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Ideals and High Heels— *A Look at Wake Forest University's Elder Law Clinic*

BY KATE MEWHINNEY

I would like to help my parents as they get older. I want to give back to the community. I am thinking of elder law as a possible career path. I learn better by doing.

Wake Forest's law students give many reasons for signing up to take the course called The Elder Law Clinic. As their professor, I have learned there is more to this story. Why put in long hours at the clinic, meeting clients, juggling cases, and tackling new legal issues?¹

To quote one student, "I learned to wear heels in this course." The students really like wearing those nice outfits and looking like young professionals! Even better, their classmates ask them if they have that *most* valuable of things: a job interview.

Changing from college garb to office attire is just the superficial side of the many changes going on in these soon-to-be lawyers. Besides trying on that new persona in a power suit, students want to help those in need and to explore a rapidly growing field of practice. As their mentor and professor, it is a genuine pleasure for me to teach them and watch them mature as attorneys.

Coming to The Elder Law Clinic well-prepared by the school's traditional faculty, the students are eager to put into practice

what they learned about civil procedure rules, will drafting doctrines, and family law principles. Only after the mid-point of law school are they permitted to actually represent clients.² Whether students are headed for a general civil practice that is seeing more "elder law" cases³ or to a corporate setting that addresses the "mature market," this clinical experience is a good strategic move on their part.⁴ Let's first take a look at some basics about the program.

Short History and the Structure

Around 1990, Wake Forest Law School Dean Robert K. Walsh learned that the university's medical center was planning a multi-disciplinary center on aging. Looking to increase the law school's clinical offerings, Dean Walsh collaborated with then dean of

the medical school, Dr. Richard Janeway,⁵ to include an elder law program. With a gift from R.J. Reynolds in honor of its retired CEO, J. Paul Sticht, such an innovative center was soon on the drawing board.⁶ Several years later, the J. Paul Sticht Center on Aging and Rehabilitation opened at the Wake Forest University Baptist Medical Center.⁷

This partnership has evolved into an exciting and mutually beneficial relation-



Leigh Beisch/Images.com

ship. But more about that later.

Who gets legal assistance at The Elder Law Clinic? Most clients are retired people who live in the community, and all must be age 60 or older. The legal services are provided at no charge, pursuant to ABA accreditation rules for law school clinical programs. These rules also bar students from being paid when enrolled in a clinical program.⁸ Clients must meet financial eligibility requirements⁹ and some types of cases are not accepted, such as traffic, personal injury, criminal, and business matters. Clients of The Elder Law Clinic are generally from Forsyth County or nearby counties. They apply for services by completing an application form that is available by calling the clinic or found on its website.¹⁰

A part-time, one semester clinical experience is intense. Each student meets his or her first client within a week of starting. To increase the student's comfort level, the initial cases assigned are typically single issue matters. One client wants a power of attorney and a living will. Another client has a creditor hassling him about past due payments. Cases are also assigned to match the students' interests. A student may even come with a passion for will drafting, having enjoyed their "Dead People" classes with Professors Patricia Roberts or Don Castleman.¹¹ Within a few weeks, the student is juggling a variety of cases.

Each week, the class meets as a group at the law school. This two hour class, generally taught by the clinical professor, covers substantive law and lawyering skills. Interviewing techniques and ethical rules are emphasized. Substantive topics covered include guardianship law, estate planning issues for the small estate, and long term care insurance. Winston-Salem elder law attorney Bailey Liipfert is a popular guest lecturer, explaining long-term care planning issues and the broad range of cases his firm handles in elder law and disability law.¹²

Doctors and Lawyers—Working Together?

The Elder Law Clinic's location in a vibrant teaching hospital, the Wake Forest University Baptist Medical Center, allows it to include experienced physicians in training the students. Legal issues often arise due to health problems, so students need some knowledge of the terminology of geriatrics, psychiatry, and neurology. In class, a board-

certified physician provides an overview of mental capacity issues. This helps the law students better handle guardianship cases and matters in which competency is an issue.

Under the leadership of the medical school's Dean William Applegate, the teaching partnership has continued to flourish.¹³ An experienced member of the medical school faculty takes the law students through an intensive care unit. These practitioners are the best teachers to explain the realities of end-of-life care and the benefits and limitations of advance medical directives.¹⁴ Hospice and palliative care are discussed, including basic Medicare coverage rules. Because elder law is by its nature a multidisciplinary practice, students need to have some understanding of these important areas of health law.

