Making Your Way Through the Minefield of Expert Witness Selection in Malpractice Cases in North Carolina

BY MARK CANEPA

Here's a riddle: When is a board certified medical doctor with 20 years of directly related surgical experience not qualified to testify as a surgical expert on the standard of care in a medical malpractice case? When he or she is asked to testify in a North Carolina courtroom.

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Increasingly in North Carolina, a significant issue at trial in malpractice actions involves the somewhat loose definition of the "same or similar communities" requirement of the standard of care. Physicians and surgeons from other states—or even within North Carolina—who might otherwise be well-qualified experts, can be precluded from testifying at trial if they are not familiar with the community where the malpractice action arose. Frequently, the biggest issue at trial has become which standard of care are we talking about: Is it the standard of care practiced in Raleigh, Charlotte, or in Hendersonville? Is it the standard observed in North Carolina, or in Georgia, or perhaps New York? Is there—or should there be—any difference?

Since the phrase "standard of care" is at the heart of any malpractice case, one would think that by now the courts and the legislature would have either created, or at least worked out through judicial opinion, a working definition of the standard to guide counsel in his or her selection of experts both prior to, and during, discovery. Unfortunately, as a number of recent appellate decisions indicate, that is not the case.

This article discusses the perils and pitfalls of qualifying expert witnesses under the "same

or similar communities" requirement in malpractice actions pursuant to N.C.Gen.Stat. § 90-21.12. It analyzes recent appellate court opinions on the subject—which are varied and not altogether consistent—and concludes with suggestions as to how to ensure that your experts are allowed to reach the most important issue in the case—the standard of care—when they are called to the stand at trial.

The Statute

In most jurisdictions, an otherwise-qualified physician may testify on the standard of care from a national point of view in any medical malpractice action.

For example, an orthopedic surgeon from Duke can testify at trial in California that the standard of care for an arthroscopic repair of a torn rotator cuff is the same in Mendocino as it is in the Triad. The fact that Mendocino, California, is a coastal resort with limited medical facilities and resources, and Duke is a leading national medical center, has no impact on the admissibility of the expert's opinion. It simply goes to the weight of the testimony

However, the same is not true in the reverse: A physician from a leading medical facility in California—or any other state—can be blocked from testifying in a North Carolina malpractice action unless that expert can testify, with some authority, that he or she is familiar with the standard of practice in the very community where the alleged negligence took place.

The reason for this is that North Carolina has refused, for the most part, any attempt to recognize a national standard of care in connection with malpractice suits that are filed here. This refusal is codified in N.C.Gen.Stat. § 90-21.12, which provides, in pertinent part:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of fact is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated **in the same or similar communities** at the time of the alleged act giving rise to the cause of action.

N.C. Gen.Stat. § 90-21.12 [emphasis added]

The rationale for the statute is easy to understand. The Legislature did not want local physicians, with limited resources, to be judged by distant experts who practiced in cities with unlimited access to the latest medical technology and support. While the rule was never meant to insulate local health care providers from any and all outside influence, it also reflected a common sense approach to medicine that recognizes that there are different approaches to medical practice in different parts of the country. As the North Carolina Supreme Court observed in a malpractice action decided just one year before § 90-21.12, not all injuries are uniform and not all treatment is handled the same way in every community:

> The medical profession in Alaska, for example, would be informed and knowledgeable on the treatment of snow blindness, frozen feet, and frostbitten lungs, but they would be without experience in the treatment of rattlesnake bites. A Florida doctor would know about snake bites, but not about frozen feet…

Rucker v. High Point Memorial Hospital, 285 N.C. 519, 527-528, 206 S.E.2d 201-202 (1974).

Unfortunately, in recent years the rule set forth in § 90-21.12 has turned into a minefield for lawyers on both sides of the bar, leaving a trail of summary judgments, directed verdicts, and reversed decisions in its wake. And the biggest problem—by far—is figuring out what "in the same or similar communities" really means.

What Community Are We Talking About?

Does § 90-21.12 require that your expert must be familiar with the exact community where the alleged malpractice took place?

The answer to that question is probably no, but it sure helps if you educate your expert about the community in question. And there has been plenty of confusion on this issue—for the bench and the bar.

Pitts v. Nash Day Hospital, 605 S.E.2d 154 (2004), is a good example of such confusion.

Pitts was a wrongful death action filed by the family of a 28-year-old woman who died the day after a laparoscopic surgery at the Nash Day Hospital in Rocky Mount.

At trial, Plaintiffs offered the testimony of Daniel M. Strickland, MD, on the standard of care. The trial judge allowed Plaintiff's counsel to make three separate attempts to tender Dr. Strickland as an expert. Each time, defense counsel objected, contending that Dr. Strickland was not familiar with the standard of care in Rocky Mount "or a similar community." The last attempt to qualify Dr. Strickland came after a 45-minute recess during which the doctor drove around the community, consulted the phone book, and otherwise tried to get an impression of the local area so as to allow him to finally meet the "same or similar community rule." *Pitts v. Nash Day Hospital, Inc.*, 605 S.E.2d 154, 155-159.

But to no avail.

The court found that Plaintiff's expert was not able to competently testify on the community standard in Rocky Mount. With no expert, the Plaintiffs' case was finished, and a directed verdict was granted.

On appeal, a divided appellate panel reversed.

First, the appellate court noted that expert testimony that a particular procedure is governed by a national standard is not, in and of itself, fatal to the introduction of that expert's testimony at trial. The expert's opinion must be taken as a whole, noted the court, which went on to observe that Dr. Strickland had training and experience that was similar to that of the defendant, and that both doctors had practiced in multiple communities within North Carolina. Dr Strickland was licensed in five states, and at the time of trial practiced in West Jefferson, North Carolina, said the court. The evidence presented at trial also showed that Dr. Strickland was familiar not only with the equipment used in the laparoscopic procedure, but also with the physical and financial environment in Rocky Mount. Accordingly, held the court, he should have been allowed to testify. *Pitts v. Nash Day Hospital, Inc.*, 605 S.E.2d 154, 156-157.

The dissent was unconvinced.

In the opinion of Justice Steelman, the trial judge was correct in excluding Dr. Strickland, because, although Dr. Strickland practiced in several different communities in North Carolina, he had no basis for testifying as to the standard of practice in Rocky Mount. Justice Steelman noted the following testimony in his dissent:

Q: [Defense counsel:] So, to summarize, what you know about the standard of care for OB-GYN surgeons practicing in Rocky Mount is that you've practiced in other small towns in North Carolina, you have driven past the hospital here, you have driven around enough to have knowledge in passing of what the industrial base was, and you've looked at

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the telephone book to see what the median income and population is. Is that basically what your basis is, Doctor?

A: [Dr. Strickland:] My basis for concluding that they are similar?

Q: Is that your basis—is that the basis of what you know about Rocky Mount, North Carolina, and the standard of practice here?

A: I suppose that's accurate.

Pitts v. Nash Day Hospital, Inc., 605 S.E.2d 154, 158-159.

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Sound unnecessary?

Then consider another very recent case, *Barham v. J. Hawk MD, et al* 165 N.C. App. 708, 600 S.E.2d 1 (2004), review allowed 359 N.C. 410, 612 S.E.2d. 316 (NC April 16, 2005).

In *Barham*, a patient's estate brought a malpractice action against the defendant, alleging that the physician's improper treatment of a cyst-like growth in the patient's ear resulted in chronic infection and, ultimately, death. At trial, the defendant called one of the decedent's subsequent treating physicians, Dr. Danko Cerenko of Atlanta, to testify not only regarding his own treatment of the patient, but also to testify on the standard of care.

Plaintiffs objected to Dr. Cerenko's testifying on the standard of care, based on § 90-21.12. Both parties conducted voir dire. Clearly, Dr. Cerenko was not familiar with Hendersonville. However, defense counsel posed hypothetical questions to Dr. Cerenko in which he asked the expert to assume facts relating to the defendant's care, and to also assume facts about Hendersonville itself. These "assumed" facts included the city's population, the size of its hospital, the number of physicians there, and the number of specialists there. After assuming these facts, Dr. Cerenko said that he was familiar with the standard of care in the defendant's community. *Barham v. J. Hawk MD*, 165 N.C. App. 708, 600 S.E.2d 1, 4-5.

It was a good try by defense counsel, but it didn't work.

The court of appeals agreed with the trial judge, who allowed the doctor to testify regarding his own treatment of the decedent, but not on the standard of care. Dr. Cerenko admitted that he "knew nothing about Hendersonville, had no idea of the size of the community, knew nothing about the hospital in Hendersonville or its resources, and had no knowledge about the physicians practicing in that area," said the court. The only information he had was from the hypotheticals posed by defense counsel and this was not enough: "This testimony establishes that Dr. Cerenko neither had any knowledge about the standard of care in Hendersonville nor had any knowledge of the resources available in Hendersonville sufficient to be able to testify about the standard of care in similar communities." *Barham v. J. Hawk MD*, 165 N.C. App. 708, 600 S.E.2d 1, 5-6.

The Education of Your Expert

The court in *Barham* did not say that an expert could not educate himself about a particular city and its resources prior to taking the stand.

In *Coffman v. Roberson* 153 N.C.App. 618, 571 S.E.2d 255 (2002) review denied 356 N.C. 668, 577 S.E.2d 111 (N.C. Feb. 27, 2003), the court allowed an expert to testify pursuant to § 90-21.12 based partly on internet research he conducted to become familiar with the defendant's city.

In *Coffman*, Plaintiffs alleged that a pregnancy was terminated as a result of a negligent diagnosis of an ectopic pregnancy. Plaintiffs offered two experts at trial on the standard of care. There was no indication in the court's opinion to suggest that either expert had ever been to, or practiced, in Wilmington where the alleged negligence took place. Nevertheless, and over objection of defense counsel, both experts were allowed to testify under § 90-21.12. The jury returned a verdict for the Plaintiffs. *Coffman v. Roberson* 153 N.C.App. 618, 571 S.E.2d 255

On appeal, Defendant contended, among other things, that the trial court should not have allowed the Plaintiff's two experts to testify, as they were not familiar with the community standard in Wilmington. The appellate court affirmed.

The court found that internet research conducted by Plaintiff's experts was enough to qualify under the statute: "At trial, Dr. Horner testified that he was familiar with the standard of care with respect to obstetrics, gynecology, and sonography in communities similar to Wilmington, North Carolina," said the court. "He based this opinion on internet research about the size of the hospital, the training program, and the AHEC (Area Health Education Center) program…This testimony is sufficient to satisfy the requirements for N.C. Gen.Stat.§ 90-21.12." Likewise, the remaining expert was also allowed to testify as the result of internet research he had conducted. *Coffman v. Roberson* 153 N.C.App. 618, 624-625, 571 S.E.2d 255, 259. *See also Billings v. Rosenstein, MD.* 2005 WL 2648953 (trial court erred in disallowing expert opinion based on Section 90-21.12).

So although an expert cannot become acquainted with your community while he or she is on the stand (by hypotheticals, as in *Barham*), they can apparently become qualified by doing their own research (or driving around, as in *Pitts*), even on the internet, prior to trial.

But the expert better not forget what he or she learned about the local community before taking the stand.

In *Smith v. Whitmer*, 159 N.C.App. 192, 582 S.E.2d 669 (2003), a Nash County case, Plaintiff offered the expert opinion of Dr. Melvin Heiman, an orthopedic surgeon from Virginia who testified that he was familiar with the standard of care in Tarboro and Rocky Mount. Dr. Heiman said, among other things, that he had taken steps to become familiar with these communities and that he understood "about the approximate size of the community and what goes on there…" *Smith v. Whitmer*, 159 N.C.App. 192, 193, 582 S.E.2d 669, 670.

But Dr. Heiman admitted on cross-examination that the information he obtained concerning the local communities had come from Plaintiff's counsel, that it was not written down anywhere, and that he no longer recalled any of the specifics. Moreover, when he was asked again about the standard of care in the communities in question, Dr. Heiman asserted his belief that the standard was *national*, "regardless of what the medical community in Tarboro, North Carolina might do." *Smith v. Whitmer*, 159 N.C.App. 192, 196-197, 582 S.E.2d 669, 671-673. As a result of this testimony, Dr. Heiman's opinions on the standard of care were excluded.

