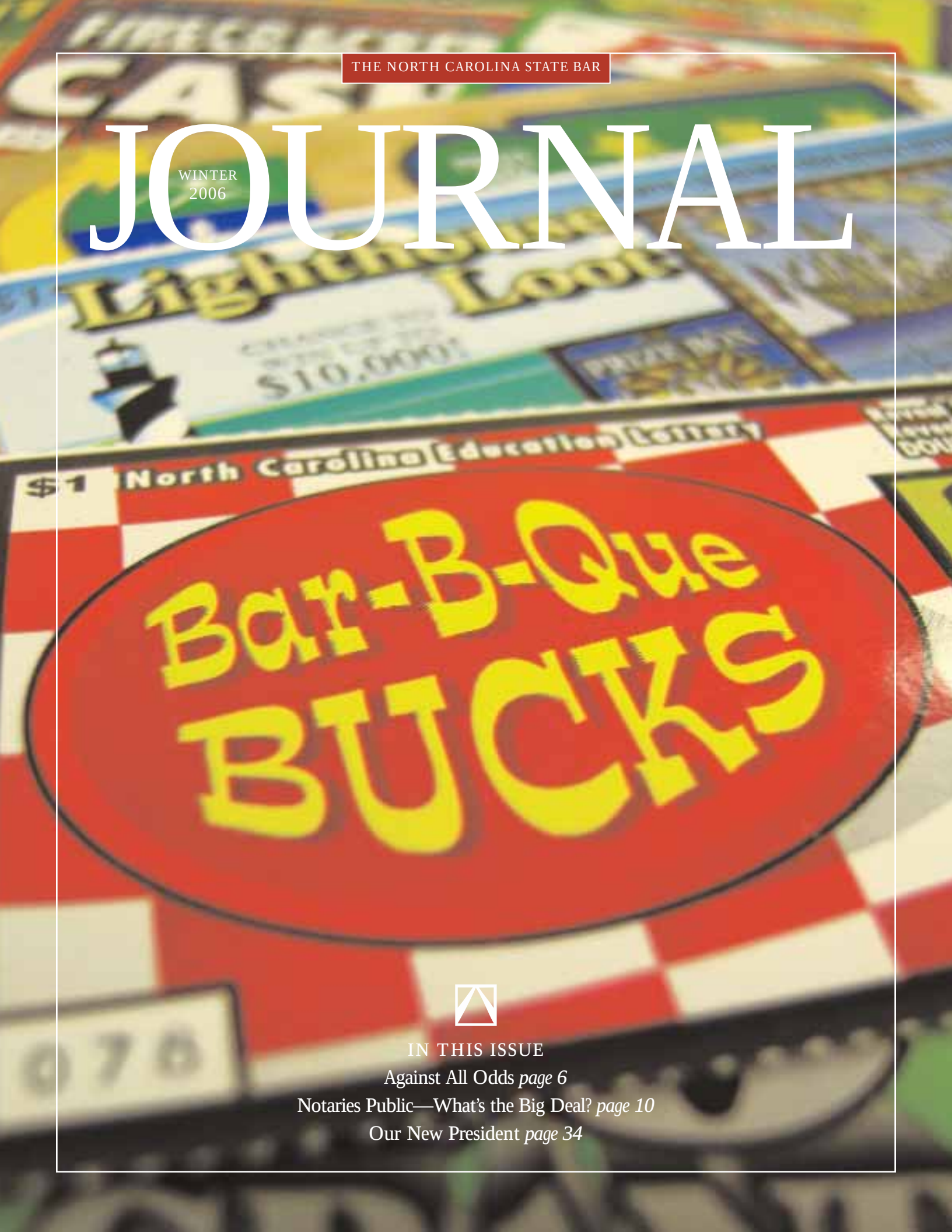
THE NORTH CAROLINA STATE BAR

# JOURNAL

WINTER
2006




IN THIS ISSUE

# Against All Odds

By Mike Dayton

North Carolina finally has a lottery. Now's your chance to hit it big—not by actually playing the games, where your prospects of striking it rich are, statistically speaking, lower than a possum's belly. No, the real money is in the original "jackpot litigation"—those lawsuits filed on behalf of the family members and disgruntled co-workers who claim they're entitled to a piece of the lottery pie. When those clients walk through your office door, will you be ready? These cases from other states offer a glimpse at your chances of success.


### To Have and to Hold

If your client claims to have the winning ticket, it never hurts to get a look at it. The reason: lottery officials tend to draw the purse strings tight when someone can't produce that piece of paper.

Take the case of Orrin J. Fowles, who alleged he purchased a winning $117,037 ticket for the Kansas Cash Lotto drawing on July 20, 1988. Mr. Fowles said he bought a $1 ticket at the Short Stop Convenience Store in Clay where his daughter, Pennie Cranmer, was a clerk. Mr. Fowles asked Pennie to hold on to his ticket because he was going out of town. Pennie said she wrote her father's name on the ticket and placed it in a basket under the counter. Somehow, the ticket disappeared and was never located. Lottery officials confirmed that the only winning ticket was purchased at the Clay store, and no one else ever stepped forward to claim the prize. Although Mr. Fowles and his daughter signed sworn affidavits about the purchase, lottery officials refused to pay.

Mr. Fowles sued. The outcome: on top of losing the ticket, Mr. Fowles also lost his legal challenge. In *Fowles v. State of Kansas*, 254 Kan. 557, 867 P.2d 357 (1994), the Kansas court stated "that to be a 'holder' of a winning lottery ticket and to have a right to collect the winnings, one must have possession of the ticket."

### Wild "Wild Card"

With thousands or millions of dollars at stake, it's no surprise that wannabe winners will test the outer limits of logic. Consider the Maine contestant, Larry Moody, who bought a scratch-off ticket called "Wild Card Cash." Contestants scratched off six hand-shaped areas on the game card to reveal two boxes with numbers or letters. If numbers or letters matched, the ticket was a winner. The card also contained a separate scratch-off box labeled "wild card." The card was a winner if the wild card number matched any of the other boxes.

None of the box pairs on Moody's card matched. Nor did Moody's wild card number—5—match numbers or letters under any of the hands. That did not stop him from pressing a lawsuit that claimed he was a winner. In *Moody v. State Liquor & Lottery Commission*, 843 A.2d 43 (2004), he argued that the common definition of a wild card permitted him to disregard the wild card number actually printed on his card and choose a number more to his liking—for instance, 4 or 6, which would turn him into a $20,000 winner.

Not so fast, the Maine Supreme Judicial Court said, in shooting down that argument as frivolous. "Moody's interpretation would make *every* Wild Card Cash ticket a winning ticket," the court said.

### Proof of Winning Numbers

Occasionally, lottery fights hinge on who actually owns the ticket. To prevail in that dispute, sometimes you need look no farther than your client's ID card. In *Sau Thi Ma v. Xuan T. Lien*, 260 A.D.2d 258 (1999), the parties both claimed to be the true owner of $3.6 million in lottery proceeds. The deciding proof at trial came from an unlikely source—the winning lottery numbers were apparently derived from the Medicaid card of the plaintiff's mother, according to the opinion.

### Seeing Red

In *Georgia Lottery Corporation v. Sumner*, 529 S.E.2d 925 (2000), a scratch off lottery ticket promised a perpetual payday: "$50 A DAY FOR FIVE YEARS!" The winning card had a symbol that contained a black circle with a white center and a smaller black circle in its middle. A player thought he'd won because his ticket had a similar symbol. One big difference: his winning symbol was red. When lottery officials refused to pay, he sued for breach of contract. The problem: "The evidence in the record shows clearly the red circle on Sumner's ticket that resembles the winning symbol was a stray printing mark, known in the trade as a 'hickey,'" the court said. Under that state's rules, that made the ticket "irregular" and thus void.



### A Dream Deferred?

Clients who play the blame game in their lottery lawsuits are likely to slip and fall flat on their faces, especially when they pin their woes on the convenience store that sold them the ticket. In *Brown v. California State Lottery Commission*, 232 Cal.App.3d 1335 (1991), a lottery player claimed he'd have won $7.25 million but for the fact that his local 7-Eleven retailer had a malfunctioning machine that would not allow him to pick his own

The California Court of Appeal had a decided lack of sympathy for the fellow's breach of contract claim, stating: "Had he not waited till the last possible instant to make his down payment on a dream, [he] might have reaped more than just a crapshoot in the courts." Ouch!

numbers. The player said he did not have time to go to a nearby store before the drawing.

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The court also ruled the store owed no legal duty to the plaintiff and said it would not "hold any establishment to answer for the procrastination of fortune seekers." According to the opinion, "The odds of winning the lottery are extraordinarily slight, to say the least; the chances of picking the correct numbers are far less than one in a million…. No store would participate in the California Lottery if to do so opened the door to crushing liability every time a machine was inoperative, malfunctioned, or an employee was too busy to attend to the needs of fortune seekers."