One final aspect of this medical-legal partnership is worth noting: this collaboration has allowed a coordinated response to proposed legislation affecting health care for the elderly. Several years ago, when a bill was introduced into the General Assembly that would have made it a felony to "assist in suicide," the Elder Law Clinic was able to serve as a catalyst to present a thoughtful response.¹⁵ Concerns were raised by a wide range of medical professionals that such a law would stifle good end-of-life palliative care. Health care providers would be scared off from providing adequate pain medication. Moreover, there was no evidence of any problem of "assisted suicide." Working relationships that had been built between lawyers who care for the elderly and their medical counterparts bore fruit. Many prominent physicians and health care providers contacted their legislators to argue against the bill. Ultimately, both the Elder Law Section and the Health Law Sections of the North Carolina Bar Association (NCBA) opposed the bill, and were soon joined by the NCBA Board of Governors. When lawyers and doctors are often at odds over such issues as malpractice litigation, Wake Forest's leadership in partnering with the medical community stands out as a hopeful exception.

But let us return to the law office setting—the clinic where the students spend most of their time. Direct client representation means a lot of interviews, fact gathering, advice letters, and figuring out what laws apply. Students cut their teeth on basic

wills, powers of attorney, consumer law advice, guardianship cases, and advice on Medicaid coverage of nursing home care.

Many cases arise from a person's loss of mental capacity. Perhaps a business persuaded an impaired elder to enter into an unconscionable contract. A relative might be seeking to be appointed guardian for a person with advanced dementia, or a completely debilitating stroke, or accident. Financial exploitation is sometimes the issue.

Here is just one example—call him Mr. Smith. When this retired factory worker developed dementia, Mr. and Mrs. Smith and their adult children decided that the eldest daughter should help the parents. She took Mr. Smith to "her lawyer" to sign a power of attorney. Then, she took her father to change his bank accounts to "joint with right of survivorship (JWROS)."

As a result of the change on the accounts, when Mr. Smith passed away, this one daughter got over \$100,000—all that her parents had accumulated. However, Mr. Smith had a will in which he left everything to his wife and, if she wasn't living, in equal shares to his seven children. This raised an obvious question: when his daughter took him to change the accounts, did Mr. Smith realize the import of the change to JWROS? Probably not. Law students Angela Cinski and Walter "Trip" Baker, now both practitioners in this state, did a superb job representing the widow in Forsyth County Superior Court. They drafted a complaint alleging breach of fiduciary duty and asking the court to impose a constructive trust on the funds. Preparing briefs, exhibits, and witnesses for the trial was a demanding but wonderfully educational experience for both students.

When the defendant filed bankruptcy, to try to discharge the state court judgment won by the students, another student—the next semester—took over and successfully argued that federal bankruptcy law barred the discharge of this type of debt. And that student won, too.

Students often advise families who have a relative in a nursing home. During the spring semester of 2006, second year student Suzanne Pomey helped a woman whose husband had an accident and requires nursing home care. The federal Medicaid program is covering part of the cost, but most of the husband's income was also having to go towards his care. This left

the wife with very little to live on. Under federal law, if the "community spouse" can establish in court that she needs more income, more income can be allocated to her from the "institutionalized spouse." Suzanne gathered the facts, drafted the necessary pleadings, and obtained the court order that her client needed.

Community education is a part of the students' experience. They each give a program, usually to a church or community group of seniors. Topics range from advance medical directives to avoiding consumer scams. Some years ago, for example, Jennifer Patterson gave a talk to a group of retired Western Electric employees about the complex topic of Medicaid coverage of nursing home care.¹⁶ These programs give students a chance to think on their feet and to see how a presentation about the law can be a useful client development tool.

Each student in The Elder Law Clinic has at least one client who is home-bound or living in a nursing home or assisted living facility. The students also visit a respite care program for people with dementia. The legal lessons? They learn about "levels of care" and the legal rights of the residents of long term care facilities.

Office management issues are another part of the learning experience in The Elder Law Clinic. Students sign off on weekly "conflicts" checks, as in any law firm, in case a conflict is not picked up by the computer-

ized checking system. Also, the important role of support staff to a successful practice quickly becomes apparent to the law students. They see the client coordinator, Jan Scales, as she patiently handles and screens telephone calls, carefully reviews letters and documents for accuracy, and helps the program turn out the best possible legal work. Students are trained to keep thorough file notes, from the initial interview, through phone calls and client meetings, to the final case disposition. They learn to follow protocols requiring the use of engagement letters and letters terminating the representation. Clear and regular communication with the client is emphasized.