The National Standard of Care and § 90-21.12

Testimony by medical experts on a "national standard of care" is a hazardous area for the unprepared. Although North Carolina case law allows such testimony, it is subject to several important conditions. The most important caveat is this: If your expert has not taken steps to become familiar with the local community, or refuses to even consider a local standard, he or she will likely be rejected.

Bak v. Cumberland County Hospital System, Inc. 165 N.C.App. 904, 602 S.E.2d 727 (table), decided in 2004, is an unpublished opinion that drives home this point.

Bak was an action brought by a husband and wife after the wife suffered a stroke following her hysterectomy. When defendants moved for summary judgment, Plaintiffs offered the expert testimony of Dr. Ahn, an OB-GYN specialist who practiced at Emory University Medical Center. On direct examination, Dr. Ahn testified that the standard of care had been breached in the treatment of Mrs. Bak.

But on cross-examination, defense counsel elicited the following testimony:

Q: [Defense counsel:] Okay. Now, Dr. Ahn, today you have spoken about standard of care, and you have told Mr. Cooper, the plaintiff's lawyer, that by standard of care you are referring to a national standard of care; is that correct?

A: [Dr. Ahn:] Yes.

Q: And is it also correct that you are not licensed to practice medicine in the state of North Carolina?

A: That's correct.

Q: And you have never practiced in North Carolina because that would be unlawful; is that correct?

A: That's correct.

Q: And you have never been to the Cape Fear Valley Hospital; is that correct?

A: That's correct.

Q: And you have never been to any other medical facility in the state of North Carolina; is that correct?

A: That's correct.

Q: And so when you give your opinions about standard of care, you are making the assumption that the standard of care is the same all over the United States? That there is a national standard of care, correct?

A: That's correct.

Bak v. Cumberland County Hospital System, Inc. 165 N.C.App. 904 602 S.E.2d 727, (unpublished). Since Dr. Ahn's testimony went only to the national standard it was insufficient, said the court, to raise a triable issue of fact as to whether the defendant physician breached the standard of care in Fayetteville.

The *Bak* court noted that more than 20 years ago, in *Haney v. Alexander*, 71 N.C. App. 731, 323 S.E.2d 430 (1984), the court allowed a medical expert to testify that the taking and reporting of vital signs by a nurse was the same in accredited hospitals across the country. But the *Bak* court refused to extend such a standard to a hysterectomy: "[A] hysterectomy is a procedure not of the kind which fits within the narrow exception of procedures so uniform, routine, and uncomplicated, that a national standard of care can be applied." *Bak v. Cumberland County Hospital System, Inc.* 165 N.C.App. 904 602 S.E.2d 727, (unpublished).

Issues involving experts who testify as to a national standard of care have appeared frequently. These cases may be distilled down into a few common principles.

First, and as set forth above, an expert who insists on testifying only as to the national standard of care will likely be rejected, either at the trial court level, or later on appeal (subject to one recent exception, discussed below). If your expert will not testify on a local standard, find another one. See, for example, *Smith v. Whitmer*, 159 N.C.App. 192, 582 S.E.2d 669 (2003) (grant of summary judgment appropriate where plaintiff's expert testified only to a national standard of care).

Second, testimony on the national standard of care is not, in and of itself, fatal to an expert's testimony where such testimony is used in conjunction with other evidence. *Leatherwood v. Ehlinger, MD*, 151 N.C.App. 15, 564 S.E.2d 883 (2002), review denied 357 N.C. 164, 580 S.E.2d 368 (N.C. May 1, 2003); *see also Baynor v. Cook*, 480 S.E.2d 419 (1997), review denied 346 N.C. 275, 487 S.E.2d 537 (N.C. June 5, 1997) (discussion of the national standard of care was allowed but a jury instruction specifically recognizing such a standard was properly rejected).

Leatherwood was a shoulder dystopia case brought in Swain County. The case was filed by a mother who alleged that her obstetrician was negligent in the care and treatment of her child during delivery.

Plaintiff's expert, Dr. Jones, was an OB-GYN licensed to practice medicine in South Carolina and Alabama. At trial, Dr. Jones testified regarding the risks of shoulder dystopia in large babies, the impact of gestational diabetes on growth rates, and on the proper methods for delivery of a large baby to minimize injury to the infant. Among other things, Dr. Jones also used an anatomical model to demonstrate the proper method of delivery in these types of cases. The trial judge granted a directed verdict for the defendant after finding that Dr. Jones was not qualified under § 90-21.12.

Plaintiffs appealed the directed verdict on several grounds, including the court's decision that Dr. Jones was not qualified under § 90-21.12. In opposition, the defendant contended "Dr. Jones' testimony related only to a national standard of care which is not permitted under N.C. Gen.Stat. § 90-21.12." *Leatherwood v. Ehlinger, MD*, 151 N.C.App. 15, 21-22, 564 S.E.2d 883, 888-889. In support of this argument, Defendant cited *Henry v. Southeastern OB-GYN Associates, PA.* discussed infra, decided in 2001. (In *Henry*, testimony on the national standard was deemed insufficient where the expert could not link the national standard to the local community.)

But the court of appeals didn't see it that way. In reversing the trial judge's directed verdict, the appellate court distinguished *Henry* on its facts:

> In contrast with the expert in *Henry*, Dr. Jones specifically testified that he had "[k]nowledge of the standards of practice among obstetricians with similar training and experience as that of [defendant] in Asheville and similar communities [at the time of Amelia's injury] with regard to the appropriate management of shoulder dystopia in delivering children." Additionally, he testified that, as a medical student, he attended rounds at the hospital

> in which Amelia was delivered. Further, the record shows that Dr. Jones practices in Greenville, South Carolina, and has practiced in similar communities in Alabama and Mississippi, which are similar in size to Asheville. **Finally, he specifically testified that "Asheville and other communities that size practice the same national standards" with respect to the management of shoulder dystopia.**

Leatherwood v. Ehlinger, MD, 151 N.C.App. 15, 22, 564 S.E.2d 883, 888.

A similar result was reached two years ago in *Cox v. Steffes, MD et al*, 161 N.C.App. 237, 587 S.E.2d 908 (2003), review denied 358 N.C. 233, 595 S.E.2d 148 (N.C. April 1, 2004).

Cox was a malpractice action following a surgery to correct a stomach acid reflux problem. The jury found for the plaintiff, but the court granted JNOV, based primarily on the trial judge's finding that the expert for Plaintiff was not qualified to testify on the standard of care in Fayetteville "or similar communities."

Plaintiff's expert was Joseph Donnelly, MD, a board-certified general and thoracic surgeon who was then retired. It is not entirely clear, but it appears from the appellate court opinion that Dr. Donnelly had extensive experience in performing the surgery at issue in *Cox*. Dr. Donnelly was apparently licensed in Pennsylvania.

The record revealed that Dr. Donnelly practiced in a similar size community in Pennsylvania and that he had been provided materials by Plaintiff's counsel about the local community in North Carolina and the Level 2 hospital where the surgery took place. Dr. Donnelly testified "Reading [Pennsylvania] was similar to Fayetteville with respect to board-certified physicians, sophisticated lab services, x-ray departments, anesthesia services, hospital certification, and access to specialists." *Cox v. Steffes, MD et al*, 161 N.C.App. 237, 244-245, 587 S.E.2d 908, 913. But this was not enough.

The appellate court reversed. The court of appeals looked not just to the testimony of Dr. Donnelly, but also to the testimony of the defendant's expert, Dr. McGuire, to find that the standard of care in Fayetteville was the same as everywhere else in the country, and that the trial judge had erred:

> Equally important, Dr. McGuire [the defense expert] testified that the standard of care at issue in this case was in fact the same across the nation. As to post-operative care, Dr. McGuire first testified, "I think it is the universally accepted standard of care." He then agreed more specifically that with respect to post-operative care "the standard of care applicable for that would be the same across the US in 1994 for any board-certified surgeon."

Cox v. Steffes, M.D. et al, 161 N.C.App. 237, 244, 587 S.E.2d 908, 913.

The appellate court also said that Dr. Donnelly was probably qualified to testify based solely on his review of the record and his knowledge of Fayetteville, but added that, "even if this testimony is disregarded, Dr. McGuire's testimony established that the standard of care with respect to post-operative care by board-certified general surgeons, under the circumstances of this case, is the same for all communities." The lesson here: If both experts agree that the standard of care is national, then it is acceptable, per *Cox*.

Is there a Statewide Standard of Care?

Is it enough for your expert to say that he or she is familiar with a statewide standard of care in North Carolina?

The answer to this questions is no. The fact that an expert witness testifies that are generally familiar with the standard of practice in North Carolina is not enough to meet the burden established by the statute. The expert must be able to testify that are familiar with "the same or similar communities" where the defendant practiced medicine.

This issue has also caused problems for counsel in recent years.

For example, in *Tucker v. Meiss*, 127 N.C.App. 197, 487 S.E.2d 827 (1997), the appellate court affirmed a directed verdict in favor of the defendant physician, even though the plaintiff's expert testified that he was familiar with the standard of care in North Carolina.

In *Tucker*, a case out of Iredell County, Plaintiff and her husband sought to recover for an allegedly negligent episiotomy in Winston-Salem. Plaintiff's expert, Dr. Tasker, testified that although he was an OB-GYN licensed in Tennessee, he was quite familiar with the standard of practice for OB-GYNs who performed episiotomies in North Carolina. What he did not say, according to the appellate court, was that he was specifically familiar with the standards of practice in Winston-Salem. As such, his testimony was precluded, and Plaintiffs were left without their standard of care expert. *Tucker v. Meiss*, 127 N.C.App. 197, 198-199, 487 S.E.2d 827, 828-829.

A similar result was reached again four years later in *Henry v. Southeastern OB-GYN Associates, PA*, 145 N.C.App. 208, 555 S.E.2d 245 (2001), affirmed 354 N.C. 570, 557 S.E.2d 530 (N.C. Dec. 18, 2001), a case out of New Hanover County that also resulted in a directed verdict for the defense.

Henry was a shoulder dystopia case brought by the parents of an infant to recover for allegedly negligent care rendered in Wilmington. Plaintiffs retained Dr. Chauhan of Spartanburg as their expert. Dr. Chauhan testified that he was familiar with standards of practice at both Duke and Chapel Hill. He also said that the standard of care was the same in all three communities—Spartanburg, Duke, and Chapel Hill. Therefore, Plaintiff argued, Dr. Chauhan met the "similar communities" requirement imposed by the statute.

The trial judge, and later the appellate court, disagreed. "Even if Dr. Chauhan was familiar with the standard of care in Chapel Hill or Durham," observed the court, "there was no evidence that a similar standard of care prevailed in Wilmington." The directed verdict was affirmed. *Henry v. Southeastern OB-GYN Associates, PA*, 145 N.C. App. 208, 211-213, 550 S.E.2d 245, 247-248 (the court also rejected testimony from Plaintiff's expert that a national standard of care applied in shoulder dystopia cases). For an even more recent case on this issue, see *Ramirez v. Little, MD*. 609 S.E.2d 499 (Table-unpublished), 2005 WL 465525 (N.C.App. March 2005).

What About Other States?

What if your expert in North Carolina is seeking to testify as to the standard of care in another state? Does the expert have to testify as to the "same or similar community" of the foreign jurisdiction?

The answer to that question is yes, at least where the underlying action is brought here.

In *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 535 S.E.2d 55 (2000), the appellate court noted that it would be necessary for a North Carolina pharmacist, testifying against a pharmacist in South Carolina, to otherwise qualify under the "same or similar communities" rule of § 90-21.12. This meant that in *Brooks*, the experts would have to be familiar with the standards of practice in Greenville, South Carolina, even though the action was filed in North Carolina. *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 652-

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657, 535 S.E.2d 55, 65-67.

The *Brooks* case also provides some important, albeit confusing, lessons in preserving issues related to § 90-21.12 for appeal.