### Late to the Game

The case of *Driscoll v. State of New Jersey*, 627 A.2d 1167 (1993), arose when the New Jersey state lottery changed its drawing time for its "Pick Six" game from 9:56 p.m. to 7:56 p.m. The switch occurred on October 1, 1990.

The lottery commission notified the general public by several means and supplied posters for display at each retailer. As bad luck would have it, a Rite-Aid pharmacy that Florence Driscoll patronized discarded its poster without ever displaying it.

Ms. Driscoll testified that she purchased her tickets at around 8:00 p.m. on October 1. She said she believed they were for that evening's game.

"As it turned out, one of the chances the plaintiff had purchased was for the combination of numbers 6, 11, 13, 22, 26, 45. These numbers were the winning numbers for the October 1, 1990, drawing!" the opinion exclaimed.

When Ms. Driscoll went to validate her ticket, she learned it was dated for the October 4, 1990, drawing. She pressed negligence and breach of contract claims against the state and also named the retailer for failing to put up the time-change poster. The Superior Court of New Jersey was not persuaded, finding Ms. Driscoll had ample time and opportunity to learn about the switched draw time, stating this public policy, "Where one willingly elects to participate in the lottery scheme, the burden must be placed upon the fortune-seekers to become informed of the rules that govern the outcome of the game, including the time and dates of the drawing, or suffer the consequences for failing to keep him or herself apprised."

The court added: "Recognizing a viable cause of action in this case would open the door to deceptive practices by fortune-seekers hoping to beat the odds in the lottery game."

### Winner Takes…Half?

In *Fullerton v. Department of Revenue Services*, 714 A.2d 1203 (1998), James and Mary Fullerton purchased one of two winning numbers for a December 21, 1993, Lotto drawing in Connecticut. The cash prize for that drawing was $5,618,438.86. Two winning tickets were sold, meaning each winning share was valued at $2,809,219.43, payable in 20 annual installments of $94,809.97. When the other winning ticket went unclaimed, the plaintiffs argued that portion should also be paid to them. Their reasoning: in order to be a winner, one must not only hold a winning ticket, but also present it to the claims center. The court sided with lottery officials and held that "winners are conclusively determined at the time of the drawing, not at the time of the presentment of the ticket."

### Pool Parties

Don't forget a simple maxim from your first year of law school: contracts can be oral. That legal concept carried the day in *Stepp v. Freeman*, 694 N.E.2d 510 (1997), when 20 co-workers agreed to pool their resources and purchase lottery tickets as a group anytime the jackpot reached $8 million. Membership in the pool was limited to 20 persons and had a waiting list. There was an understanding about how much each person would contribute, and the pool organizer allowed members to stay in even when they occasionally neglected to make their required $2.20 contribution toward 40 tickets and four "kickers."

A dispute arose when the pool organizer, Freeman, and one of its members, Stepp, had "a serious work-related disagreement" that included some name-calling, according to the *Stepp* opinion. After the argument, Freeman unilaterally booted Stepp out of the pool even though he'd been a member for five years.

Lady Luck showed up the very next week when the group hit the $8 million jackpot. Although Stepp had not contributed toward the winning ticket, he argued he was entitled to a share of the loot, and he sued when the pool members refused to pay him. The Ohio Court of Appeals ruled in his favor, finding an implied contract had been created. The court said Freeman breached that contract when he failed to inform Stepp that the group was playing the lottery.

As you may have gathered, the odds usually favor the house, even in lottery lawsuits. So one final tip: if you decide to take one of these cases, you may want to bill by the hour, rather than on a contingency basis. ■

*Mike Dayton is editor of* North Carolina Lawyers Weekly *and* South Carolina Lawyers Weekly *and co-author of a book on the history of Wake County lawyers published in 2004.*

# Notaries Public—What's the Big Deal?

## *And the New Chapter 10B of the General Statutes*

By Haley Haynes

If you had asked me before I joined the NC Secretary of State's staff about the importance of notaries public to society, I would have answered out of ignorance: "They serve to witness signatures—what's the big deal?" Now I know better. Notaries public are state-appointed officials who play a vitally important role in the deterrence of fraud by requiring that signers of legal documents be positively identified, as well as making sure the signer is signing knowingly and willingly. No technology can take the place of an impartial and unbiased individual identifying another person. In short, the notary is often the first, and sometimes best, line of defense against fraud in this age of increasing identity theft.

Recent enactments by the General Assembly include Session Law 2005-391, creating a new Chapter 10B in the General Statutes, and Session Law 2006-59, which further revises Chapter 10B. These laws serve to provide clear guidance to notaries regarding the standards to which they must conform. Plus, the changes still allow third parties to rely on notarizations for conducting their business even in the event of a technical defect within a notarization.

Additionally, S.L. 2005-391 took the

steps necessary to enable electronic notarization (hereinafter "e-notarization") and electronic recording (hereinafter "e-recording"). As a result, North Carolina is positioned to be the first state to enjoy widespread adoption of both e-notarization and e-recording, further enhancing our financial and business communities' competitive edge in the global economy.



## Chapter 10B: The Creation

At the direction of the General Assembly, the Department of the Secretary of State (hereinafter, the "Department") studied Chapter 10A in order to modernize and to improve the laws concerning Notaries Public.[1] Additionally, the Department was directed to study the appropriate method for authorizing e-notarization.[2] The Department undertook the General Assembly's mandate in two parts. First, for the "regular" notary act, in February 2005 the Department published for comment a re-draft of Chapter 10A based upon our extensive experience in commissioning and regulating approximately 168,000 notaries. Secondly, for the e-notary and e-recording portion, Secretary of State Elaine F. Marshall[3] convened an advisory council of stakeholders[4] in order to provide recommendations to her for transmittal to the General Assembly regarding the appropriate mechanism for enabling e-notarization and e-recording.[5]

After numerous meetings and vigorous public policy discussions, the Advisory Council on Uniform Real Property Electronic Recordation Act (hereinafter "URPERA") and E-Notarization provided its recommendations to Secretary Marshall.[6]

The Secretary reported to the General Assembly at the beginning of the 2005 Session.[7] Throughout the 2005 Session, the North Carolina Bar Association's Real Property Section, the North Carolina Bankers' Association, the North Carolina Land Title Association, the North Carolina Register of Deeds' Association, and the Department, as well as a number of other organizations, continued to work on the mutually shared goal of providing an improved regular notary act and enabling e-notarization and e-recording in North Carolina. It was through the significant efforts by the leadership of all of these organizations to reach a common agreement on the text of the entire bill that this goal became reality with the passage of Senate Bill 671. On August 24, 2005, the General Assembly overwhelmingly approved this legislation, creating the new Chapter 10B, Notaries.

After the dust settled from the 2005 Session, concerns were raised about various unintended consequences from the new Chapter 10B. Among those concerns were: whether the repeal of Chapter 10A had any effect on the long-established common law concept of "substantial compliance";[8] whether the Chapter's new acknowledgment forms, which were intended to serve as "universal" forms, confused the issue of legal requirements of a notary's acknowledgment. To their credit, the drafters of the acknowledgments went back to the drawing board to re-work the acknowledgement forms in a fashion that would meet the intended goal of providing easily-used universal acknowledgment forms in North Carolina statutory law. The results of their efforts now exist in the recently-amended Chapter 10B,[9] set to take effect on October 1, 2006. Legislative research staff were instrumental in teasing out and separating within the notary law two equally important concepts: (1) the authority of the Secretary to effectively regulate the conduct of notaries public in order to accomplish the underlying goals of the notary laws,[10] and (2) the ability of third parties to rely on notarizations in the event of technical defects in a notarization. An example of this differentiation within the law can be seen in N.C.G.S. § 10B-37: "Seal Image" which provides that the failure of a notary's seal to conform to statutory requirements is a matter for which a notary may be disciplined but "failure of a notarial seal to comply with the requirements of this section shall not affect the sufficiency, validity, or enforceability of the notarial certificate."[11]

## The Final Result

The newly revised Chapter 10B now contains the following:

- An extensive definition listing—some revised and some new for clarification of the statutes;[12]
- Additional requirements for qualification to become a notary, including proof of legal residency in the United States, and the ability to speak, write, and read English;[13]
- Clarification of grounds for denying a notary commission;[14]
- Clarification and enhancement of educational requirements for commissioning of non-attorneys, including six hours of classroom instruction within three months preceding application,[15] passage of a mandatory test with a score of 80% or better for initial and re-appointment applicants (excepting licensed members of the North Carolina Bar and certain other long-time notaries[16]);
- Maximum fee for performing a notarial act increased to $5.00 per signature;[17]
- Clarification of the proper procedure for acknowledging a person's mark and for acknowledging an instrument for a person who is unable to sign or make a

mark;[18]