From High Heels to High Ideals

Besides teaching lawyering skills and legal principles, The Elder Law Clinic seeks to impart to students a commitment to the ideal of compassion and commitment.

Hopefully this ethic of service will grow so that, as lawyers, they will carve out the time to help others. They might accept *pro bono* referrals from legal services, join the board of a non-profit group, or manage their law firm's *pro bono* program.¹⁷ This generosity is modeled for them by the North Carolina Bar Association, whose foundation has provided funding for a Client Needs Fund at the clinic for several years.¹⁸ The ideal of reaching out to others is the first one articulated for attorneys¹⁹

and is a focus at Wake Forest University, which has as its motto, "Pro Humanitate" (for humanity).

Collegiality among lawyers is another professional ideal the students learn. As a solo practitioner with ten new associates every six months, I am especially thankful that my colleagues in the bar share their expertise.²⁰ We also turn to the other fine clinical law programs in this state. Just recently, for example, law student Kara Sullivan represented a grandmother who had adopted her minor grandchild. Due to an illness, the grandmother wanted to make arrangements for this child in case of death or disability. On this matter, the Elder Law Clinic was assisted by Duke Law School's AIDS Legal Project. Kara learned from the experts how to set up a "standby guardianship" for her client.²¹

Wake Forest's "pro humanitate" extends to lawyers, of course, and so The Elder Law Clinic also provides resources in a variety of ways to the bar. Besides having a library available for lawyers, it maintains the most extensive collection in the state of Internet resources for the older client.²² Links are provided to state and federal regulations, ethics materials, recommended books, and legal organizations and advocacy groups. Other resources include a PowerPoint presentation on how to select a long-term care insurance policy,²³ a link on locating an elder law attorney in another state,²⁴ and brochures developed by The Elder Law Clinic, such as "Consumer Tips on Nursing Home Discharge."²⁵ Students participate in developing materials that may be of use to the bar, such as a resource list on "Estate Planning for Unmarried Couples"²⁶ recently added to the clinic's website. They are encouraged to write articles for practitioners.²⁷

Students in The Elder Law Clinic find, upon graduation, that they sometimes are teaching their elders in their firms. They also have become leaders in the bar, teaching overflow audiences at CLE programs on elder law, as have Tate Davis of Lewisville, Caroline Knox of Hendersonville, and Aimee Smith of Winston-Salem. And they share their expertise and time by participating in the leadership of the rapidly growing Elder Law Section of the NCBA as have Christopher J. Leonard of Wilmington and Jennifer Barnhart Garner of Pinchurst, among others. Many of them, like Heather

Angela Kreinbrink (spring 2006 student) confers with geriatrician Mary Lyles, MD.



Johnson Bowen, share their expertise by assisting hospice programs in community education programs.

Ethics are a fundamental lesson in The Elder Law Clinic. It may surprise the reader that the hardest topic is often "Who is the client?" If the elderly client is accompanied by his family, the student learns to direct his or her attention to the client.²⁸ In most cases, the first and only face-to-face interview is with the elderly client. In this meeting, rapport is built and the student and client can clarify the client's goals and to whom disclosures are made. Then, in an engagement letter, the student confirms the list of persons to whom disclosures can be made. Students are trained to give the confidences of an elderly client the same respect as those of other clients.²⁹

In some cases, the clinic's brochure "Why Am I in the Lobby?" is given to the elderly client's family. It helps to gently educate the family about the issues of client identification, conflicts of interest, competency, and confidentiality. This brochure has been adopted by the American Bar Association,³⁰ the Canadian Bar Association (in both French and English), and Solicitors for the Elderly, a practitioners' organization in the United Kingdom.

The Elder Law Clinic also has served as a resource to the State Bar when professional ethical issues arise regarding elderly clients. The clinic provided input on ethics opinions regarding the preparation of powers of attorney,³¹ the representation of impaired clients in guardianship cases,³² and the clarification of the attorney's role when first approached by the family member of an elderly person who may become a client.³³ It has obtained an Ethics Advisory Opinion clarifying that an attorney may breach confidentiality to disclose a violation of elder abuse statutes.³⁴

The ideals studied in The Elder Law Clinic go even further than community service, professionalism, and professional ethics. Students grapple with how best to balance the elderly client's goal of independence—an ethical ideal expressed in the principle of autonomy—with society's interest in protecting vulnerable people from exploitation, expressed in the ethical concept of beneficence. This dilemma is not a theoretical academic exercise in this course. Consider the student who represents an impaired elderly person whose family wants