In *Brooks*, Plaintiff alleged that his physician was negligent in writing a prescription, and that a Wal-Mart store pharmacist was negligent for filling the prescription. The prescription was filled in Wal-Mart's Greenville, South Carolina, store. The physician and the store, apparently happy to do the work for Plaintiff's counsel, in turn sued each other. The Guilford County jury which heard the case returned a verdict for $2.5 million in compensatory damages and $1 in punitive damages against Wal-Mart, which subsequently brought an appeal on more than 33 different issues, including the claim that an expert at trial was not qualified to testify under § 90-21.12.

Plaintiff's expert was Joseph Burton, a pharmacist who maintained a practice in Greensboro, North Carolina. The gist of Dr. Burton's testimony was that Wal-Mart's pharmacist had failed to adhere to the standard of care in filling a prescription of Prednisone, that was too high. Wal-Mart maintained that Burton was not competent to testify as to the standard of practice in Greenville because his testimony "revealed a total dearth of knowledge or familiarity with the practice of pharmacy in that community." *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 654, 535 S.E.2d 55, 65.

Although Burton testified summarily that he believed he was familiar with the appropriate standard, he pretty much admitted on cross-examination that the standard to which he was referring was a national one. There was no testimony that he had ever practiced in Greenville, that he had done any independent research on that community, or that he had been provided with any information on the city or its pharmacy community by counsel. Observed the court:

> Burton also admitted he was not familiar with South Carolina Statutes or administrative regulations governing the practice of pharmacy, that he had not attended any seminars discussing such statutes or regulations, and that he had not discussed the instant case with any South Carolina pharmacist.

Brooks v. Wal-Mart Stores, 139 N.C.App. 637, 656, 535 S.E.2d 55, 67.

Nonetheless, the testimony was allowed to stand. The appellate court held that Wal-Mart had waived its objections to Burton's testimony by several actions.

First, said the court, Wal-Mart initially interposed no objection to the tender by Plaintiff of Burton as "an expert in the field of pharmacy." The court noted that Wal-Mart should have objected and requested an Evidence Code § 705 hearing to conduct voir dire before the expert was offered to the jury.

To make matters worse, continued the court, Wal-Mart failed to move to strike (following its objection) Burton's testimony on the standard of care and therefore waived its objection.

Finally, said the court, Wal-Mart waived any benefit of its earlier objections to the testimony of Burton when defense counsel proceeded to cross-examine the expert and thereby elicited the same testimony that was proffered on direct. *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 656, 535 S.E.2d 55, 67.

It is hard to fault defense counsel for proceeding on cross-examination (wherein counsel effectively proved that the expert was not

qualified under § 90-21.12) when the trial judge has overruled counsel's previous objections. In this sense, *Brooks* is a rather confusing opinion. Still, the case should be a warning, and a possible road map, for future actions in which experts are challenged and how to best accomplish that task during trial.

The National Standard Allowed?

Are there any situations in which an expert can be totally oblivious to the local community and still be accepted as an expert on the standard of care?

Well, maybe.

One example is found in *Marley v. Graper*, 135 N.C.App. 423, 521 S.E.2d 129 (1999), cert. denied, 351 N.C. 358, 549 S.E.2d 214 (N.C. Feb. 3, 2000), a case that at first glance seems to run contrary to decisions both before and after 1999.

Marley was a malpractice action brought by a patient and her husband alleging negligence in connection with a surgery performed at a hospital in Greensboro. Following surgery, the patient experienced memory loss, confusion, hallucinations, and vision impairment. The patient was ultimately diagnosed with optic neuropathy, a condition caused by decreased blood flow to the end of the optic nerve, leading to tissue death. *Marley v. Graper*, 135 N.C.App. 423, 425, 521 S.E.2d 129, 131-132.

The *Marley* case went to trial in Mecklenburg County. The jury returned a defense verdict. On appeal of the verdict, Plaintiff contended, among other things, that the trial judge had erred in admitting the videotaped testimony of a defense expert who, according to the appellate opinion, "did not testify that he was familiar with the standard of care for Greensboro." *Marley v. Graper*, 135 N.C.App. 423, 430, 521 S.E.2d 129,134-135. What the expert did say, however, was that the defendant met *any* standard of care.

The appellate court observed that the videotaped testimony of the expert "obviated the need" for familiarity with the local community standards. "If the standard of care for Greensboro matched the highest standard in the country," said the court, "Graper's treatment of Marley met that standard." If the standard of practicing medicine was lower in Greensboro, continued the court, then the treatment of the plaintiff exceeded the area standard. Either way, the requirements of § 90-21.12 were met.

The *Marley* decision is best suited to defense experts in a malpractice trial. As long as the expert testifies that the defendant met the highest standard of care found anywhere, the testimony comes in. However, the reverse is not true: an expert retained by the plaintiff could not testify that the defendant breached the standard of care anywhere—that expert would still have to testify as to the standard of practice that existed in the same or similar community at the time the treatment was rendered.

Getting Your Expert Qualified

What can be distilled from all of these opinions, and how should counsel best approach the task of getting their expert qualified?

First, keep a close watch on advance sheets from the court of appeals—both the published and unpublished decisions. These cases are common, and they appear to be reaching the appellate court on a regular basis. Even where the opinion is unpublished, the fact patterns involving § 90-21.12 issues can provide guidance for you as you prepare your own experts for trial.

Second, be careful with any expert who insists that the standard of care in your case is the same everywhere—that the standard is a national one. Your expert may very well be correct, but that will be of no benefit to you at trial if the court insists on requiring the expert to make the link to the "same or similar communities" involved in your case. If you cannot get your expert to understand the requirements of § 90-21.12, find another expert.

On a related question, even if you represent the defendant physician and your expert is ready to state that your client met the "highest standard of care that there is," as in the *Marley* case, be prepared to have a backup plan. There is just too much uncertainty in these cases to have your entire case depend on an expert who cannot make the local link.

Next, do not assume anything—always a good rule for lawyers. If you find an expert here in North Carolina, find out what he knows about the local community in which the alleged malpractice took place. Has he ever practiced there? Does he know any other doctors there? Did he do his internship or residency there? Does he ever take referrals from that community? Remember, just because your expert is familiar with the standard of care in North Carolina, does not mean that he will be allowed to testify in each and every county here.

There are no cases in which an out-of-state expert is precluded from testifying simply because he does not practice here. What lands lawyers in trouble are experts who know nothing about the local community.

If the expert has no ties here, educate him, and also instruct him to do a little research on his own: What type of hospital is there? What are the facilities? What kind of medical community is it? Where is it (this is especially important for out-of-state experts who know nothing about North Carolina), and the like. Internet research is available for your expert (as in the *Coffman* case) and your own local contacts can provide information for your expert on the medical community.

If you are representing the defendant, do not forget that your own client may have a wealth of information about the local medical community that can be passed on, through you, to your expert.

For either side, once your expert knows more about the community, he or she may be able to compare it directly to a similar size community once practiced in—or that he or she practices in now.

If you are challenging an expert, consider doing so pursuant to Evidence Code § 705 outside the presence of the jury. If you have already deposed the expert, you should have a pretty good idea prior to trial as to whether or not you can make a good case that he or she be precluded pursuant to § 90-21.12. And if the court overrules your challenge, keep in mind the requirements for preserving your challenge on appeal.

Most medical malpractice cases require your expert to spend several hours, at least, in review of the file to prepare for a deposition. Many cases require much more preparation. So do not fret over asking your expert to spend another hour or two educating himself about the local community. If he does not, then all the rest of the time for which you are billed may be a useless (for you and your client) academic exercise. ■

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Pork on the Prairie

BY WAYLAND COOKE

We didn't make this trip with the idea of writing about it. But when Steve Crihfield, one of our State Bar Councilors, heard about it, he urged that we produce an account of the venture because "…people need to read about lawyers doing enjoyable things, not just about legal matters." Steve has long been involved in attorneys' quality of life issues such as the secured leave program and thought the story of this trip would be a pleasant change of pace for the *Journal*.

Greg Brooks and the author at a rest stop in Iowa.

It all started when I learned Garrison Keillor's public radio show "A Prairie Home Companion" would be broadcasting from the Corn Palace in Mitchell, South Dakota. This serendipitous juxtaposition was too good to pass up so I mentioned it to Kevin Morse, friend, fellow attorney, and afficionado of the show as well as the Corn Palace. Kevin and Greg Brooks, a local sleuth, are the Pig Masters—they cook whole pigs eastern North Carolina style over hickory coals for various events. We convinced Greg and my law partner, Davis North, that "Pork on the Prairie" would be an interesting journey.

The idea was to cook a pig for the cast and crew of A Prairie Home Companion in connection with their appearance at the Corn Palace. I wrote to Garrison Keillor extolling the virtues of the Pig Masters and offering to provide a meal for him and his entourage. Katrina Cicala, his assistant, called to accept our offer and we began planning the details.

Davis North and I met over a poker table in Chapel Hill in the late 60's. We later both worked as assistant public defenders for Wally Harrelson in Greensboro and have practiced primarily criminal law together since 1983. We have taken several lengthy road trips with friends and this looked like a good opportunity for another.

Kevin Morse also practices criminal law in Greensboro. He is married to Kathleen O'Connell, an attractive and somewhat flamboyant assistant district attorney here. I knew Kevin enjoyed driving, road trips, and had visited the Corn Palace years back. He imme-

Dinnertime at the Corn Palace (above), the Pig Rig at the Gateway Arch (right), the Pigmasters with the Showfolk. From left, Wayland Cooke, Amanda Barrett, Davis North, Garrison Keillor, Abby DeWald, Greg Brooks and Kevin Morse. Abby and Amanda are the Ditty Bops (below).

diately recognized the merit of the idea.

Greg Brooks is an ex-policeman, formerly head of security at Guilford Mills, presently a private investigator and full-time philosopher. We have learned never to bring up the Kennedy assassination around him unless there's about two hours to kill. Besides needing his skills as one of the Pig Masters, we brought him along to do the heavy thinking and PR work.

Kevin and Greg have a 14 foot enclosed trailer, the "Pig Rig," with a back door that drops to make a ramp. There are kitchen cabinets built in, a CD stereo, and plasma TV with dish. It holds a pig cooker made from a 275 gallon oil tank, a keg refrigerator, a 55-gallon drum burn barrel, two canopy tents, several tables, and a large tub for transporting the pig.

The Red Oak Brewery in Greensboro donated a keg of its amber beer and our local Cheerwine distributor contributed three cases of his finest vintage. We were intent on making some southern cuisine available to those who might otherwise be deprived. In that vein, we procured two cases of Moon Pies and prepared to haul pig.

The Corn Palace rises majestically from the rolling plains of South Dakota in the town of Mitchell (population 14,588), home of George McGovern. It is designed as a theater with a basketball court just in front of the stage. The Mitchell High School basketball team, The Kernels, plays there and won the South Dakota state championship this year. The place attracts tourists in bushels to see the large murals done in a mosaic style made of corn, grasses and grains grown locally. These huge murals adorn the outside of the building and are replaced annually with a different theme portrayed every year. This has been going on since 1892. The combination of this great building plus A Prairie Home Companion beckoned us westward.

We split and loaded a quarter cord of hickory wood into the bed of Kevin's Dodge Hemi truck and he, Greg, and I left early on Wednesday morning. We were to pick up Davis at the Omaha airport Thursday afternoon. The Pig Rig attracted plenty of interest at gas stops (and there were an abundance of those). After we explained our trip to a kid running a service station in Tennessee, he refused to let us pay for the fresh bags of ice we'd put on the pig. We kept about 30 bags of ice under and on top of the pig during its voyage west. We got into St. Louis before dark and photographed the Pig Rig under the Gateway Arch on the banks of the Mississippi River. The parking staff at the Radisson saw the Pig Rig, thought we were

The eighth wonder of the world - the Corn Palace, Mitchell, South Dakota (right), Cooke and Brooks in Hannibal, MO (below right), the Pig Rig at Churchill Downs, Louisville, KY (below left).

carrying barbeque ready for eating, and provided space for the truck and trailer at their front door. We had a great dinner at Charley Gitto's, an Italian restaurant about two blocks from the courthouse where the Dred Scott decision was handed down. We closed down the hotel bar while engaging in a multi-topic discussion no one cared to recall in the morning, particularly our PR man, Greg.