- Clarification of the requirement that a notary sign by hand in ink (i.e. no facsimile or signature stamps);[19]
- Clarification of grounds or situations in which a notary is prohibited from notarizing an instrument;[20]
- Clarification and simplification of various acknowledgment forms;[21]
- Clarification of process for a notary change of status (i.e. change of name, address, county, and resignation of commission);[22]
- Enhancement of criminal penalties for a variety of notarial offenses, including making a person who knowingly solicits, coerces, or materially influences a notary to perform official misconduct an aider and abettor, therefore subject to the same level of punishment as the notary performing the misconduct;[23]
- Clarification in statutory form that the "presumption of regularity" created by the doctrine of substantial compliance shall apply to all notarial acts, absent evidence of fraud or knowing and deliberate violation of Chapter 10B by the notary;[24]
- Addition of a precautionary curative provision for all notarial acts performed before October 1, 2006.[25]

## Practice Tips

There are a few items worth a special mention to all notaries. The first is that, even though the non-exclusive statutory forms provided in the amended N.C.G.S. § 10B-41,[26] 42,[27] 42.1,[28], and 43[29] are quite simple, those forms do not change the notary's role and duties when performing an official act. N.C.G.S. § 10B-40 clearly states that, *regardless of whether it is stated in the certificate*, the notary is certifying to all of the requirements of an official act,[30] including the following by virtue of the now-amended N.C.G.S. § 10B-40(a2),[31] which reads as follows:

> (1) At the time the notarial act was performed and the notarial certificate was signed by the notary, the notary was lawfully commissioned, the notary's commission had neither expired nor been suspended, the notarial act was performed within the geographic limits of the notary's commission, and the notarial act was performed in accordance with the provision of this Chapter.
>
> (2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress, or undue influence.
>
> (3) The notary was not prohibited from acting under G.S. 10B 20(c).

Therefore, it is important the notaries remain mindful of their duties and roles regardless of whether or not the certificate they are using specifically recites the required elements.

The second practice tip is that the forms for various certificates provided in Sections 18, 19, 20, 21, and 22 of S.L. 2006-59 are *non-exclusive* and are meant to supplement, not replace, those that are already prescribed by other state laws. Section 18 of S.L. 2006-59 specifically states that notarial certificates are sufficient and shall be accepted if they are substantially in the form set out in Chapter 10B[32] *or* if they are substantially in a form otherwise prescribed by the laws of this State.[33]

My final practice tip to all attorney/notaries out there: consider taking a notary public course offered through your local community college. Due to licensure by the NC State Bar, we are exempted from taking such a course before becoming commissioned as a notary. However, taking one of these classes will serve to give you training in an area of law that many of us only come into contact with incidentally or indirectly. We have had attorneys tell us that taking the notary course was one of the most useful courses they had taken to improve their understanding of an everyday part of their practice.

## E-Notaries: The Next Generation

I would be remiss if I did not take this opportunity to inform my colleagues about the exciting developments surrounding e-notarization in North Carolina. The Department is currently engaged in the rule-making process[34] to enable e-notarization to move forward in this state. Once the rules become effective[35] (January 1, 2007, is the proposed effective date), North Carolina will be the first state in the nation to have enabled a method for a variety of e-notary solutions to be approved and deployed. Because this law has been approached in terms of the standards that should govern the technology, the standards themselves are technology neutral. The added benefit is that we are setting the baseline for what is required without prescribing any specific technologies, as other states have chosen to do; therefore, future developments and improvements in technology may be enabled without further rule-making or legislative action.

You may be asking yourself what is meant by "electronic notary"—does this change a notary's duties? Is personal appearance required in the e-notary world? The short answers are: no, the duties of a notary are the same, regardless if they are working on paper with their seal in hand or on a computer and accessing their electronic seal and signature; and yes, personal appearance[36] and all of the other bases for a notary acting in their official capacity are still required when an e-notary performs an official electronic notary act.

First, the basics: only already-commissioned notaries are eligible to become e-notaries;[37] they must also complete three additional hours of training in notarial laws, procedures, technology, and ethics and pass a test on these topics[38] before they are authorized to perform electronic notarizations. There are additional registration requirements along with a $50.00 registration fee;[39] the term of registration coincides with the regular notary commission.[40]

Next, the concept: electronic notaries will be using new tools (i.e. their electronic seal and signature) to perform their duties in an electronic setting. The Department is responsible for adopting rules to "insure the integrity, security, and authenticity of electronic notarizations."[41] The Department has proposed rules that set standards by which technologies are to be measured. If an e-notary solution measures up to the standards set by the rules, then that solution becomes an authorized method of performing e-notarizations. This allows notaries who wish to become e-notaries to do so easily and without having

to learn the ins and outs of different technologies in order to know which method to choose. Instead, e-notaries will be able to choose from the list of approved vendors who have been found to have met the rules' standards in order to move into the electronic arena.

### A Final Word

Secretary Marshall believes in giving the public prompt and useful service, and everyone in the Department strives to meet that goal every day. If you have questions about this article or other matters relating to notaries, please feel free to contact me directly at (919)807-2005 or by e-mail: hmontgomery@sosnc.com. Director Gayle Holder, former Harnett County Register of Deeds, is also available for your questions. You may reach her at (919)807-2288 or at gholder@sosnc.com. Further detailed information about the e-notary program development can be obtained from Ozie Stallworth, E-Notary Analyst/Director, at (919)807-2295 or ostallworth@sosnc.com. ■

*Haley Haynes currently serves as deputy secretary of state. She oversees several major divisions of the Secretary of State's Office, including its corporations, trademarks, notary public, and Uniform Commercial Code sections. Haynes served as the department's general counsel since 2002 before being promoted to deputy secretary in June 2004. Haynes worked as a private attorney in Asheville prior to joining the department. She is also a former public defender in both Asheville and Fayetteville.*

### Endnotes

1. Section 6.2, Session Law 2004-161.
2. *Id.*
3. Secretary of State Elaine F. Marshall is presently serving her 3rd consecutive term as secretary of state, having first been elected in 1996 and re-elected in 2000 and 2004.
4. Represented on the Advisory Council were the following organizations: NC State Bar, NC Property Mappers Association, NC Land Title Association, NC Association of the Register of Deeds, NC Association of Assessing Officers, NC Association of County Commissioners, NC Bar Association, NC Notary Association, NC Society of Surveyors, NC Department of Cultural Resources, NC Department of Transportation.
5. *See* Secretary of State Directive 2-04, The Secretary of State's Advisory Council on the Uniform Real Property Electronic Recordation Act
6. *See* Report to the North Carolina Secretary of State on North Carolina Electronic Recordation and Notarization by the Secretary of State's Advisory Council on the Uniform Real Property Electronic Recordation Act, February 10, 2005.
7. *See* Report on Modernization and Simplification of Notary Public Laws and E-Notarization, March 16, 2005.
8. *See Freeman v. Morrison*, 214 N.C. 240 (1938), in which the NC Supreme Court established a "substantial compliance" standard for evaluating whether an acknowledgment complies with statutory requirements. In that case, the Court reasoned that, absent evidence to the contrary, a "presumption of regularity" applied to the acts of public officers, particularly judicial acts, and then cited a case stating that taking an acknowledgement qualified as a judicial or quasi-judicial act. The Court then cited several secondary authorities supporting its holding, including this quotation from American Jurisprudence, "Probably in all jurisdictions the courts strongly advocate a liberal interpretation of the statutes, in order that acknowledgements may be upheld wherever there has been a substantial compliance with the law and no suspicion of fraud or unfairness attaches to the transaction." As of the writing of this article, *Freeman* has not been overruled. Cases citing and approving the *Freeman* holding include *Lawson v. Lawson*, 321 N.C. 274 (1987), *Contract Steel Sales, Inc. v. Freedom Const. Co.*, 321 N.C. 215 (1987), and *Matter of Hess*, 104 N.C. App. 75 (1991).
9. *See* Sections 18-22, Session Law 2006-59.
10. *See* N.C.G.S. § 10B-2, which give six underlying purposes, including:
    (1) To promote, serve, and protect the public interests.
    (2) To simplify, clarify, and modernize the law governing notaries.
    (3) To prevent fraud and forgery.
    (4) To foster ethical conduct among notaries.
    (5) To enhance interstate recognition of notarial acts.
    (6) To integrate procedures for traditional paper and electronic notarial acts.
11. *See* N.C.G.S. § 10B-37(f).
12. *See* N.C.G.S. § 10B-3.
13. *See* N.C.G.S. § 10B-5(b).
14. *See* N.C.G.S. § 10B-5(d)
15. *See* N.C.G.S. § 10B-8(a)
16. *See* N.C.G.S. § 10B-11(b)(3) as amended by S.L. 2006-59, providing that the testing requirement does not apply to notaries who have been continuously commissioned since July 10, 1991, who have never been disciplined as a notary.
17. *See* N.C.G.S. § 10B-31.
18. *See* N.C.G.S. § 10B-20(d) & (e).
19. *See* N.C.G.S. § 10B-35 as amended by S.L. 2006-59.
20. *See* N.C.G.S. § 10B-20(c) as amended by S.L. 2006-59.
21. *See* N.C.G.S. § 10B-40, 41, 42, 42.1 & 43 as amended by S.L. 2006-59.
22. *See* N.C.G.S. § 10B-50 through 55.
23. *See* N.C.G.S. § 10B-60.
24. *See* N.C.G.S. § 10B-99(a) as enacted by S.L. 2006-59.
25. *See* N.C.G.S. § 10B-99(b) as enacted by S.L. 2006-59.
26. *See* Sec. 19 of S.L. 2006-59.
27. *See* Sec. 20 of S.L. 2006-59.
28. *See* Sec. 21 of S.L. 2006-59.
29. *See* Sec. 22 of S.L. 2006-59.
30. *See* Section 1 of S.L. 2006-59 as follows: N.C.G.S. § 10B-3(1) for acknowledgements, N.C.G.S. § 10B-3(2) for affirmations, N.C.G.S. § 10B-3(14) for oaths, N.C.G.S. § 10B-3(28) for verifications or proofs.
31. *See* Section 18 of S.L. 2006-59.
32. *See* Section 18 of S.L. 2006-59, G.S. § 10B-40(b), (c), (c1) and (d).
33. *Id.*
34. The public comment period on the proposed rules for Chapter 10B ends October 31, 2006.
35. Go to http://www.oah.state.nc.us/rules/register/ register.html and click on Issue 5 of Volume 21 for the full text of the rules in their proposed form for both regular and electronic notaries.
36. *See* N.C.G.S. § 10B-116.
37. *See* N.C.G.S. § 10B-105.
38. *See* N.C.G.S. § 10B-107.
39. *See* N.C.G.S. § 10B-106 and 108.
40. *See* N.C.G.S. § 10B-106(b).
41. *See* N.C.G.S. § 10B-126(d).