Elizabeth Bernard (spring 2006 student) meets with a hospitalized client.

their parent forced out of her home and into someplace "safe." When a clinic student serves as this client's court-appointed guardian ad litem in a guardianship case, the clash of ideals can leave that student with his or her first gray hairs. Until recently, the duty to serve as a zealous advocate was not clearly set out in state law, though it was eloquently presented by a national leader in the field of elder law and disability rights, A. Frank Johns of Greensboro.³⁵

A young law student in The Elder Law Clinic may find himself pondering some difficult questions. Some of their clients are dealing with major health problems, such as a stroke or Alzheimer's disease. Is this the person's sole responsibility, or should society step forward to help? How far should the "ideal" of personal responsibility be taken? From the perspective of an advocate for older people, it seems the pendulum may have swung too far. Families provide most of the long term care in this country. Older people themselves and women in particular bear the heaviest load. They do this for no pay and often at a great sacrifice to their health and economic security. Does our health care policy—those laws embodied in Medicare and Medicaid—treat equitably those with chronic illness?

The tension between ideals of independence and autonomy versus social responsibility underlie many of the cases handled in

the clinic. Like other busy practitioners, we do not spend enough time focusing on this big picture in The Elder Law Clinic.³⁶ Class discussions do not do justice to the enormity of the ethical challenges faced by our aging society. It is apparent our current approach to long term care is less than ideal, for example, unless one is wealthy. Middle class families are left with their heads spinning and wallets empty when faced with expensive long term care.

There is much to learn and much advocacy to be done. The law students learn professional ethics and the ethic of service to others. Most importantly, their generation will decide what is the right thing to do for the growing numbers of older people.

Wake Forest University's commitment to helping others while teaching students is demonstrated in many arenas. In the 15 years since it was created, The Elder Law Clinic has come a long way. ■

Professor Mewhinney, who has been the managing attorney of the clinic since it was started in 1991, is a former chair of the North Carolina Bar Association's Elder Law Section. She is a Certified Superior Court Mediator and is certified as an elder law attorney by the National Elder Law Foundation, a specialty recognized by the North Carolina State Bar Board of Legal Specialization.

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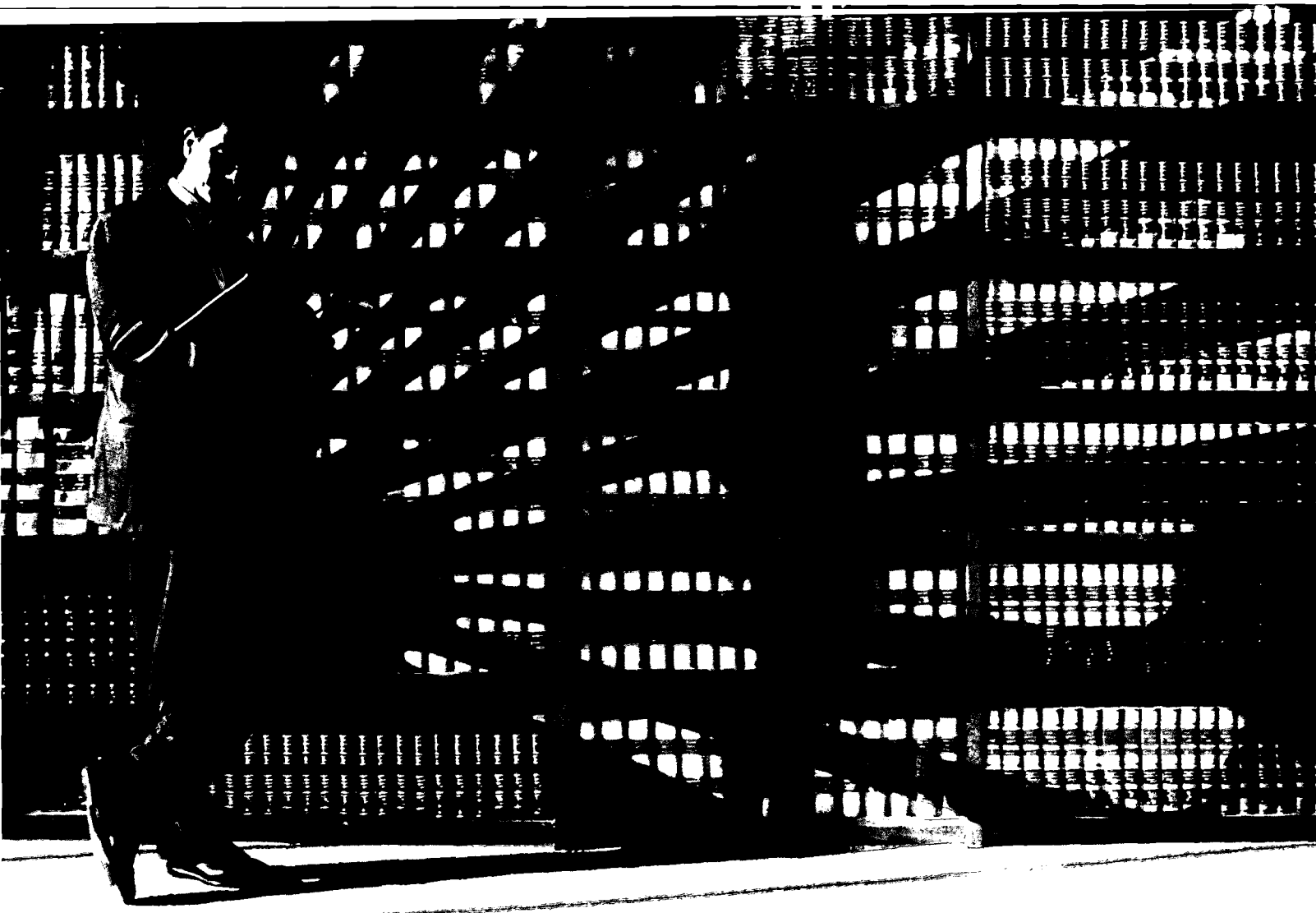
the Wake Forest University Law School's Elder
Law Clinic: www.law.wfu.edu/clinic.