Thursday morning we made the obligatory stop in Brunswick, Missouri, to visit the WORLD'S LARGEST PECAN.(Lewis and Clark Journals, Vol. III "...a nutte of greate sizze.") This 12,000 pound beauty sits proudly adjacent to Highway 24 close by a James Hican tree. That tree was developed by George James in 1976 and yields nuts that look like pecans on steroids—part pecan, part hickory. They will ship you a tree for $21.95 (nuthut@mcmsvs.com).

We then visited the house in St. Joseph, Missouri, where Robert Ford shot Jesse James in the back of the head. Jesse was straightening a picture on the wall at the time. He should have left interior decorating to his wife. After paying our respects, we headed up the Big Muddy to pick up Davis at the airport in Omaha, which is actually in Carter Lake, Iowa, even though it's west of the Missouri River and all the rest of Iowa is east of the river. It looks like a situation ripe for a riparian rights controversy with some accretion law thrown in.

We proceeded on up the Missouri to Mitchell where we were met by Mark Schilling, director of the Corn Palace. He was there at 9:00 pm Thursday to point out where we should set up Friday, and was there at 8:30 am Sunday when we were leaving town. He is earning his pay. Mark was very helpful and genuinely nice as were all the folks we encountered in Mitchell.

At 6:30 Friday morning we lit the fire barrel to start producing coals, and put the pig on the cooker at 7:00. We set up two canopy tents, put out some tasteful outdoor carpeting, and purchased hanging plants and palm trees to spiff up the decor at the trailer. After plugging into municipal power at City Hall adjacent to the Corn Palace, we cranked up the Allman Brothers, adding to the ambiance. The plan was to serve dinner to the cast and crew of A Prairie Home Companion, employees of the Corn Palace, and folks from South Dakota Public Radio after the rehearsal that evening.

A Prairie Home Companion is a two hour radio show carried live on public broadcasting at 6:00 pm eastern time on Saturdays with a rebroadcast on Sunday. Garrison Keillor is the host and moving force. He is joined by actress Sue Scott, actors Tim Russell and Fred Newman, who is also the sound effects maestro, and the

Guys' All Star Shoe Band headed by Rich Dworsky. The guests for the week were Prudence Johnson, an accomplished singer, the Ditty Bops, two female musicians from California, and George McGovern, former US senator and the Democratic presidential candidate defeated by Richard Nixon in 1972.

Our menu was headlined by a 91-pound pig who hailed from Pikeville, NC. He was a hardy road tripper and made the 1520 mile trip without a squeal of complaint. We soaked a bunch of red potatoes overnight in water, garlic powder, and onion powder, and prepared a huge pot of green beans with side meat. It was Fred Newman's birthday and Sue Scott brought us a cake to serve up for dessert along with the *tarts de lune*.

Downtown Mitchell was soon permeated with the aroma of hickory smoke and pig and lots of people stopped by looking to purchase a barbeque sandwich. These included two gentlemen from Fayetteville who professed to cook pigs themselves and recognized the bouquet from blocks away. A young attorney from Mitchell, Doug Dailey, dropped by at lunchtime, had a couple of Red Oaks, and discussed South Dakota law with us. We invited him to come for dinner and he did along with his parents who are big fans of Garrison Keillor and the show.

I had written to Alice Claggett, mayor of Mitchell, and invited her and the aldermen to join us for dinner. Alice first stopped by around 9:00 am on the way into her office. It was love at first sight. Alice is 78 years old and an absolute pistol. She speaks her mind and has a great sense of humor. She is a splendid ambassador for Mitchell and the town is blessed to have her. She enjoyed the Red Oak and granted us an informal dispensation to partake of it on city property.

Harold Campbell, reporter for the *Mitchell Daily Republic*, caught a whiff of the pungent pork and dropped by. He took photographs and wrote a story which included us for the Saturday edition. Needless to say, we wined and dined Harold in great style. We sent a large portion of barbeque back to the newsroom with him. He was pleased to quote Greg's explanation about our motivation for making the trip.

At 7:30 pm the rehearsal was over and about 40 hungry folks descended on us. Musicians and actors like to eat. These people went through the pig and side dishes like Sherman through Georgia. They ate everything but the squeal. Garrison Keillor devoured two large plates of barbeque and washed them down with Cheerwine. Fred Newman is from southern Georgia and a confirmed vegetarian except for barbeque. He swore this was the best pig he had ever encountered. The Ditty Bops, Amanda and Abby, are also vegetarians but loved the green beans. (We neglected to tell them about the side meat.) Many diners ended up pulling pork directly from the pig on the cooker. The Red Oak beer was enthusiastically enjoyed.

The Pig Rig ready for some fast laps at Indianapolis Motor Speedway.

As the show's entourage numbers about 25, they rarely eat and socialize as a group. Deb Beck, Keillor's logistics and road manager, said the group appreciated the opportunity to get together, eat, and talk. Several of the cast members autographed the Pig Rig including Keillor who penned an impromptu poem on the side door. After the meal we adjourned to the Holiday Inn lounge to continue socializing with the cast and crew.

Saturday morning we scrubbed all our equipment and packed the Pig Rig. Garrison Keillor showed us around backstage and we donned earphones to listen to the musicians rehearse. Keillor was wearing a red "McGovern" button we had given him which matched his red tennis shoes. He is a fellow of few words but was very generous of his time with us.

We had great seats for the live broadcast Saturday and the show confirmed for us how talented these people are. Fred Newman can make a zillion different sounds using only his mouth. Sue Scott and Tim Russell were a joy to watch. The music was great. As the show was on May 7, most of the songs had a Mother's Day theme. George McGovern did a guest appearance on the "Lives of the Cowboys" segment and, for an 82-year-old gentlemen, did a great job with an awkward script. Garrison Keillor's weekly soliloquy, the "News from Lake Woebegon" was unscripted and apparently off-the-cuff. Kevin noted, and we agreed, having seen the show done live, we'd never listen to it the same way again.

Early Sunday we stopped by the Corn Palace on the way out of town. Mark Schilling was on the job and Mayor Clagget drove by while we were parked out front. Bev Robinson, one of the aldermen, had joined us for dinner and she and her husband gave us gift bags full of South Dakota products. As I said, all the people we met in Mitchell, including the showfolk, were as nice and pleasant as could be.

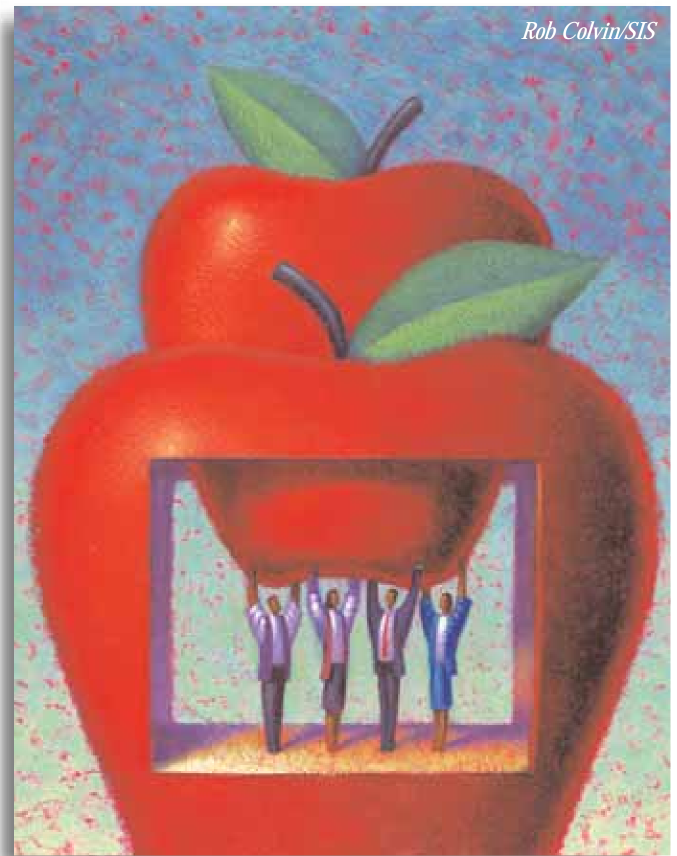
On the trip back to Greensboro we photographed the Pig Rig at Indianapolis Motor Speedway and Churchill Downs. We covered almost 3200 miles, met some wonderful people, and had a great time. A Prairie Home Companion and the Corn Palace make a special couple and we were lucky to be at the wedding. ■

Wayland Cooke graduated from UNC-CH in 1971 and received his JD from NCCU in 1976. He practices with Cahoon & Swisher, North, Cooke & Landreth.

Do You Want to Be a College Professor?

BY JOHN WINN

Tired of grinding out 2,000 billable hours per year? Would you consider a career change that lets you spend more time with your spouse and children? How about a job that gives you time off for holidays plus summers, with pay? Would you consider a profession that allows you to make a positive impact on others by instilling respect for the rule of law? On the other hand, can you accept a significant decrease in salary, a lesser pension, or a requirement that you move to a new state to practice your craft?



Rob Colvin/SIS

More than a few weary and worn mid-career lawyers consider the possibility of teaching full or part-time in a college or non-law graduate degree program. Why not teach law school? If you believe you would be competitive for a law school teaching position, that might be a first choice, but few of us have the background or experience to be competitive for a teaching position at a law school.[1] On the other hand, although salaries tend to be lower[2] than law school salaries, there are other advantages to teaching outside law schools. These include the freedom to independently develop courses without necessarily focusing on current jurisprudence (or the bar exam); discussing the law with young people; and mentoring students in the legal and ethical responsibil-

> "Another obstacle you may encounter is what may be termed the 'Ph.D. thing.' While your Juris Doctorate (JD) is a doctoral degree, there are institutional and cultural biases against lawyers in academia."

ities of citizenship. If you believe you have a real desire to teach, there is no reason not to at least explore the possibilities, while remaining aware of the drawbacks.

I. Qualifications of a College Professor

Once you decide that teaching is something you wish to pursue, there are hurdles the legally trained jobseeker must confront. The first of these hurdles is teaching experience. There is a maxim that states "the best way to get a teaching job is to be in a teaching job to begin with." In other words, academic search committees place a great deal of emphasis on experience.

Education is a commodity and tuition-paying students have the right to expect a certain minimum level of teaching ability. Hiring an untested teacher is a gamble most institutions cannot afford. Prior experience teaching, even in an adjunct position at a local community college or night school program will open doors for full-time employment. Adjunct teaching is an ideal "entry level" position for lawyers to gain a foothold into academics.

In this respect, if you have the opportunity to teach a law-related course as an adjunct, it should be your highest professional priority. Your students deserve a superior academic experience. Poor preparation, tardiness, absences, or lack of respect towards your students will yield unfavorable term-end feedback and marginal teaching evaluations. Being an adjunct is a great way to hone teaching skills and accumulate needed experience.

Another obstacle you may encounter is what may be termed the "Ph.D. thing." While your Juris Doctorate (JD) is a doctoral degree, there are institutional and cultural biases against lawyers in academia.[3] This bias exists despite the fact that a JD requires a comparable number of credit hours of study[4] (plus a bar exam). On the other hand, a Ph.D. often takes longer to complete because a dissertation[5] is required. While law courses might be more rigorous than some Ph.D. courses, professors tend to view the Ph.D. as superior to the JD because of the added research component in the Ph.D. Lawyers applying for non-law teaching positions will have to understand the world of Ph.D. academics as well as they understand the legal environment.