## 2007 Meeting Schedule

Below are the 2007 dates of the quarterly State Bar Council meetings.

| | |
|---|---|
| January 16 - 19 | Sheraton Capital Center, Raleigh |
| April 17 - 20 | Sheraton Capital Center, Raleigh |
| July 10-13 | Sheraton Atlantic Beach |
| October 16 -19 | Sheraton Capital Center, Raleigh |
| | *(Election of officers October 18, 11:45 am)* |

# Creating a National Model for Legal Education at Elon—and Why

By Leary Davis

*There was a man from our town,*
*And he was wondrous wise.*
*He jumped into a bramble bush*
*And scratched out both his eyes.*

*When he saw that he was blind*
*With all his might and main,*
*He jumped back in the bramble bush*
*And scratched them in again.*

*Karl Llewellyn, The Bramble Bush*

*Elon Law School Professor Don Peters teaches in one of the school's high-tech classrooms.*

On August 10, 2006, in Greensboro, Elon University School of Law enrolled a charter class of 115 students. They came from 12 states and 49 different colleges and universities, including those from the Piedmont Triad, North Carolina's major state universities, and such other schools as Duke, Davidson, UVA, UCLA, Harvard, and Yale. Their median LSAT and GPA were remarkable for the entering class of an unapproved law school.

They may be the first class to enter a new American law school with a building capable of housing and supporting the school not only in its first year of operation, but also for all three years of instruction. When Justice Sandra Day O'Connor dedicated Elon University School of Law on September 19, she praised the school's H. Michael Weaver Building, which also houses the North Carolina Business Court, telling the students they could not imagine how fortunate they are to be able to study in such a fine, technologically advanced facility.

Elon's law library encompasses the bottom two floors of the Weaver Building, where it provides seating for over 300 patrons. It already offers access to 150,000 volumes for its students, faculty, and the practicing bar.

As impressive as Elon's facilities and downtown Greensboro location are, it was primarily Elon's faculty members and the educational program they are constructing that attracted the school's charter class. Elon's School of Law is building on the strengths of its parent university, designated America's "hottest college" for student engagement by *Newsweek-Kaplan*, in creating a national model for engaged learning in legal education.

### The Bramble Bush

I want to use this article to describe distinctive aspects of that model, but first to tell why it is needed. Karl Llewellyn's *Bramble Bush* poem quoted above provides a good place to start. If I understand the poem correctly, it is a metaphorical statement of the traditional advice given first-year law students: "We don't know exactly how one comes to think like a lawyer, but… trust us. Work hard. You'll feel blind. Keep working hard. Then you'll see."

One can argue that this advice has worked well for better than a century, since the advent of the case method at Harvard. After all, we're good lawyers, achieving at high levels, helping clients solve problems and maximize opportunities in broad ranges of situations. Law school must work well.

But has it worked as well as it should? When we read state of the profession surveys, we sense that it might not have worked as well as it could, and should, for the 20% or more of lawyers who find themselves feeling neutral or dissatisfied about their careers. I suspect it also does not work as well as it could, and should, for the rest of us, who express satisfaction with our careers.

None of us achieve our full potential. What if our three years of law school had provided us with broader and more substantial foundations upon which to construct our careers? At what higher levels of effectiveness might we have constructed our law practices and our lives? And if all, or even most, of us were functioning at those levels, how much better might the justice system and our families, firms, communities, nation, and world be?

We are going to need lawyers who function at those levels in the future. Those lawyers will need to be capable of making more high quality events happen for more clients in less time if they are to meet the demand for legal services in the United States and to respond to international competition in a global marketplace (see sidebar). They must be problem solvers who know more, think better, are more skilled, understand and use technology better, possess greater global and multi-cultural awareness, and build and participate on better teams.

### State and National Demand

From 1970 to 2000, the number of lawyers in the United States increased from 326,000 to 1,086,000, more than tripling while total population increased by only 37%. Despite this growth, the United States soon might not have enough lawyers to meet the domestic demand for legal services unless we change the way we practice law. To maintain our current ratio of lawyers to our projected population, we will need 1,591,000 lawyers by 2030. Because we will have 400,000 lawyers retiring in the next 10 to 15 years, it might be difficult to maintain that ratio.

A better indicator of the need for lawyers is the ratio of lawyers to projected gross domestic product. To maintain our current ratio of about $9.5 million per lawyer, we would need a total of around 2.5 million lawyers by 2030. It is debatable that having that many lawyers in the United States would be a good thing. A good thing or not, it is unlikely to happen. In the absence of a large increase in law school enrollments and graduations, lawyer population is projected to grow at less that one-third the rate of the economy. These pressures may be felt most keenly in North Carolina, which has fewer lawyers per capita than any other state in the nation except South Carolina, and which trails only Nevada and Delaware in gross state product per lawyer. US clients may have to look overseas to find lawyers to help them facilitate their business transactions.

### International Competition

Regardless of whether we experience a shortage of lawyers nationally, we could still find ourselves competing more with lawyers from other countries. Legal research is already being outsourced to India, another common law country that has all of our research tools available online.

Japan, which historically produced a percentage of law graduates per capita comparable to that in the US, then utilized an artificially low bar passage rate to funnel most of those graduates to government or business, has recently expanded graduate legal studies dramatically in order to compete better in a global economy. A national commission filed a report at the beginning of this century calling for the establishment of graduate JD programs like those in the US, while continuing its traditional undergraduate law programs. Since 2003 it has opened 67 graduate law schools patterned after those in the US.

Australia has also added JD programs to better equip their undergraduate LL.B. recipients for law practice, so that they may enter the profession at levels more comparable to those of US law graduates.

### Problems with Legal Education

Elon's model of engaged learning for legal education is designed to produce those lawyers. In the process of doing so it also addresses two significant and relatively recent problems with legal education. The first is that many law students disengage from their studies in their second and third years of law school. The second is that legal education is perceived by some to have become "soft," which is said to be not a good thing in preparing people for a "hard" profession; it is not a good thing *if* the soft substitutes for rather than supplements the hard. Hard analytical knowledge and skill are essential to lawyer competence.

But the problem is more complex than that. While knowledge and skill are necessary for lawyer competence, they are not sufficient. Whenever lawyers are asked to think of the best lawyer they know and to list the attributes of that lawyer, most of the attributes they list are soft attributes like self-knowledge, empathy, integrity, persistence, and good communication skills. It is these personal attributes that provide the catalysts that allow lawyers to translate knowledge and skill into competent representation, and the absence of which can preclude competence.

"Soft" is probably not a good word to describe attributes and education that equip one to develop the self-management strategies and strategies for dealing with others that make lawyers successful. As Center for

Creative Leadership (CCL) President John Alexander has said, "The soft stuff is the hard stuff." The complaint of those who say that soft legal education does not prepare graduates for a hard profession is not that law schools teach interpersonal skills, but that they do so at the expense of legal education's traditional rigor.

## Elon's Model

Elon's educational program is both harder *and* softer than the traditional law school program. It is building on and supplementing, rather than departing from, the traditional strengths of legal education. It is keeping the hard, the rigor, and making it more effective by providing the constant, constructive feedback of leadership education and law practice while keeping its students engaged throughout all three years of law school.