Endnotes

1. A traditional law school class offers one credit per classroom hour. In The Elder Law Clinic, students get four credits, or 40% of the normal academic credit. They put in a minimum of ten hours: eight hours in the clinic and a two hour weekly class.
2. Students become "Certified" by the State Bar only upon approval by the law school dean, if under the supervision of a licensed attorney. Rules and Regulations of the NC State Bar, Subchapter C, Sec. 0200, Rules Governing the Practical Training of Law Students.
3. Elder law is a broad field and most attorneys handle only several aspects of it. Historically, it came out of the estate planning and probate field, and now includes issues of long-term care planning, health care decisions, elder abuse and breach of fiduciary duty litigation, age discrimination, public benefits, and disability law. Typical litigation also includes guardianship, will contests, and nursing home negligence.
4. For some basic demographic information, see <http://www.aging.unc.edu/infocenter/slides/index.html> or <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf>
5. Janeway was dean of the School of Medicine from 1971 to 1994.
6. The Elder Law Clinic was initially funded in part by the US Department of Education, in a program to teach law students and increase legal services to under-served communities. Since the mid-90's, it has been funded primarily by the university, including the School of Medicine. Foundations, law firms, and individual attorneys have made financial contributions to The Elder Law Clinic. For information on how to contribute, contact Margaret Lankford at (336) 758-5431.
7. The elder law program was named The Legal Clinic for the Elderly for about the first ten years of its existence.
8. Many students also enroll in the law school's Litigation Clinic, directed by Clinical Professor Carol Anderson. In this program, they are placed in a variety of settings, both civil and criminal.
9. Currently, the income limit for a single person is \$1,700/month and for a married couple it is \$2,200.
10. Clients are only seen during the academic year,

although The Elder Law Clinic is open year-round. During months that the law school is not in session, the managing attorney and a paid summer clerk handle on-going cases.