There are also issues of accreditation that some schools may wrestle with when considering whether to hire a JD over a Ph.D. College and masters degree programs fall under both regional[6] and program-based[7] or specialized accreditation agencies. Most accreditation agencies will recognize the JD as an acceptable terminal degree if the applicant's file demonstrates a commitment to research, teaching, or service in that particular field.[8] Nevertheless, having an additional post-graduate degree of any kind (MS, MA, MBA, or LLM) is a significant advantage if you don't possess a Ph.D. Another option is to enroll in a Ph.D. program part-time or via an accredited distance learning (internet-based) degree program.[9]

II. Available Positions and Successful Applications

After deciding that you might wish to pursue an academic position, it is important to focus on the two keys to success: (1) finding open academic positions; and (2) creating a marketable curriculum vitae (CV).[10] You must bear in mind that there are more legal jobs than professorial jobs as there are more law firms than colleges. For some academic positions, English or History for example, there may be hundreds of Ph.D.-qualified candidates seeking a single position. This means that lawyers must determine what teaching niche they might occupy and probably be willing to relocate as well.

For planning purposes, the normal academic hiring season begins with job announcements in late fall, a review of applications during the holiday season, and concludes with campus visits in the early spring for positions in the fall semester. Thanks to the internet, finding available jobs is fairly easy. Most teaching solicitations will indicate whether or not initial letters of interest and CVs may be sent via e-mail.[11] It may be worthwhile to mention here that unsolicited mailings to schools not advertising any open positions are unlikely to yield any positive responses.

Two job information sources of great benefit are The Chronicle of Higher Education's "Careers Online"[12] website and the American Society of Criminology's "Employment Exchange."[13] Chronicle Careers lists thousands of teaching positions by discipline, state, region, and institution. Chronicle Careers also has specific listings for "law and legal studies" which includes potential teaching positions in law-related fields. Law-related areas include paralegal studies, labor relations, law enforcement, criminal justice, criminology, homeland security, management of criminal justice agencies, forensic science, debating, government, international relations, and, of course, political science.

Most (if not all) of the positions listed in the alternative Employment Exchange specify that a Ph.D. in sociology, criminology, or related field is required. Nevertheless, if teaching responsibilities include criminal law, courts, terrorism, law enforcement,[14] evidence,[15] juvenile justice, corrections, conflict resolution, white-collar crime, or homeland security, a JD with experience in these fields might persuade a search committee[16] to consider a strong non-Ph.D. candidate.

III. Developing Your Curriculum Vitae

While similar in many ways to a resume, the curriculum vitae ("CV") focuses primarily upon three academic domains: teaching, research (i.e. scholarship), and service. In this context, a curriculum vitae should be longer (2-3 pages or more) and more detailed than a resume. While work experience is important, the CV should focus on education, teaching, publications, lectures,

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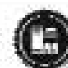

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Don't forget to list continuing legal education (CLE) courses, especially those at which you have taught or lectured. You should expect to draft slightly different versions of your CV for each position in which you are interested. For example, a CV prepared for an undergraduate business law position will be different than one prepared in response to an assignment teaching political science or criminal justice at a community college.

A carefully drafted cover letter for your CV is also important. The cover letter is what may persuade search committee members to look at your CV. After referencing the position for which you are applying, start with your strongest qualification. "I have four years of graduate and undergraduate teaching experience as an adjunct faculty member at East Westchester County Community College." If the position announcement specifies a Ph.D., focus your cover letter on actual knowledge and skills in the field. "In addition to my teaching, I have substantial experience and training in most of the fields referenced in your position description."

If members of the search committee haven't considered that an experienced lawyer may be a better choice to teach government, labor relations, or criminal justice, this is your opportunity to make your case. Often, the Ph.D. will be a minimum requirement, especially at more prestigious colleges, but even they might have a need for a JD. For example, a school of education within a university will usually hire only Ph.D. professors, but the school might have a need for a lawyer/professor to teach the courses pertaining to educational law, which involves federal and state constitutions and statutes.

Another document that is usually expected with a cover letter and CV is a "statement of teaching philosophy." The statement of teaching philosophy should not exceed a page in length. It simply articulates your vision of the learning process and what you seek to achieve in the classroom. Frankly, it probably also functions primarily as a screening tool to weed out applicants who can't write, use bad grammar, or don't proofread.

My statement of teaching philosophy included references to active listening and positive reinforcement, but focused primarily on my use of digital imagery (PowerPoint[17]) in the classroom to appeal to visual and abstract learners. I ended the statement by mentioning my most important goals in the classroom, instilling respect for the rule of law and ethical decision making. There is a wealth of useful information online on how to prepare effective statements of teaching philosophy.[18] At a minimum, make sure you ask someone to review your statement to ensure it is reasonably articulate and free of typos.

IV. Completing the Application Process

The final component of your packet will be letters of recommendation and transcripts. Most schools will accept photocopied college and law school transcripts, while others may request official sealed transcripts. You should expect to be asked for a minimum of three letters of recommendation. If you have adjunct experience, letters from your department head or other faculty

"You will probably also begin to receive a good number of polite rejection letters. Don't let this discourage you. Remember, as a JD, you are looking for a teaching department with open-minded faculty willing to consider your application despite perceptions you may lack traditional academic qualifications."

will probably be of greater value than letters from local judges, the mayor, or your senior partner. If you have been involved in community service, charitable activities, or perhaps a pro se program, letters regarding this service should be included.

Letters should emphasize your teaching experience, popularity with students, and ability to get along well with other people. Search committees are not necessarily looking for the "best teacher." They are looking for well-qualified candidates that will fit in and contribute to their departments without problems. A "good colleague" is usually better than a great instructor who does not get along with others.

With luck and patience, you should start receiving routine letters from schools seeking voluntary disclosure of your racial, ethnic, veterans, or handicap status. These form letters often come from university or college affirmative action offices. I filled them in and returned them, for no other reason than to avoid any possible ripple effects of not sending in the form. Another colleague advised me to throw them in the trash. If you are a minority or female, I think this information would certainly be in your best interests to provide.[19]

You will probably also begin to receive a good number of polite rejection letters. Don't let this discourage you. Remember, as a JD, you are looking for a teaching department with open-minded faculty willing to consider your application despite perceptions you may lack traditional academic qualifications. Even well qualified Ph.D. candidates normally do not expect more than a handful of positive responses from among the dozens of applications submitted.

V. Interviewing and Campus Visits

With some luck, however, the next step may be a friendly phone call from the chairperson of the search committee, or the departmental chair, who will arrange for a phone interview (conference call) with the members of the faculty search committee. Phone interviews may be the most important step in the hiring process. A request for a phone interview means that you (and probably several other candidates) are qualified for the job.

The search committee wants to find out in the phone interview if you will fit in as a teacher and colleague. To prepare, you may write out a list of questions with answers to the usual areas of inquiry. Why do you want to teach? Where do you see yourself in five years? What would you bring that is unique to this school or to the department? Are you willing to relocate with your family to a distant state? Every phone interview is different. Some committees focus on classroom experience, others on scholarship or curriculum development. Another committee may utilize a set of numbered questions with graded responses for each candidate. It is certainly helpful, and probably even expected of you, to ask the initial point of contact about the format of the phone interview in advance.

When preparing for the phone interview, it is essential to research the department, curriculum, and school. The easiest way to do this is to peruse the college or university website. Write down names of all faculty members and review their backgrounds and qualifications. Become familiar with the courses and think about how you would teach them effectively. Review the school's vision statement. Be ready to respond to questions about accreditation and whether you would serve on committees. Things like your community service can also be of interest to the committee.

If you don't familiarize yourself with the school and program in advance, your chances of moving past the phone interview will be seriously diminished. Remember, be yourself, listen carefully to the questions, don't interrupt, and ask for clarification if necessary. Be candid about apparent or perceived weaknesses in your application. Make sure you emphasize what you can bring to a program that other applicants cannot.

If the phone interview goes well, you can expect to receive an invitation for a campus visit within a few days. This should be great news for you. Invitations to visit campus are normally granted only to the final two qualified candidates. With regard to travel, unless the campus is nearby, you will be reimbursed for airfare, mileage, and other reasonable expenses. Campus visits often last most of the day and involve several meetings, interviews, teaching demonstration, or a presentation of your "current research."[20]

On a visit, you can expect to meet with the department head and other faculty members in the morning, give a teaching demonstration,[21] then a luncheon, followed by a meeting with the dean. While you are on a campus tour in the afternoon, the faculty search committee is probably meeting with the department chair to discuss your candidacy. Do not expect to be offered a job on the spot, although it may happen on occasion. Remember, the other candidate may not have visited campus. Also, despite your bravura performance, formal approval for job offers usually requires approval by the dean and provost. Expect delays in the search process.

Nevertheless, if during your campus visit, your discussions turn toward salary, benefits, and promotion, there is a better than even chance you have been selected for the job. No matter what occurs, when you return home, a follow-up letter of thanks to the department head is an expected courtesy. Even if the other candidate is offered the position, if the other candidate declines, a well-timed letter of thanks will not hurt your candidacy.

If you have been lucky enough to be invited on several campus visits, the most difficult decision you face may involve the timing of contract offers. One week you are waiting for your first offer and the next you may have two offers with short deadlines for acceptance.[22] You may even have campus visits scheduled for subsequent weeks. There are worse dilemmas to be sure, but waiting for the "better offer" from another school is a fairly hazardous option.

Depending upon your qualifications,

there may or may not be an opportunity to negotiate salary, benefits, promotions, tenure, moving expenses, or other considerations. On the other hand, some offers may be limited to take-it-or-leave-it. Whatever occurs, do not be surprised at the brevity of your employment contract. Many, if not most of the terms and conditions of your employment will be found in the school's faculty manual.

VI. Summary

To summarize, maximize your knowledge, skills, and abilities in your cover letter and CV. Don't be discouraged by rejection letters, and apply for as many positions as you can.[23] Finally, be realistic about your own qualifications. Most lawyers would be wasting time by applying for a faculty position at the Kennedy School of Government, but there are thousands of universities, colleges, junior, and community colleges that need qualified faculty every year. Somewhere out there lies an opportunity to teach and mentor outside the courtroom or law office. ■

Professor Winn is an associate professor at the Harry F. Byrd School of Business, Shenandoah University, Winchester, Virginia. He also taught undergraduate law and legal studies at the United States Military Academy (West Point) from 2000-2005 and post-graduate criminal law and trial advocacy in the LLM program at The Judge Advocate General's School (Army) in Charlottesville, Virginia, from 1993-1996. Professor Winn recently retired from active duty with the Army Judge Advocate General's (JAG) Corps.

Endnotes

1. Typically, law school faculty are distinguished graduates of nationally recognized law schools, have served on law review, have experience as legal clerks, or with prestigious law-firms in a major cities.
2. Salaries vary considerably among public and private colleges and by geographic region. A doctoral level assistant professor at a four-year college can expect to make between $50,000-$60,000 per year. Data from Table 4, Average Salary and Average Compensation Levels, by Category, Affiliation, and Academic Rank, 2004-05, American Association of University Professors, Annual Report of the Economic Status of the Profession.
3. At a recent conference for political science professors teaching in college pre-law programs, a lecturer speaking to a colleague (who is a JD) stated in all seriousness that "the law is too important to be taught by lawyers."
4. A Ph.D. requires between 85 and 90 hours of postgraduate credit (which normally includes credits earned towards a masters degree). One third or more of these credits are awarded for writing a dissertation.
5. A dissertation is a lengthy (often a hundred or more pages) writing project based upon original research which demonstrates mastery in the area of study.
6. There are six geographic regions in the United States that accredit college and university higher education programs: The Middle States Association of Colleges and Schools; The New England Association of Schools & Colleges; The North Central Association of Colleges and Schools; The Northwest Association of Schools And Colleges; The Southern Association of Colleges and Schools; and The Western Association of Schools and Colleges.
7. Criminal Justice programs are usually accredited under the auspices of The Academy of Criminal Justice Sciences (ACJS) while MBA programs may seek accreditation from The Association to Advance Collegiate Schools of Business (AACSB).
8. The Academy of Criminal Justice Sciences (ACJS) actually proposed a requirement that two-thirds of the faculty members in an undergraduate degree program and 90% in graduate programs possess a Ph.D. Part I. C. 4 and 5, proposed ACJS Certification Standards, 2004.
9. Before enrolling in a graduate online ("distance learning") program make sure it is properly accredited by an agency accepted by the Council on Higher Education. For more information visit the council's website at: www.chea.org.
10. A curriculum vitae (usually referred to as "CV") literally means "course of life." It is used when applying for academic or scientific positions as opposed to a resume.
11. Most academic institutions use MS Word for this type of correspondence
12. http://chronicle.com/jobs/
13. http://www.asc41.com/dir3/index.html
14. Law enforcement, forensic sciences, and homeland security are currently very popular areas of study in criminal justice programs.
15. Most attorneys are surprised to learn that evidence law is often taught outside of law schools by Ph.D. faculty with no litigation experience. It should be noted, however, that dual degree (JD/Ph.D.) holders are not uncommon in criminal justice programs.
16. Most teaching candidates are screened by faculty search committees of three or more members who propose nominees to the department head or dean for final approval.
17. PowerPoint is a proprietary software program of the Microsoft Corporation for creating classroom and business presentations.
18. One of the better sources for developing your statement of teaching philosophy is the Ohio State University Faculty & TA Development Center website: ftad.osu.edu.
19. Colleges and Universities often have difficulty finding qualified women and minority candidates, especially in scientific and technical fields. See New York Times: Little Advance Is Seen in Ivies' Hiring of Minorities and Women, Karen W. Arenson, March 1, 2005.
20. This usually means your most recent bar journal or law review article. You will probably be expected to be working on some scholarly article or be involved in some other research project. Current research does not have to be a completed law review article, it can be at almost any stage of development.
21. Normally a guest lecture can be on almost any topic, although tailoring your presentation to local course goals would be a plus in your favor.
22. Because of other pending candidacies and academic deadlines, job offers must normally be accepted or declined within seven to ten days.
23. It would not be unusual for even well qualified Ph.D. candidates to apply (by mail or e-mail) to 60 or more colleges and universities and be seriously considered by no more than five or six schools.