Think about how we learn in law practice. Jeff Kinsler, who's leaving the deanship at Appalachian Law School to join Elon's faculty in January, graduated first in his class at law school, but says he never learned to write until he started practicing law. That was because, as an associate in law practice, when he wrote and turned in a pleading or memorandum, his senior partner marked it up and had him do it again until it was perfect, certainly the equivalent of an A answer in law school. If that is what is required in law practice, where at its best we give new lawyers the feedback they need to produce perfect work products, why not in law school?

The major reason is that for the purpose of giving and receiving feedback the associate-partner ratio in law firms is far superior to the student-faculty ratio in law schools. The second reason is that keeping law students engaged and giving this kind of constant, constructive feedback is hard work: the soft stuff is the hard stuff.

With the help of a host of Triad lawyers, Elon is attempting this hard work, which generates an educational program with ten key differences from other law schools.

1. Importing the best of leadership education into legal education. Most lawyering skills and leadership skills are the same skills, employed to focus resources to create desirable opportunities and outcomes. The most important foundational attributes for competence as lawyers and leaders are knowledge of self, others, and the environments in which they operate. Elon's first-year students had an extended orientation that included not only an introduction to law school and to legal method, but also leadership modules that taught them things about themselves and others that will make them better law students and lawyers. Assessments for development instruments used in CCL's programs were particularly helpful in this regard.

2. Bringing new skills to the faculty. Most law school faculties do not possess an ideal skills mix to prepare their students to enter law practice. Perhaps one reason law schools have not expanded their approaches is that they lack the expertise to do so. Elon has decided to bring new skills to the faculty, employing legal education's first executive coach in residence. Bonnie McAlister, who has taught at CCL and Davidson College, coaches students and faculty in leadership and communication skills. Marty Peters, chair of the Association of American Law Schools Academic Support Section, serves as an academic coach, and Jim Exum, former Chief Justice of the North Carolina Supreme Court, is Elon's first distinguished jurist in residence.

Elon is also developing new skills for existing faculty. To create shared knowledge about leadership development and assessment for development, and to improve their own skills, all faculty members attend CCL's Leadership Development Program (LDP) before assuming their duties at Elon. The faculty also devotes substantial time to improving its teaching and to research concerning teaching, learning and the acquisition of competence. Visiting Professor of Law Steve Friedland and Peter Felten, Director of Elon's Center for the Advancement of Teaching and Learning, are national experts who are leading this effort in the school of law.

3. Providing constant, constructive feedback. Elon endeavors to provide its students more feedback than other law schools. To gain a realistic picture of how they might perform as lawyers, students should receive feedback on all aspects of their performance, not just how well they do in ordering information within a three-hour time frame in answering law school examination questions. While perhaps not keeping them out of the Bramble Bush, feedback at Elon lets students know they might go blind, why they're going blind, where the thorns are, and how to form the neuronal pathways that will allow them to see sooner. With respect to feedback that will prepare them for their fall semester exams, they've had a mid-term exam in Civil Procedure in October, and they will have had a series of practice exams in their other courses to prepare them for finals in December. While many schools have practice exams, few provide feedback to the extent Elon gives its students before their final exams.

4. Using final examinations as assessment for development instruments and rewrites to attain mastery of material. Elon has a three-week winter term in January, which students will use to rewrite any December final exam answer that did not reach an A level, just as Jeff Kinsler and we had to rewrite our work in practice. They will have to attain that A level on their rewrites to demonstrate mastery of the course material and to advance to the spring semester.

Using examinations as assessment for development purposes is not really as novel as it sounds. Think about your final exams in high school and college. Most of us never reviewed our final exams unless we thought the teacher might have made a mistake in grading them. But mid-term exams were different, if we knew that material on those tests was going to be examined again on the final exam. Almost all of us would look at those tests to refresh our recollection about what we knew and to learn what we did not know.

Well, for a lawyer, the real final exam is law practice, which makes a law school course's final exam like a mid-term. While Elon students will not have to rewrite answers that fail to reach the A level in subsequent semesters the first-year winter term experience will equip them to self-evaluate subsequent exams. For exams in the second through fifth semesters, they will be asked to review their exams and write brief analyses of what they knew and did not know, why they knew and did not know different aspects of the course, and what their plans are for learning what they did not know before they start practicing law.

5. Involving the bar in creating a Preceptor Program. Elon's is an intense educational program, and to help Elon's students deal with its intensity, 53 practicing lawyers have volunteered to create what is believed to be the first law school Preceptors Program. Each preceptor is assigned two or three students. Every other week these preceptors observe their students in class and give them feedback on their preparation and performance.

The Preceptor Program is undoubtedly Elon's most important innovation. That this many lawyers would not only be willing to spend this much time with Elon's students,

but also to spend another six hours in preceptor training, and that dozens of other lawyers have volunteered to invite Elon law students into their offices to observe interviews, negotiations, mediations, and depositions, is symbolic of the ideals of our profession.

There's nothing quite as wonderful for law students than being around real lawyers in a law school setting. Every Thursday afternoon at 4 o'clock Elon has a tea for its students and faculty and the bar. Elon will endeavor to provide free CLE to the bar before one of the Thursday teas each month.

6. Adopting graduate school grading standards. Most law schools have adopted *de facto* graduate school grades, giving almost all A's and B's to their students, but they have not adopted the rigor of graduate school grading that requires a B average to receive a graduate degree. Some students at these schools are misled into believing they are performing satisfactorily because they are receiving C's, only to learn of the profession's expectations when they fail the bar exam. Once they understand what is expected of them, they study harder than they did in law school and pass the bar exam. Requiring B's as the measure of satisfactory work should preserve rigor and discourage disengagement at any point in law school, and Elon has adopted that graduate school grading standard.

## The Second and Third Years of Law School at Elon

The second and third years are also a bit different at Elon. Four initiatives are worthy of mention.

1. Structuring the curriculum to maintain student engagement and enhance competence. Elon has analyzed the elements of knowledge and skill, doctrinal and general, technical and interpersonal, that lawyers need to function competently in their roles as analysts, advocates, and counselors. Its upper level curriculum will be structured to require that each student acquire a foundation that will equip that student to master whatever field or fields of law the student selects as a life's work. Each student will be required to select at least one of four upper level concentrations: business, litigation, public interest, or general practice. Each concentration contains required courses and electives that will keep students engaged throughout their three years at Elon.

2. Requiring international awareness. Elon is structuring a required second year course that will orient students to global legal, social, and economic environments while providing overviews of comparative, public, and private international law. The winter term during the second and third years may be utilized for foreign travel and study.

3. Providing a capstone leadership experience in the third year. Elon's law school is located at the center of a diverse urban network of state and federal courthouses and government offices, businesses, and nonprofits that provide unusual opportunities for civic engagement and public service. Before they graduate, Elon law students will be required to plan, implement, evaluate, and report on a capstone leadership experience of their own design, where they have attempted to make something happen to improve the law school, the legal order, or some other aspect of the world.



4. Being committed to the optimum development of each and every law student. The single best predictor of success in law practice is one's attitude toward one's studies in law school, not one's class rank. Nevertheless, law schools sometimes communicate to the bottom three-fourths of the student body, perhaps the bottom 90% at some schools, that they are not valued intellectually by many of their faculty members. Three years ago I communicated that thought to a distinguished judge, the recent recipient of his school's distinguished alumnus award, after he had appeared on a panel at a national meeting of legal educators. His face lit up as if he had been waiting 30 years to hear that admission from someone in the academy. He replied, "Leary, I worked hard all three years of law school, but I never got out of the bottom half of my class. I knew I was going to be a good lawyer, but I had to do it all by myself." No one who pays tuition to join the profession should have to feel that way, and Elon's team of faculty, coaches, and preceptors are dedicated to the proposition that no one will feel that way at Elon.

Legal education and the legal profession face interesting times in the next quarter-century. Elon's model of engaged learning should position it to lead constructive change in the profession and in legal education.

Elon's faculty knows that *they* cannot establish a national model of engaged learning. However, they believe that they, plus the lawyers of North Carolina, those who serve as preceptors and those who support Elon's work in other ways, can establish this much needed model.

Come to Greensboro for a Thursday tea, look over Elon's H. Michael Weaver Building, and let's talk about it. ■

*Leary Davis is dean and professor of law at the new Elon University School of Law. He was also founding dean of Campbell University School of Law, and before that practiced law in Wake County. He holds law degrees from Wake Forest and Columbia.*

# Our Judiciary Under Attack—A Call to Service

By Thomas W. Ross

*The following remarks were made by Thomas Ross on April 20, 2006, at the quarterly meeting of the State Bar Council.*

Thank you for your kind introduction! I appreciate Ron mentioning some of my awards. I used to say when asked about the awards that I have received that I was like a "turtle on a fence post"—I didn't get there by myself. But, that was before I was talking to this old farmer about a particular politician in Washington—I'll let you fill in the name of anyone you want.