11. "Dead People" is the law student terminology for "Decedents' Estates and Trusts."
12. Liipfert is a partner with the firm of Craige, Brawley, Liipfert and Walker, and is certified as an elder law attorney by the National Elder Law Foundation.
13. The students have the option of attending a Memory Assessment Clinic or a Geriatric Consultation Clinic, which address issues of dementia, polypharmacy (drug interactions), depression, and ability to live alone. The medical center also has provided opportunities for the law students such as participating in the medical center's ethics committee, observing the administration of electroconvulsive therapy (ECT), and attending meetings of the Institutional Review Board, a federally-mandated approval mechanism for all human research projects.
14. For a thought-provoking article on this topic, see Carl E. Schneider, "After Autonomy," 41 *Wake Forest L. Rev.* 2, 411, 425-429 (Summer 2006). Regarding the limited effect of the federal law aimed at increasing the use of advance directives, see Edward J. Larson & Thomas A. Eaton, "The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act", 32 *Wake Forest L. Rev.* 249 (1997).
15. Senate Bill 145 of the 2003-2004 Session.
16. Patterson is now a practitioner in Charlotte.
17. Many local lawyers, too numerous to name, have generously assisted The Elder Law Clinic by taking referrals. Most recently, these include David Pishko, Clyde Cash, Edward Griggs, Susan Ryan, V. Tate Davis, Scott T. Horn, Aimee L. Smith, and Penni Bradshaw. Tripp Greason, an attorney at Womble Carlyle, coordinates that firm's *pro bono* program and has been invaluable in arranging for assistance to elderly clients. The firm of Kilpatrick Stockton has done terrific work representing grandparents who have custody of minor grandchildren.
18. The fund covers expenses such as court costs, filing fees for powers of attorney, and litigation expenses.
19. NC Rules of Professional Conduct, Rule 0.1(A), provides that a lawyer is "a public citizen having special responsibility for the quality of justice."
20. Some of the attorneys who have assisted, on a consultative basis, included Gail Arneke, Robin Stinson, Anna Caldwell, and Mark Addison.
21. See G.S. 35A-1373.
22. <http://www.law.wfu.edu/lawyerinfo.xml>. Readers interested in getting a twice-yearly newsletter mailed to them should contact Jan Scales at scalesjn@law.wfu.edu or by calling (336) 713-8630.
23. <http://www.law.wfu.edu/legalinfo.xml>, under Long Term Care Insurance.
24. <http://www.naela.com/>
25. <http://www.law.wfu.edu/Prebuilt/NHdischarge.PDF>
26. <http://www.law.wfu.edu/x5468.xml>. This resource is both for gay and lesbian couples and for the increasing number of older heterosexual couples who choose not to marry.
27. Articles written by students for *Elder Law*, the newsletter of the NCBA Elder Law Section: Susan J. Ryan, "The Risks of the Easy Power of Attorney," Vol. 8, No. 4 (May 2004); Robert E. Rude, MD (Dr. Rude was a student in the clinic, after many years in medical practice), "Physician Orders for Scope of Treatment (POST)," Vol 9, No. 2 (Dec. 2004).
- Articles written by students in collaboration with Prof. Kate Mewhinney for that newsletter: "Three Simple Steps Lawyers Can Take to Protect a Home: Medicaid and the 'Intent to Return Home' Rule," March 2003, John T. Griffin, reprinted in newsletters of Real Property Section (June 2003) and Estate Planning Section (Nov. 2003); "Prosecuting and Preventing Financial Abuse Under Powers of Attorney," Jan. 2002, Alex N. MacClenahan.
- Using research by student Karen W. Neely, see: Kate Mewhinney, "Gifts with Powers of Attorney—Are We Giving the Public What it Wants?" 35 *Wake Forest Jurist Magazine* (Summer 2005) 14-17; reprinted in *The NC State Bar J*, Vol. X, No. 4, Winter 2005; reprinted in *Experience* magazine, ABA Senior Lawyers Division, Vol. 16, No. 3, Spring 2006.
28. Often, but not always, the client chooses to include the relative at the end of the interview. But the risks of "undue influence" and unintended family domination during the interview merit careful attention.
29. For a comprehensive overview of ethical issues in elder law, the reader is referred to the *NAELA Journal*, Vol. 2, No. 1 (2006), which focuses on this topic. To obtain a copy, contact NAELA at (520) 881-4005, ext. 115 or email Jonathan Boyle at jboyle@naela.com.
30. The ABA brochure can be seen and ordered at <http://www.abanet.org/aging/lawyerrelationship.pdf>.
31. 2003 Formal Ethics Opinion 7.
32. 1998 Formal Ethics Opinion 16.
33. 2003 Formal Ethics Opinion 7, Inquiry #4.
34. EA 2394, at <http://www.law.wfu.edu/prebuilt/EA2394-Ethics&FinancialAbuse.pdf>
35. Frank Johns was the first chair of the NC Bar Association's Elder Law Section, which now has almost 500 members. He was also the president of the National Academy of Elder Law Attorneys (NAELA), which has 5,000 members, and is a fellow of both NAELA and the American College of Trust and Estate Counsel (ACTEC). N.C.G.S. Sec. 35A-1107(b) now requires that the guardian ad litem present the respondent's views to the court. Previously, guardians ad litem would generally present only their views on what was in their client's "best interests."
36. Fortunately, the law school faculty includes Professor Mark A. Hall, a national expert in health care law and public policy.



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