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Gifts with Powers of Attorney—Are We Giving the Public What It Wants?

BY KATE MEWHINNEY

The word "gift" conjures up a surprise in wrapping paper and ribbon. Unfortunately, when it comes to giving gifts under a power of attorney, often the unhappy surprise is that the gift that is needed cannot be given.

Gift-giving by agents under a power of attorney is important in the context of the federal/state program known as Medicaid, which pays for half of all nursing home care. Gifts or transfers by nursing home residents can only be made by competent people or their properly authorized agents. In addition to "Medicaid planning" to preserve their assets, nursing home residents are legally permitted to provide for certain people, such as a spouse or disabled child.

Powers of attorney often fail for one of two reasons. The person signed a statutory "short form" power of attorney with limited or no gifting authority. Or he or she used an attorney-drafted document that negates the utility of the gift power. Too many attorneys include "gifting" provisions that are suitable for the Mercedes owner, when the client is still paying off a Chevy. In either case, the problem is only discovered when the principal is no longer competent—and thus unable to cure the problem by executing a new document.[1]

The first problem can be resolved by an amendment to the North Carolina statutory power of attorney that broadens the powers in the widely used form. The second is not so easily solved, but the beginning point is increasing the knowledge level of lawyers who do powers of attorney so that they appreciate the importance of gifting for government benefit programs.

The problem typically arises when the client goes to a lawyer for a will, and learns about the benefits of a power of attorney for possible incapacity. This is most obviously useful for the older client becoming reliant on relatives. The power of attorney allows another person, the agent or attorney-in-fact, to make financial decisions for the client, the principal. The agent is a fiduciary and can only act for the principal's benefit.

Giving away the principal's property, especially to the agent himself, is a breach of fiduciary duty unless specifically authorized. In most states, the principal may allow gift-giving by simply adding that power. Such "gifting" powers have long been standard elements in the documents drafted for the well-to-do to enable them to preserve wealth for

the next generation by avoiding federal estate tax. But the gift-giving powers used by the wealthy—the "Mercedes" version—are often inappropriate for lower- and middle-class clients.

Moreover, transferring real estate by a power of attorney lacking appropriate gifting authority can be a trap. The transferee does not get a good title, so the buyer cannot get title insurance. Like the inadequate power of attorney itself, the problem becomes apparent when it is far too late to cure.

North Carolina's elder law practitioners are beginning to study how the short form could be amended to offer gifting options that better fit the financial demands that families encounter. Also, we are getting the word out to practitioners that the gifting power drafted for the wealthy client might not accomplish the goals of their other estate planning clients.

The Short Form Power of Attorney—Short but Not Sweet.

North Carolina is one of 17 states that provide for an optional statutory power of attorney, known as "the short form." The short form's extremely limited gift authority often precludes families from preserving property when the principal needs nursing home care.

Who uses it? Often, it is the attorney who does not do high end estate planning. Or the form is used without a lawyer and is obtained from the internet or computer software.

The person executing a statutory short form power of attorney indicates, by initializing options, which powers she wants to give the agent.[2] These can include real estate transactions, banking, and other familiar categories.

The gifting options in the short form permit:

(14) Gifts to charities, and to individuals other than the attorney-in-fact

(15) Gifts to the named attorney-in-fact

Putting aside whether non-lawyers understand "gifts to the named attorney-in-fact," they surely do not realize that the power in the form is limited by statute to gifts "… in accordance with the principal's personal history of making or joining in the making of lifetime gifts."[3] It is hard to imagine the client who has a history of giving away his or her home or an interest in the home, or other significant assets. But such gifts are exactly the option that competent people often select when faced with the enormous costs of nursing home care. For the client who has lost competence, though, it is too late to execute a new power of attorney.

For many clients, the attorney's failure to offer a broader "gifting power" may be costly. One option is this provision: "I authorize my agent to transfer my property for the purpose of qualifying me for governmental medical assistance." The provision can be enhanced by specifying to whom property transfers can be made and in what shares.

Nursing Home Care… or "What the Client Least Wants to Talk About"

Nursing homes are an unappealing topic. But given the odds of needing care and the limited resources of most people to pay, clients executing powers of attorney should consider how they want the agent to proceed if nursing home care becomes necessary. The client might well direct that all of her resources be used to pay for her care, until depleted. No gifting power would be needed. But for the client who prefers to pass something to his family, an appropriate gifting power is necessary if the power of attorney comes into play.

What are the odds? Most people over 60 will need long-term care for some time. Medicare, contrary to widespread belief, covers very little nursing home care. Most care is paid by private payment (savings or insurance) and about half by Medicaid. Two out of three people who enter nursing homes as private pay residents exhaust their resources within one year and then rely on Medicaid.

Three aspects of Medicaid must be addressed if people are to make an informed choice about allowing gifts to be made with their powers of attorney: strict asset limits, estate recovery, and approval of some asset transfers. The person who obtains the statutory short form needs a form that includes an option for gifts to achieve eligibility for governmental assistance.

First, the asset limits. Consider the widow who has a home, $50,000, in savings and $1,000 per month income. Medicaid asset limits mandate that all but $2,000 of the savings must be spent before Medicaid will begin to pay. In most cases, she is allowed to keep the home.

Second, what must one know about Medicaid's claims against a person's estate, or "estate recovery"? Unlike Medicare or any health insurance you are familiar with, the Medicaid nursing home program essentially runs a tab on each recipient. With few exceptions, the state demands to be repaid. After a year on Medicaid, in our example the estate recovery claim would be about $42,000 and after two years $84,000. Soon there is no house or other asset left in the estate. This part of the equation can make the most artfully drafted will merely a futile gesture.

Third, federal Medicaid law *allows* families to protect some assets by transferring them. In particular, it permits transfers to a spouse or a disabled child. A home may be transferred to a caregiver adult child or a sibling co-owner. Any asset may be transferred to a trust for the benefit of any disabled person under age 65.

An important and common reason to include a gifting power is to provide for one's spouse. To protect the healthy spouse from impoverishment, federal law permits a "resource allowance." If the couple's assets are in the name of the incapacitated spouse, the "resource allowance" must be re-titled to the healthy spouse. This can best be accomplished using a power of attorney with a gifting power.

Without a broad gifting power, the family can seek guardianship. Court supervision and permission for asset transfers is required. Another option, not limited to married couples, is a special proceeding for approval to add a gifting power. Both of these procedures cost money and take time. It is a lot to ask of families who are already under tremendous stress.

Gift and Estate Tax Considerations are Only One Factor

The second problem with the gifting powers found in many powers of attorney is that they are written for the Mercedes owner when the client drives a Chevy. Federal estate and gift tax considerations should not dictate the scope of a gifting provision for such clients. In any event, they need to be balanced against the issue of Medicaid.

Many powers of attorney limit the agent to making annual exclusion gifts. These are gifts to individuals up to $11,000 per spouse per person per year, which are excluded from the federal gift tax. This amount is not sufficient to fund the "resource allowance" for a spouse or to transfer a home to a disabled child.

Second, some attorneys are concerned that overly broad gifting powers will expose clients to federal estate taxes by creating a general power of appointment.[4] This would cause the principal's estate to be included in the agent's taxable estate if he predeceases the principal.[5] The problem, not widespread, is avoided by requiring written concurrence for gifts to be given by someone other than the agent, typically one of the principal's other adult children or by a "special agent."

Ethical and Policy Issues Large and Small

Gifting powers raise big issues—from the micro-climate of the attorney-client relationship on up to the level of distributive justice and social needs.

For practitioners, our goal is to provide an atmosphere that allows the client to make free choices regarding the gifting power. We ask whether the older person is being pressured to protect assets for their family. Careful practitioners assess the family dynamics, meeting privately with the older client to elicit her goals.[6] Some attorneys will not accept payment of fees from the client's adult children, although the rules allow this. Procuring the document or taking the lead in client meetings to control the client are indicia of undue influence.

A broad gifting power may open the door to exploitation, especially of marginally competent older clients.[7] Mandatory disclosure language on the form would address this to some extent. Also, if the gifting language is free of jargon, people will better understand the import of the power being granted.

Another concern for the practitioner is that a broad gifting power allows an agent to frustrate the principal's testamentary goals by divesting assets differently. There are solutions. One is to draft the gifting provision to require gifts in accordance with the principal's will or with intestacy laws. Another is to require consent of all adult children to major gifts.

Some will oppose broader gifting options because they feel that Medicaid planning itself is against sound public policy, whether by a competent person or by his agent. They make two arguments.

First, they argue that assisting clients in becoming Medicaid eligible is unethical. A program intended for the poor, they contend, is being manipulated so that the middle class can shift their responsibilities to the public. Elder law attorneys would respond that we have the duty to present legal options. Certainly tax lawyers would not withhold advice from their clients to keep the federal deficit from growing. In any event, most attorneys find that they are assisting families with modest means to avoid the rapid impoverishment that results from a $60,000 annual nursing home bill.[8]

A similar argument is that gifting in powers of attorney to obtain governmental benefits undercuts personal responsibility and planning. Of course, that is true of all insurance, private as well as public. But most long-term care is being provided free by family members, strong evidence that personal responsibility and ethics are alive and well. And increasing numbers of people are planning ahead by purchasing long-term care insurance, though it is too expensive for many people.[9] While a comprehensive discussion with the client should include mention of the insurance option, this product is extremely difficult to assess. Moreover, those with chronic health problems are told that they need not apply.

Rather than question the ethics of Medicaid estate planning, perhaps we should ask whether our country's health care system itself is ethical or even logical.[10] Medicare covers expensive surgery, but not the devastating costs of chronic illnesses and strokes. Are these priorities in line with our moral values? Should we be looking at ways to ethically spread the tremendous burdens of caring for the disabled elderly? The desire to leave a legacy to one's children and grandchildren is a universal desire, not limited to the wealthy.

Proposed Changes

The North Carolina short form power of attorney is overdue for changes to better serve the public's needs. An option for gifts to obtain governmental assistance should be considered. And the estate and gift tax restrictions that apply to the few should not be thoughtlessly included in the powers of attorney of the vast majority of people. These changes would be two welcome gifts for the public. ■

Kate Mewhinney is a Clinical Law Professor at Wake Forest University School of Law, and the managing attorney of its Elder Law Clinic. She served as chair of the NCBA Elder Law Section in 2003-2004, and is a fellow of the National Academy of Elder Law Attorneys. Mewhinney is certified as an Elder Law Attorney by the National Elder Law Foundation and is also a Certified NC Superior Court Mediator. Information for practitioners about elder law issues can be found at www.law.wfu.edu/eclinic .