When asked about this politician, the old farmer said that he is just like a "post turtle." I asked him to explain to me what he meant. This is what he said, "When you're driving down a country road and you come across a fence post with a turtle balanced on top, that's a 'post turtle.'" The old man saw a puzzled look on my face, so he continued to explain about how the Washington politician was like a "post turtle," "You know, he didn't get there by himself, he doesn't belong there, he doesn't know what to do while he's up there, and you just want to help the dummy get down."

Thank you also for inviting me to be with you today. I am always happy to be in the Queen City. My grandfather used to own a laundry just down the street and was treasurer of Meyers Park Presbyterian Church for 40 years, I went to college at Davidson, and my daughter currently lives here, so I feel connected to Charlotte in many ways.

Speaking of my grandfather, those who have heard me speak know I always begin my speeches with an old Scottish prayer my grandfather taught me. It goes like this: "Lord, make them like me and if they don't please afflict them in some way so that when they leave I will know who they are."

I am delighted to be with you tonight to celebrate and recognize public service by legal professionals. I want to particularly hold up and congratulate those among us who serve the public through elective office. I want you to know that I think I can speak for all of us here tonight in saying that we appreciate your willingness to go through what it takes to get elected and to put up with what you must tolerate once you are in office. It is not uncommon for you to be attacked and vilified by opponents. I can only urge you to remember the words of Dr. Frank Graham, former president of the University of North Carolina and a member of the US Senate, who said when attacked in his race for the Senate, "I shall not bend to the power of those who make the attack, but seek sympathetically to understand them."

I was asked to speak tonight about the status and needs of our judiciary. Before I get to that topic, I want to commend each of you for your dedication to public service and service to your profession. I am certain you have all committed many hours to serving your community and your fellow residents and you do so in exceptional ways. You make a difference in individual lives, but also in the life of your community. You have seized upon what I think is one of our basic human responsibilities—to serve our fellow man and woman and make the places we live better. It is also folks like you, who commit themselves to serving others, who make the great experiment in democracy work. And, as Winston Churchill said, "Democracy is the worst form of govern-

This problem ... is exacerbated by legislators who get angry with the courts over particular decisions and use this as an excuse for not properly funding the courts. Whatever the cause, court funding in North Carolina is reaching crisis dimensions and the credibility of the courts is suffering as a result.

ment except for all the rest."

As people and lawyers committed to service, whether in government, the non-profit sector, community organizations, or your profession; however, I would like to ask even more of you. I ask you to stand up for democracy and for our form of government which I feel is under significant stress. Allow me to explain.

We would all agree, I think, that the rule of law not only provides order to government, but is a tool for positive social change. As lawyers, you and I have the opportunity to help people, to change people's lives, to help our nation live up to its promise of justice for all. I believe that, among the three branches of government, the judicial branch is the one which must maintain greatest credibility, and which must provide the people with the greatest sense of security that they are truly equal under the law. This has been part of our collective psyche since the very beginnings of this nation. It is the judiciary that protects our rights—particularly the rights of the minority. The majority needs the judiciary less. After all, it has protection of the elected legislative and executive branches. The minority depends on the judiciary and this is even more of a reason we need to protect the independence of the judiciary—so the courts can decide the issues that are not necessarily supported by the majority and, thus, may be unpopular. The rule of law depends upon the respect the public has for the integrity with which our laws are interpreted. The credibility of the courts is what allows the rule of law to continue and anarchy to be avoided. As George Washington wrote during his first term in office, "The administration of justice is the firmest pillar of government."

Friends, I believe our democracy is at risk. I am not trying to sound alarmist. But the fact of the matter is that one of our branches of government is under attack, both directly and indirectly, and the very separation of powers that has kept our democracy alive and vigorous is in jeopardy.

First, allow me to discuss briefly the direct attacks. I gave a speech at Law Day here in Charlotte last year. I quoted at length direct attacks on the independence of the courts from many politicians in both parties. I won't take time to repeat those words tonight. We all have heard them and know the judiciary is, at times, being used as a whipping boy by public officials and opinion leaders who believe that the way to move their agenda forward is to chastise, threaten, and bulldoze this country's system of justice.

The point is, however, that the constant, degrading, and sometimes personal attacks on judges and the judiciary by political and other leaders are slowly eroding the credibility of the judiciary and will ultimately, I fear, undermine the rule of law. We cannot let the desire of a few to obtain their own desired short-term outcomes destroy the fabric of our constitutionally created institutions.

As lawyers, as people who believe in the system of justice, you and I have an obligation to speak out against these words and this conduct and to constantly educate the public and politicians about the value and importance of an independent judiciary that can impartially resolve disputes based on the law and facts and not under threat, duress, or coercion.

Quoting the 1935 case of *Humphrey's Executor v. United States*, Judge Birch of the Eleventh Circuit in his opinion in the Terry Schaivo case said, "the Constitution mandates that each of the three general departments of government must remain entirely free from the control or coercive influence, direct or indirect, of either of the others."

The rhetoric of those who want to control the third branch of government to advance their own agenda is not the only danger to judicial independence. Let me quickly mention a few more.

Judicial selection and campaign financing are still problems in our state. Judges must not only *be* impartial and fair, they need to *appear* to be impartial and fair.

Campaign contributions are a problem. There is no way around it. A system that requires judges to raise money, most of which comes from those who have an interest in the cases that come before the judge, puts great pressure on the ability of judges to be impartial and, I believe, makes it nearly impossible for them to be seen by the public as always impartial.

Fortunately, North Carolina has enacted public financing for appellate elections and this change appears to have been somewhat successful last year. It is, in my view, a positive step for good government in North Carolina.

Also, as someone who ran statewide in a partisan election and in a district-wide partisan election for Superior Court Judge, I can say I think we have made a very positive step in the right direction by enacting non-partisan elections for all judges in this state. I think this system is an improvement and is generally working well at the trial court level. We have fewer contested elections and the amount of money invested in those elections is on the decline.

I am not sure the non-partisan system is working as well at the appellate level, but I think it is still better than what we had before. Over time, I hope candidates will not run on party labels, but instead will focus on their qualifications. I commend Judge Howard Manning for taking this principled stand in the last election.

I remain convinced that elections are not the best way to select and retain judges. Judicial independence requires, in my view, that we appoint judges. With that change, I think we should institute a system of review and retention that is based on the quality of a judge's work, his

or her work ethic, demeanor, and promptness because it is important that there be a means of holding judges accountable.

Lack of diversity on the bench also puts judicial independence at risk.

Many of you have heard me talk about this issue before. Why do I think it is so important? It is because of the way growing numbers of Americans see our justice system. Increasingly, there are large segments of our society that no longer believe the courts are fair to everyone. There is a belief by many of our citizens, both among whites and people of color, that justice is available only to whites and to the wealthy.

Many citizens do not feel the poor get a fair shake and they believe the system discriminates against people based on inappropriate factors, including race and ethnicity. These are concerns we don't like to hear about. These are things that are uncomfortable to talk about, particularly for those of us who are white and well off economically. Some believe these are only problems of perception and have no basis in fact. I, however, believe they are real.

Our state and nation are becoming increasingly diverse. Our population looks much different than it did ten years ago and it will be even more diverse in another ten years. If we want our justice system to enjoy the confidence of this diverse population, the system must provide the real opportunity for all people to see themselves in the mirror when they look at the judiciary. No longer can we afford to have only a small percentage of our judges made up of people of color and women. The judiciary must reflect the populace it serves. As President Franklin D. Roosevelt said, "Among American citizens there shall be no forgotten men (and I am sure he would include women) and no forgotten races."

The final issue that I believe directly impacts judicial independence is funding for the courts. I'm sure you would expect a former director of the Administrative Office of the Courts for the state to raise this issue, particularly when there are legislators around. My experience in Raleigh only strengthened the views I held previously and continue to hold. If you don't provide the courts with adequate resources so they can do their job without undue delay, the public will lose confidence in the system. We have seen this happen when business litigants hire a "private judge" so they can get their case disposed of without waiting several years. Most people who come into the system don't have that option. If folks see a system that is way behind, if they hear law enforcement officers say we don't arrest folks for many misdemeanors because we know the courts are too busy to fool with them, and if these people can't get the service they need from the Clerk's Office, they lose confidence in the system. And when that happens the credibility so essential to maintaining the rule of law takes a hit.

This problem has been caused in part by recent budget problems, but it is a long term, chronic problem. It is exacerbated by legislators who get angry with the courts over particular decisions and use this as an excuse for not properly funding the courts. Whatever the cause, court funding in North Carolina is reaching crisis dimensions and the credibility of the courts is suffering as a result.

So, back to what I ask of you regarding these issues.

I ask you to support efforts to move to an appointment system for selecting appellate judges. This is a change long overdue which, in my view, has growing support and more likelihood of success than at any time in recent history.

