection process).

111. Maute, *supra* note 28, at 1203.

in South Carolina.[112] Arguably, there is no single effective method to assure improved diversity among a state's judiciary. For example, the American Bar Association released a study on diversity among state courts throughout the nation and found that, "on intermediate appellate courts, more minority judges attained their seats through merit selection, but partisan elections placed slightly more women on these courts.[113] Without clear reasoning, different selection methods can produce different outcomes. However, each method of judicial selection brings its strengths and weaknesses in relation to improving judicial diversity. In general, the study released by the American Bar Association noted that "several studies have found no link whatsoever between selection systems and diversity on the bench."[114]

Although South Carolina's current process for judicial selection requires the consideration of factors relating to diversity, state officials do not maintain a formal database containing diversity statistics on unsuccessful candidates for judicial office. In researching data for this Note, there was an obvious void in the availability of prepared historical data on unsuccessful candidates for judicial office in South Carolina. The absence of this type of historical demographic data likely impedes the ability of the South Carolina General Assembly and citizens to fully assess the state's progress in diversifying the state judiciary since the 1996 reforms. At a minimum, the South Carolina Court Administration, functioning under the auspices of the Chief Justice of the South Carolina Supreme Court, should be tasked with developing and maintaining a formal historical demographic database that is regularly updated and made available to the public. Historical demographic data, especially pertaining to unsuccessful judicial candidates, is particularly helpful in identifying patterns of failure to obtain nomination and subsequent election within a particular demographic group.[115]

VI. CONCLUSION

Today, little publicity surrounds the process for judicial selection in South Carolina. By contrast to the period of contentious judicial elections

112. *See* S.C. CODE ANN. § 2-19-35(B) (2005) (although not a requirement or quota for judicial selection, the 1996 reforms established specific evaluation criteria relating to race, gender, national origin, and other demographic factors).

113. Reddick et al., *supra* note 38, at 29.

114. *Id.* at 28.

115. See, for example, § 2-19-35(B) on the diversity criteria to be reviewed by the JMSC. Maintaining a formal system of historical data, particularly for unsuccessful candidates, should be established in South Carolina based on the metrics of evaluation used by the JMSC under the current state law.

preceding the reforms of 1996, today's judicial elections are much less contentious and rarely garner significant public attention. With exception to the infrequent elections to fill seats on the South Carolina Supreme Court, the media even gives limited coverage to judicial elections. With the recent election and swearing in of the second African-American Chief Justice of the South Carolina Supreme Court since reconstruction, even arguments that minorities are underrepresented are less persuasive.[116] In the absence of a public outcry over the present judicial selection process, it is unlikely that the recommendations contained in this Note would receive immediate and formal consideration by the State of South Carolina. Nevertheless, as South Carolina's process remains uncommon and regularly criticized in comparison to states across the nation, the time will hopefully come for additional process reforms that will allow South Carolina's process of judicial selection to continue improvement and further build upon the 1996 reforms.

116. *See* Monk, *supra* note 82 (noting the election of Justice Donald Betty as the second African-American Chief Justice of the South Carolina Supreme Court since Reconstruction).

Rethinking Judicial Selection

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The quality of justice suffers when politics invades the judicial sphere, casting doubt on the impartiality of case outcomes and eroding public confidence in our nation's system of justice. The author, senior counsel in the Democracy Program at the Brennan Center for Justice and an authority on the judicial system, observes that intensifying politicization of the judiciary is a problem that cannot be solved by merit selection of judges alone. She makes the case that the states and would-be reformers should consider a new framework for judicial selection reform, rooted in what we know about how existing systems advance or impede important values such as judicial independence, democratic legitimacy, and diversity on the bench.

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