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Endnotes

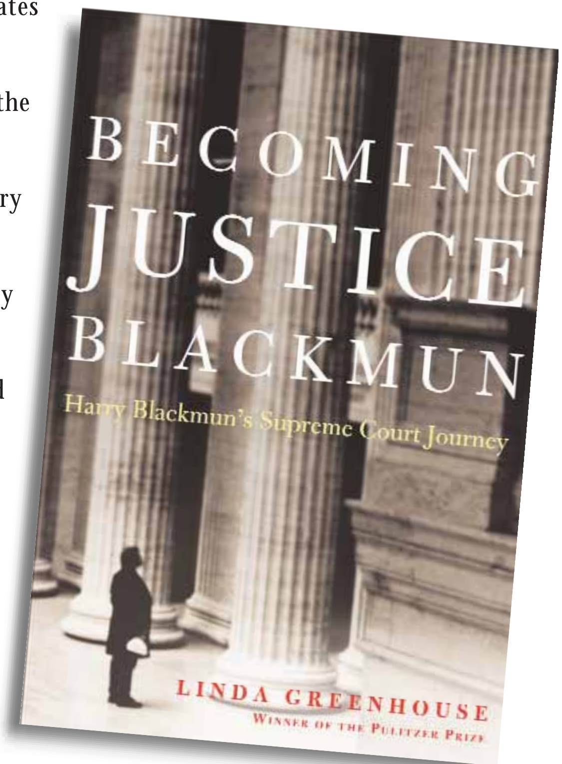
1. The author thanks Karen W. Neely for research when she was a student in The Elder Law Clinic, and elder law attorney Ron M. Landsman, of Rockville, Maryland, for critiquing a first draft.
2. A colleague describes seeing an attorney-prepared short form on which not a single power had been initialed, so the document accomplished nothing for the client!
3. N.C.G.S. § 32A-2 (15).
4. IRC § 2041.
5. In many elder law cases, gift and estate taxation will not be relevant since the assets of both the principal and the agent are less than the exemption equivalent of the unified credit. Andrew H. Hook, "Durable Powers of Attorney: They are Not Forms!" National Academy of Elder Law Attorneys' Symposium 2000, pp 1-51, 13.

   However, some argue that an unlimited gifting power does not risk creating a general power of appointment because the creator of the power must join in making the gift, at least by failing to revoke the power. *See* V. Tate Davis, "Basics of Elder Law," Potpourri for the GP (NCBF CLE), 4/29/05, fn. 50.
6. An NC State Bar ethics opinion provides that lawyers may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal. 2003 FEO-7. Another tool for attorneys is a recent ABA brochure, "Understanding the Four C's of Elder Law Ethics." www.abanet.org/aging/lawyerrelationship.pdf
7. Timothy Takacs and David McGuffey, "Revisiting the Ethics of Medicaid Planning," *NAELA Quarterly*, Summer 2004, pp. 29-37, 33.
8. Ellen O'Brien, "Issue Brief: Medicaid's coverage of nursing home costs: Asset shelter for the wealthy or essential safety net?" Georgetown University Health Policy Institute, Long-Term Care Financing Project, May 2005; "Long-Term Care Financing: Growing Demand and Cost of Services are Straining Federal and State Budgets," U.S. GAO, 4/27/05, GAO-05-0564T, p. 7. Charles P. Sabatino, "Debunking the Myths of Medicaid," *Legal Times*, 1/26/04, p. 25.
9. Fifteen percent or less of middle-aged or elderly persons in North Carolina might conceivably purchase long-term care insurance, based on wealth and income levels necessary to afford such a policy. Donald H. Taylor Jr., Ph.D.; "Alzheimer's Disease and the Family Caregiver: The Cost and Who Pays?" *NC Med Jl*, Jan./Feb. 2005, Vol. 66, No. 1, 18-24, 24.
10. Germany and Japan have universal long-term care insurance. Taylor, supra note 9 at 22; "International Approaches to Long-Term Care Financing and Delivery," Global Report on Aging (AARP), Winter 2004, pp. 5.

Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey

A Book by Linda Greenhouse, Reviewed by Mark A. Davis

Few justices on the United States Supreme Court ever changed over the course of their tenure as did Harry Blackmun. Dismissed by many soon after his appointment as merely a conservative clone of his childhood friend, Chief Justice Warren Burger, by the time of his retirement from the Court he was perceived as a reliable member of the Court's liberal wing. Simultaneously a hero and a villain to millions based on his authorship of *Roe v. Wade*, Blackmun became the living embodiment of the landmark (and controversial) 1973 Supreme Court decision articulating a right to an abortion under the United States Constitution.



Upon his death in 1999, Blackmun left his voluminous collection of papers—both official and personal—to the Library of Congress. In 2004, under the terms of his will, the collection was opened up to the public. In her new book *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*, veteran Supreme Court correspondent Linda Greenhouse of the *New York Times* has published the first biography of Justice Blackmun that draws from these papers. The result is a fascinating,

highly readable account of the life of one of the Twentieth Century's most interesting jurists.

Following his graduation from Harvard Law School, Blackmun tried his hand at private practice and achieved modest success before becoming in-house counsel for the Mayo Clinic, a position he filled for nine years. In 1959, he was appointed by President Eisenhower to the United States Court of Appeals for the Eighth Circuit. Eleven years later, he was nominated by President Nixon to serve on the Supreme Court, and he was easily confirmed.

Blackmun was not Nixon's initial choice for the appointment, his nomination occurring only after the nominations of Clement Haynsworth and Harrold Carswell failed to pass in the Senate. While always sensitive to personal slights (real or imagined), Blackmun maintained a self-deprecating sense of humor on this issue, referring to himself for the rest of life as "Old Number 3." When Anthony Kennedy joined the Court in 1987 following the failed nominations of Robert Bork and Douglas Ginsburg, Blackmun welcomed him into the "Number 3 club."

At the time Blackmun joined the Court, Burger had recently been named Chief Justice by Nixon. Much has been made of Blackmun's lifelong friendship with Burger and their relationship is a recurring theme in Greenhouse's book. As boys, they lived on the same street in Minnesota and first met in kindergarten. For the first few years that Blackmun was on the Supreme Court, the two voted together so frequently that they were dubbed "the Minnesota twins." By 1986 (Burger's last year on the Court), their relationship had fractured both personally and professionally to the point that they did not agree on much of anything. Over the years in which they served together, Blackmun broke with Burger on many important issues including the extension of constitutional protection to commercial advertising, affirmative action, and the Court's response to Watergate.

Prior to *Roe*, Blackmun's early opinions as a justice were relatively noncontroversial. A rare exception was his opinion in *United States v. Kras* in which he upheld a constitutional challenge to the filing fee attendant to a bankruptcy petition. He dismissed the claim of the indigent plaintiff, writing that the litigant could pay the fine in weekly installments for "less than the price of a movie and little more than the cost of a pack or two of cigarettes." This statement was perceived by some as evidencing a callous disregard for the plight of the poor. Nevertheless, he remained largely unknown outside legal circles.

Everything changed once he was assigned to write the majority opinion in *Roe* striking down a statute making it a crime to perform abortions except to save the life of the mother. Greenhouse speculates that Burger's decision to assign Blackmun the opinion was based on Burger's belief that Blackmun would write an opinion invalidating the statute on narrow grounds. If so, Burger was in for a rude awakening.

Upon receiving the *Roe* assignment, Blackmun immediately contacted the Mayo Clinic librarian and asked for books on the history of abortion. After months of painstaking research and writing, he produced a 50-page opinion which analyzed in great length the history of abortion along with an exploration of various medical issues relating to the procedure. In essence, his opinion divided a woman's pregnancy into trimesters, setting constitutional restrictions on a state's ability to outlaw abortions during the first two trimesters. Interestingly, Blackmun's notes show that even he conceded that his trimester approach was arbitrary.

Blackmun prophetically predicted that the Court would be excoriated for the decision. The day *Roe* was announced, former President Lyndon Johnson's death dominated the news. However, *Roe* was not ignored. Several days later, Blackmun was traveling to Iowa for a speech and was forced to obtain police protection due to the presence of antiabortion protestors. Thus began the after effects of *Roe* which Blackmun would have to live with for the rest of his life.

Over the years, Blackmun received tens of thousands of pieces of hate mail regarding *Roe*, most of which he read and all of which he kept. His opinion was most heavily criticized based on the widespread perception that it rested almost exclusively on historical and medical factors and that it announced a new constitutional right despite the absence of any clear constitutional language expressly protecting the right to an abortion. As Greenhouse points out, Blackmun's focus appeared to be on ensuring that a woman's doctor be free to give his or her best medical advice regarding the abortion decision without fear of criminal prosecution. To Blackmun, *Roe* was—at its core—about the rights of doctors at least as much as it was about the rights of women. Nevertheless, *Roe* made Blackmun a hero of the feminist movement.

In the decades following *Roe*, Blackmun found himself consumed by the decision and obsessed with ensuring its survival. While he had not sought the onus of writing the opinion, he recognized that it was the centerpiece of his judicial legacy.

During the last half of his tenure on the court, Blackmun continually fretted about the possibility of *Roe* being overturned. To his great chagrin, several cases began chipping away at *Roe's* foundation. However, in 1992, the moderate wing of the Court joined forces in *Planned Parenthood v. Casey* to definitively reject the argument that *Roe* should be overruled. While the reasoning of *Casey* was not completely faithful to the original *Roe* opinion, Blackmun was nevertheless greatly relieved that the basic right to abortion had been preserved.

Another theme explored by Greenhouse is Blackmun's evolving views on the death penalty. While he was never a proponent of capital punishment in his personal views, Blackmun as a judge upheld the death penalty on a number of occasions before ultimately concluding near the end of his career that the death penalty—while constitutional in the abstract—could never be fairly applied. He famously declared in a dissenting opinion during the 1993 Term: "From this day forward, I no longer shall tinker with the machinery of death." From that point on, he never voted to uphold the death penalty again.

His sympathy for the underprivileged in society was nowhere more evident than in the Court's 1989 decision in *DeShaney v. Winnebago County Department of Social Services*. In that case, the Court's majority rejected the notion that a county department of social services had an affirmative duty under the Constitution to protect a boy who was brutally murdered at the hands of his father. "Poor Joshua" began Blackmun's heartfelt dissent in which he

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lamented the majority's opinion.

Greenhouse recounts numerous passages from Blackmun's journals and private correspondence. A habitual chronicler since childhood of events in his life, Blackmun wrote down details about not only his thought processes, but also concerning his insecurities and perception of the Court. Blackmun was less than giddy about his initial appointment, referring to it in his private notes as a "crisis" and stating that the "roof has caved in." Indeed, upon first being offered the position by Nixon, Blackmun made a list of the pros and cons of accepting the appointment. Later, in assessing his years on the Supreme Court, he wrote that "[i]t has not been much fun."

Among his habits was jotting down notes about lawyers during oral arguments which addressed not only their skill as advocates, but also their appearance. In one such entry, he wrote that future Justice Ruth Bader Ginsburg was clad "[i]n red & red ribbon today."

The book offers a number of other delicious tidbits, including the fact that the member of Nixon's staff who was the point person for Blackmun's nomination was a young lawyer named William Rehnquist. In a memorandum to Nixon, Rehnquist wrote that Blackmun "can be fairly characterized as conservative to moderate" on criminal and civil rights issues. He further described Blackmun overall as "more conservative than liberal." Greenhouse also quotes from notes of a meeting with Blackmun in which Nixon—while discussing public service—made the poignant observation that "one is either honest or dishonest in government."