You can continue to support the public financing system in North Carolina by checking off the box on your own tax returns that allocates $3 to the pubic financing fund and urging your clients to do the same. It may be too late for most of you this year, but some, like me, had to get an extension and may still have the chance. But, we can all remember to check off next year.

You can support and encourage people of color and women in the profession to seek positions on the bench. It may mean some of us white guys have to be willing to step aside for the good of the system we love. This may be a personal sacrifice, but it is, in my opinion, right and better for the common good if we are to build a diverse judiciary that reflects the society it serves. I commend Judge Bill Reingold in Winston-Salem who recently changed his mind and decided not to run for the Supreme Court against Justice Patricia Timmons-Goodson because he believes in diversity on the bench.

You can support increases in court funding. Speak out about how the underfunded system causes delays and backlogs that are hurting your clients, your community, and your practice.

Work with the business community to help them understand the need for a strong, well-funded, independent judiciary. Encourage legislators to do what is needed and what is right by the third branch.

Finally, you must speak out! As Martin Luther King said, "Our lives begin to end the day we become silent about things that matter." If lawyers don't care enough about the rule of law and an independent judiciary to protect and defend it, who will? It is your responsibility and mine to step up to the plate and offer a strong defense of our justice system and the need to protect its independence.

Speaking up on these issues is, in my view, part of your public service.

Many of you are familiar with Marian Wright Edelman, the first African American woman accepted to the State Bar in Mississippi and now the director of the Children's Legal Defense Fund. When it comes to public service, she offers these words: "Service is the rent we pay for being. It is the very purpose of life, and not something you do in your spare time." I think she hit the nail on the head.

Let's keep paying our rent every day.

Thank you for allowing me to speak with you tonight and please remember that Scottish prayer when you leave.

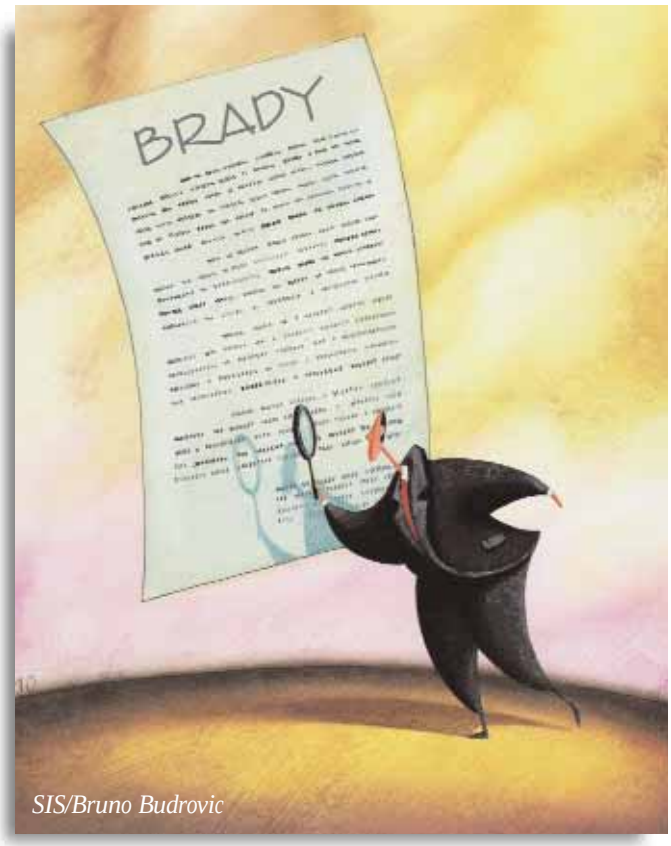
Thank you! ■

*Thomas Ross is the executive director of the Z. Smith Reynolds Foundation in Winston-Salem, North Carolina. He has been with the foundation since 2001. Previously, he was the director of the NC Administrative Office of the Courts; a NC Superior Court Judge; chair of the NC Sentencing and Policy Advisory Commission; administrative assistant to former Congressman Robin Britt (D-NC); a partner in a Greensboro law firm; and assistant professor at the Institute of Government. He earned a BA from Davidson College in 1972 and his JD with honors from UNC-CH School of Law, in 1975; National Judicial College, 1985.*

# Disclosure under *Brady v. Maryland*—A Prosecutor's View

By Jeff Hunt

Like many, I carry around each respective issue of the North Carolina State Bar *Journal* until I have time to sit down and read it. I have just completed the article written by attorney Mike Klinkosum of the capital defender office and criminal defense lawyer Brad Bannon entitled "*Brady v. Maryland* and its Legacy—Forging a Path for Disclosure" in the Summer 2006 *Journal*.



SIS/Bruno Budrovic

I am a three term elected district attorney, and past-president of the North Carolina Conference of District Attorneys. I was pleased that Mr. Klinkosum and Mr. Bannon, unlike many who discourse about North Carolina prosecutors' evidence disclosure obligations, avoided the incorrect and unfounded blanket assertion that North Carolina prosecutors who do not disclose certain evidence under the *Brady* cases are automatically engaging in prosecutorial impropriety or "prosecutorial misconduct." This is a dangerously irresponsible assertion many seemingly serious defense attorneys cavalierly toss out without much apparent thought.

The authors, however, have apparently made the same substantial error in their analysis and description of the *Brady* requirements of disclosure, that the vast majority of defense attorneys who write on the subject make. *All* impeachment evidence is simply not required to be disclosed. *Giglio v. US*[1] and subsequent cases are crystal clear in stating that *only material* evidence (whether impeachment evidence or other) is required to be disclosed. *Giglio* and *Napue v. Illinois*[2] hold, as the authors stated: "that *when the reliability of a given witness may be determinative of guilt or innocence...*" the evidence affecting credibility of the witness must be disclosed per *Brady*, as "exculpatory."

Clearly none of the cases have changed the initial "*materiality*" requirement established in the 1963 decision of *Brady v. Maryland*:[3]

> We now hold that the suppression by prosecution of evidence *favorable* to an accused upon request violates due process *where evidence is material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [emphasis added]

This is a critically important point and distinction because it can lead to the above-mentioned unfounded accusation of prosecutorial misconduct when not properly understood.

Under the cases involving the *Brady* disclosure requirements, as evolved through today, prosecutors must determine if evidence is first "*favorable*." Next, is that *favorable* evidence "*material*"? All favorable evidence is not necessarily *material*. Only evidence *favorable*

and *material* is required to be disclosed under the due process analysis established in these cases. This is true whether it is impeachment evidence or other evidence.

Under the cases, only impeachment evidence which relates to a witness whose testimony "*may be determinative of guilt or innocence*" is required to be disclosed by prosecutors. This is simply another way of stating that the evidence (impeachment or other) must be material and favorable to the defendant before its non-disclosure constitutionally violates that defendant's due process.

The significance of this is simply that, under the *Brady* line of cases, in deciding what is required to be disclosed, the prosecutor must apply his/her good faith discretion by determining the favorability and materiality of the evidence. It is misleading at best to claim: "Impeachment Material is Exculpatory Evidence" (one of the section headings of the Summer 2006 *Journal* article) and therefore necessarily must be disclosed. Only material and favorable evidence can be exculpatory and therefore, must be disclosed.

The problem is that these kinds of misleading descriptions of the *Brady* requirements lead the public often to erroneously conclude that, even when a prosecutor applies his/her good faith discretion and determines certain evidence is not subject to disclosure because it is not material and favorable, the prosecutor has engaged in "prosecutorial misconduct" *per se*. The unique responsibilities of the prosecution in searching for the entire truth on the one hand, while acting as the prosecuting advocate on the other, are difficult enough without having the "misconduct" label hung around his/her neck for the simple exercise of good faith discretion required to be applied by the *Brady* line of cases.

Justice Souter in the *Kyles v. Whitley*[4] opinion gets very close to the crux of the entire matter with a few succinct statements.

> …The Constitution is not violated every time the government fails or *chooses not to disclose* evidence that might prove helpful to the defense [citation omitted]. We *have never* held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and hence in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for all prosecutorial disclosures of *any evidence tending to exculpate or mitigate*. [emphasis added]

In describing this required application of good faith discretion by prosecutors seeking to apply the dictates of the *Brady* line of cases so as not to violate the defendant's due process, Justice Souter added:

> This means naturally, that a prosecutor anxious about tacking too close to the wind will disclose…[citation omitted] (The prudent prosecutor will resolve doubtful questions in favor of disclosure.) This is as it should be. *Such disclosure will serve to justify trust in the prosecutor as the representative…of a sovereignty…whose interest… in a criminal prosecution is not that it shall win a case, but that justice shall be done.* [emphasis added]

The good faith non-disclosure of evidence (impeachment or other) by the prosecutor for reasons of *immateriality* or *unfavorability* to the defendant cannot, and should never be referred to as prosecutorial misconduct. Likewise, absolute statements that the *Brady* line of cases *require* disclosure because, for example, "Impeachment Material is Exculpatory Evidence," without mention of the sometimes confusing "materiality" and "favorability" analysis required of the prosecutor under the *Brady* line of cases should be avoided.