The primary defect with Greenhouse's book is simply that it is too short. Two hundred fifty-one pages is simply not enough to adequately chronicle Blackmun's career on the Supreme Court—which spanned from Nixon's pre-Watergate presidency through Bill Clinton's first term and encompassed a number of the most significant cases of the last 35 years. Nevertheless, *Becoming Justice Blackmun* is must reading for anyone interested in the inner workings of the Supreme Court or the life of one of its most intriguing justices.

More than a decade after Blackmun's departure from the Court, a Supreme Court nominee's fidelity to *Roe* remains a litmus test for many special interest groups and senators. This perhaps is his ultimate legacy. ■

Mark A. Davis is an attorney in the Raleigh office of Womble Carlyle Sandridge & Rice, PLLC.

About the book's author: Linda Greenhouse has covered the Supreme Court for The New York Times since 1978 and won a Pulitzer Prize in 1998 for her coverage of the Court. She appears regularly on the PBS program Washington Week and lectures frequently on the Supreme Court at colleges and law schools. She graduated from Radcliffe College and holds a master of studies in law from Yale Law School.

Times Books/an imprint of Henry Holt and Company, May 2, 2005, 288 pages, ISBN 0-8050-7791-X, $25.00

An Interview with Our New President—Calvin E. Murphy

Q: What can you tell us about your roots?

I am a Charlotte native, born and raised. I graduated from J.H. Gunn High School, a community school in the East Mecklenburg neighborhood where I grew up. I am the youngest of four children (two boys; two girls) born to Grover and Louise Murphy. My paternal grandfather (Alonzo Murphy) owned a small farm in the area where I grew up. I spent a great deal of time with him before he died in the early 60s. It was from him that I learned what it meant to be a responsible adult. I dearly loved and respected my grandfather. To this day, I own the land where he lived and farmed until his death.

Q: When and how did you decide to become a lawyer?

In 1962—at age 14—to complete a class project, I had to interview the Mecklenburg County Sheriff. While I waited in an outer office to meet with the sheriff, a tall, well dressed, well spoken black man entered the office. The deputies greeted him warmly and respectfully. One of the deputies promptly alerted Sheriff Don Stahl that he had a visitor—not me. The sheriff emerged from his inner office immediately, acknowledged the man, and invited him inside. I thought to myself…this man must be someone special to receive that kind of greeting from the sheriff himself. I later learned from one of the deputies that the man was a lawyer—Charlie Bell. I was hooked. It was at that very moment that I knew I wanted to be a lawyer.

Q: What is your practice like now and how did it evolve?

My practice is principally criminal defense work. After law school my original plan was to join a firm and practice criminal law with another classmate in his brother's firm in Chapel Hill. On reflection, I decided the better course would be to get some experience before unleashing all of that book learning on some unsuspecting client who perhaps unwittingly placed his freedom in my novice hands. And, what better way to get that experience without sacrificing some poor soul to jail than as a prosecutor. The worst thing that would happen if I made a mistake was that someone would not go to jail. After five years of prosecuting—finishing with a two-year stint as a career criminal prosecutor—I went into private practice. In 1989, Ron Chapman and I started a separate practice—Murphy & Chapman, PA—where I have remained to this day.

Q: If you had not chosen to pursue a career in law, what do you think you would have done for a living?

All during high school, I fancied myself a mathematician and loved the subject. Even when I entered Davidson College as a freshman, my intention was to major in math, then go to law school. The back-up plan was to get a degree in architecture if I did not get into law school. My first semester calculus professor quickly disabused my mind of the notion of becoming a mathematician.

Q: How and why did you become involved in State Bar work?

For six years before running for a position as a State Bar Councilor, I served on the Mecklenburg County Bar Grievance Committee, and for a term on the board of the local bar. I thoroughly enjoyed the work. Karl Adkins and Ron Gibson were the first two black attorneys from Mecklenburg to be elected to the council in the early 80s. By the time Karl's term expired, Ron Gibson had already left the council and there was no other black attorney on the horizon who seemed interested in succeeding Karl. I jumped at the opportunity to serve my profession at the state level and, fortunately, was

We want your fiction!

Historical Fiction ***Romance***
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Fourth Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce that it will sponsor the Fourth Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, ***the article may be on any fictional topic and may be in any form*** (humorous, anecdotal, mystery, science fiction, etc.). Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. Articles should not be more than 5,000 words in length and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar ID number, placed only on a separate cover sheet along with the name of the story.

6. All submissions must be received in proper form prior to the close of business on May 26, 2006. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

Deadline is May 26, 2006

With his daughter, Sommer Joy Murphy, looking on, Calvin Murphy is sworn in as president of the State Bar by Chief Justice I. Beverly Lake Jr.

elected.

Q: What has your experience on the State Bar Council been like? What has surprised you most? What has pleased you most? What has troubled you most?

Without question, my work at the State Bar has been the most rewarding of my professional life. I am not sure what I expected when I arrived there, but what I found was a cadre of the most committed, respected, and talented lawyers in the state. Most surprising was the level of professionalism that I encountered. Lawyers—noted for holding strong beliefs and opinions—were more than willing to hear opposing points of view and change their positions in the light of sound judgment and reason. Still a source of concern to me is the absence of ethnic, racial, and gender diversity on the council. There is much work to be done in that regard.

Q: Prior to becoming an officer you served as chair of the Grievance Committee. What was that like?

That was an eye opener. During my term as chair, the State Bar received, on average, between 1900 and 2000 grievances each year. Although 80-85% were dismissed for failure to allege an actionable violation of the Rules of Professional Conduct, there were still too many. I felt it was my challenge to do something to stem that number. Earlier, the Bar had implemented the Client Assistance Program, but we had not developed sufficient data to determine the direct impact the program was having on the number of grievances filed. It was clear, however, that the rise in grievances tapered when compared with the rise in the number of lawyers in the state.

Q: Last year, while serving as the State Bar's president-elect, you were appointed to chair a special committee to look into the State Bar's handling of a controversial disciplinary case against two prosecutors who wrongfully withheld evidence from the defense in a capital case. Tell us about that experience and what you learned from it.

The Disciplinary Review Committee was charged with reviewing what happened in the handling of that situation to determine how we might improve the State Bar's disciplinary process. We were not charged with correcting any wrong, or perceived wrong, that occurred during the handling of the underlying case against the two prosecutors. It was a historic undertaking in the sense that this was the first time in the history of the State Bar, at least to my knowledge, that we opened the disciplinary process to public scrutiny. There had been a great hue and cry from the media and from segments of the bar, particularly from the criminal defense bar, that, generally, the State Bar lawyers had failed to investigate adequately the case before trial and had failed to prosecute with sufficient zealousness, notwithstanding the fact that the Disciplinary Hearing Commission had found in favor of the State Bar concerning three out of four violations that had been alleged in the complaint against the two prosecutors. It became evident to me early on that, because we are permitted to regulate ourselves as a profession, the appearance of how we do things can be just as important as we do them. On the committee were some of North Carolina's educational, political, legal, and media luminaries. The committee produced a final report containing a number of recommendations that the Bar has already begun to implement. I was most pleased that the final report was by consensus; there was no minority report. All of the committee's meetings were open to the public, and the final report, along with all witness interviews,

were published on the State Bar's website.

Q: Do you think lawyers can be trusted to regulate themselves? Is our system seriously flawed? Is there anything about it that you would like to see changed?

I honestly believe that the lawyers of this state do an exceptional job of self-regulation. We have public members who serve on the Grievance Committee, and have for many years. In addition to serving two terms as president, I served on the Grievance Committee as a lawyer-member for seven years. On many occasions, the discipline that lawyer-members felt was appropriate in a particular situation was much more severe than the public members felt was called for. My perception is that lawyers often tend to be harder on their own than others might be. I have yet to witness an instance when "cronyism" or any other such influence was a factor that affected the outcome of a disciplinary matter. That the State Bar has willingly opened its disciplinary system to public inspection this past year suggests to me that if there are flaws in the system, the State Bar is not afraid to have someone point out that "the Emperor has no clothes" and to respond in an appropriate way. I do not believe the system is seriously flawed. And, in those areas where the need for change has been identified, the Bar has responded appropriately.

Q: You're only the second African-American to be chosen as the president of the North Carolina State Bar. In your mind, how significant is that? Are we anywhere near where we ought to be as a profession as far diversity is concerned?

There are roughly 20,000 lawyers in this state. Although the State Bar has never sought to capture or maintain data regarding race and gender of North Carolina lawyers, I think it is fair to say that minorities are underrepresented in the general population of lawyers when compared to their presence in the state. The number of female lawyers is growing rapidly. According to my daughter, a first year law student at North Carolina Central University School of Law, over 60% of the students in her class are female, suggesting perhaps that the number of women lawyers in the profession is growing disproportionately to their male counterparts. Although statistically small now, the number of Hispanic and Asian attorneys in North Carolina is growing. And, those numbers will only increase. Currently, we have only three black councilors (5% of the council) and seven female councilors (about 12%) of a total of 55 councilors for the state. Hispanics and Asians are currently unrepresented on the council. We can do better; we must do better. Black, female, Hispanic, Asian, and other minority lawyers must be willing to make the sacrifice and participate in local bar elections, and local bars must make clear that participation by diverse groups is important to the overall health and welfare of the profession. There is much to be done to make our Bar more reflective of the community we serve.

Q: What in your opinion is the greatest challenge facing the legal profession at this time? What can the State Bar do that would make a difference?

In my installation speech, I said that I intended to make professionalism a focal point of my administration. Unfortunately, the public's perception of lawyers remains one of the profession's greatest challenges. As a state agency the Bar has the daunting task of regulating lawyers and protecting the public from those who lose sight of their calling or of their duties of loyalty and service to their clients, to the court, or to the profession. And service should be the clarion call to all of us, for it is lawyers who stand tall between the citizenry and the excesses and overreaching of government. It is lawyers who help ensure that the least and greatest of our citizens enjoy the guarantees of life, liberty, and the pursuit of happiness assured to us by the Constitution of this great nation. The orderly administration of the law is the single-most important deterrent to outright anarchy in our society. And, the great defenders of that order are invariably lawyers. With such awesome power at their disposal, lawyers have an obligation and duty to conduct themselves in such a way as to command honor and respect for themselves, for the law, and for the institutions of justice. The way we conduct ourselves in court, before the public, and with each other is perhaps the single most important aspect of who we are. It is the measure by which we, and the profession, are judged. Being good stewards of the law means that how we conduct ourselves is just as important as the service we provide. It is a charge we cannot afford to under serve or take lightly.

Q: Tell us a little about your family?

I have two children, a daughter-in-law, and one grandson, all of whom I am enormously proud. My daughter, a licensed securities broker, is now a first year law student at North Carolina Central University School of Law. She called a few days ago elated that she "aced" her first law school exam. My son is one of Atlanta's finest, having just completed rookie school this year. He now works as a line officer with the Atlanta Police Department. His wife is a stay-at-home mom to my nine-month-old grandson, Caleb Hunter Murphy. I have three siblings: a sister who lives in Charlotte not far from me, a brother and his wife in Miami, Florida, and a sister and brother-in-law in Baltimore, Maryland. We are all very close to each other.

Q: What do you enjoy doing when you are not practicing law or working for the State Bar?

Actually, there is very little time for much else. Occasionally, I get a chance to go whitewater rafting—one of my passions. And I enjoy travel. Last year I spent two weeks cavorting about London, Barcelona, and Paris with my daughter. If my schedule will permit, I intend to arrange a trip to Africa soon. I have heard that an activity is work only if you would really rather be doing something else. It would be hard to convince me that Michael Jordan "worked" every day on the basketball court. I love practicing law and I find great enjoyment in the work of the State Bar. Despite the rigorous schedule that I keep, both pursuits bring me a great deal of satisfaction and pleasure.

Q: How would you like to be remembered by the next generation of lawyers?

It would be nice to be remembered, period, if just by name. But that may be asking a lot. The point I think I want to make now, and to have all lawyers remember, is that what we do as individual lawyers may be shaping the ideas, dreams, and aspirations of future lawyers. I doubt that Mr. Bell ever knew what impact he had on the direction of my life. We should be careful to make and leave positive impressions in our personal, professional, and public lives. I hope that I have made a positive difference to someone on my journey through the profession…and through life. ■