In 2004 representatives of the North Carolina Conference of District Attorneys, Attorney General's Office, North Carolina Academy of Trial Lawyers, and the Indigent Defense Services Agency hammered out a new criminal discovery bill which essentially enacted a statutory "open file" discovery law for North Carolina. While it needs some "fine tuning" (protections from disclosure of certain confidential informants and identification information of certain victims need to be enacted), the law for practical purposes relieves the prosecution from a large part of the torturous above-referenced analysis and the "…tacking too close to the wind…" mental process foisted upon prosecutors by the *Brady* line of cases which Justice Souter so aptly described.

To be certain, the prosecutors must in all cases apply the *Brady* line of cases along with the new North Carolina discovery statute because in the rarest of cases the *Brady* line of cases might require the disclosure of something which the new discovery statute might miss. However, in practical terms, it is difficult to imagine what might fall into this category.

In the future, prosecutors will find several things to be true:

1. The *Brady* line of cases when, closely examined, will be found to require disclosure of *almost* everything now required by the new North Carolina discovery statute.

2. The new discovery statute in our state virtually relieves prosecutors of having to become enmeshed in the nearly super-human determination of what can and cannot be withheld from disclosure under the *Brady* analysis.

3. The state will save virtually millions of tax dollars by vastly reducing the number of appellate cases reversed because a well-meaning prosecutor failed to disclose certain evidence (impeachment or other) which he/she determined to be unfavorable or immaterial or both; but which a panel of judges or justices later determined was required under due process to be disclosed.

4. Far fewer prosecutors will be called to testify about their disclosure/non-disclosure analyses years afterward at motion for appropriate relief hearings.

5. The new discovery statute will virtually dissolve even the slightest argument that might have been assembled to justify a death penalty moratorium. Under the new discovery statute we have simply moved the "open file" complete disclosure requirements which already existed *after* the defendant's conviction (e.g., motion for appropriate relief practice in North Carolina) to a point in time *prior* to the trial. This in turn eradicates an entire line of "fairness" complaints once marched out in support of efforts to appeal or succeed at the motion for appropriate relief level.

Thanks to attorneys Klinkosum and Bannon for their well-drafted article with these gentle caveats. ■

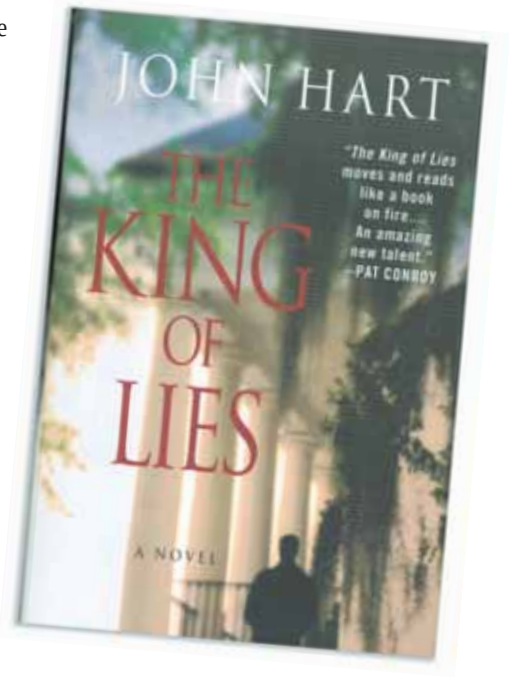
*Jeff Hunt is in his third term as district attorney of the 29th Prosecutorial District, and recently won re-election. Hunt was president of the NC Conference of District Attorneys the year the discovery bill was passed, and was therefore chairman of the negotiating team who hammered out the precise language.*

## Endnotes

1. *Giglio v. US*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)
2. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)
3. *Brady v. Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2 d 215 (1963)
4. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)

# An Interview with John Hart

BY JOHN E. GEHRING




My interview with John Hart took place on the Olde Beau Golf Course in Alleghany County. We agreed to play until we had finished 18 holes or lost 18 balls, whichever first occurred. Since this interview, I have been humming the tune "to dream the impossible dream" repeatedly. John Hart has a dream, and the dream is coming to fruition.

Q: Please talk about John Hart.

I was raised in Salisbury, received my secondary education at Woodberry Forest, my undergraduate degree from Davidson, and my law degree from Franklin Pierce Law School in New Hampshire. I have a masters degree in accounting and have worked as an attorney, accountant, and stockbroker. Part of my youth was spent working on (and flying) helicopters in Alaska, tending bar in a London pub, and living for eight months in France. I think I liked the pub work the best.

I am happily married and we have two daughters. Without the strong support of family, friends, and even some strangers, I would not have had the wherewithal to pursue the dream of writing full time. I consider myself blessed to have had such good fortune.

Q: Why a murder mystery for your first novel and rural North Carolina as your setting? Also, do I detect some Faulkner-type characters running through your book?

*The King of Lies* is much more than a murder mystery, although the murder of the protagonist's father is the major plot point of the book. Rather, the growth of Jackson Workman Pickens, known as "Work" to all, from a courthouse drunk to a man of conscious reflection, was my aim. The protagonist suffers from the same ills as much of society and a lot of the book is about finding the strength to recognize what he truly values and then leveraging that awareness to pull himself up by his bootstraps. I tried to ground it in what criminal defense lawyers see every day, the theater of the real. Chronic defendants, jaded lawyers and bailiffs, all of whom pretty much know who is guilty and who is innocent. Small towns can be the home of the rich, the want-to-be rich, and the poor. Work learns that his privileged upbringing means nothing when the tables turn and "society" passes judgment. Being cast out hurts, but it also opens new windows of perspective. In the end, that's what saves him.

Q: You have not mentioned redemption but have hinted at the same.

We see Work in many states: as an unsuccessful, hard-drinking lawyer, a defendant in the murder of his father, the big brother of a disillusioned sister, and a mentally clean and sober man. Along the way, he leaves his wife, finds adultery surrounding him, and learns some hard truths about murder, friendship, family, and even himself. There is so much more to tell but then, I might ruin the book for future readers.

Q: Just how hard was it to get published?

WHEW! I found out early on that you just cannot call up Random House or Doubleday or St. Martin's press and tell them that you are an unknown/inexperienced writer and that you have a book for them to read. The laughter can be heard around the world. You must find an agent with a passion for your work. He must have ample experience and the good will of editors at major houses. No editor will look at your work if he or she doesn't respect the agent. The editor, in the end, must share the same passion, see something in your work that makes it stand out from the other hundred manuscripts crossing his desk that week. In the end, everyone has a stake in the book's success: author,

agent, and editor. The process can take a long time, and be very frustrating. Rejection is a big part of it.

Q: It seems that you are now off and running! Can you tell the readers how many books have been printed? Also, how did you obtain the front page endorsement from Pat Conroy?

The first printing was 75,000 books. It is now in its fifth printing. Rights have been sold in about 15 countries, with translations into 12 foreign languages. None of the foreign publishers have released the book yet. However, it is also a featured selection of the Mystery Guild, The Book-of-the-Month Club, The Literary Guild, and the Doubleday Book Club. They print their own books, and I have no idea how many they've put out there. Movie rights have been acquired and hopefully you will see *The King of Lies* on the big screen.

I met Pat Conroy at an author's event in Charleston. A mutual friend introduced us. I told him that he was an idol of mine and that I would be honored if he would read my novel. He read the book and consented to write the "blurb" on the front cover. Getting to know him has been one of the highlights of this entire process.

Q: Speaking of the front cover, is the building pictured thereon a Southern mansion or a courthouse?

I'll let you and my readers figure that out. What the Southern mansion and what the courthouse represent play a large part of the story. Your imagination will take you in different directions as you read *The King of Lies.*

Q: What is next for John Hart?

I am working on my next novel which will be released in the fall of 2007. The protagonist will not be a lawyer. This story focuses on the other side of the spectrum, namely a young man hounded out of town five years earlier after narrowly beating a murder charge. Now he's back, and no one knows where he's been or why he's come home. Suffice it to say, bodies start piling up.

Also, I am working to improve my golf, especially on mountain courses. And, I still have some of my 18 golf balls left! ■

*John Gehring graduated from the University of North Carolina with undergraduate and law degrees. His postgraduate work was done at the Hague Academy of International Law and the University of Amsterdam, both located in the Netherlands. He practices law in Walnut Cove, North Carolina, and specializes in criminal defense. His international law training fell by the wayside.*

## Southern Mystery is Good Enough to be Called "Literature"

BY LINDA BRINSON

*The King of Lies*. By John Hart. St. Martin's. 310 pages. $22.95.

It's been a busy spring, so busy that when I finally grab a few moments with a novel at the end of the day, I usually nod off before I can find the passage I was reading when the book slipped out of my hand the night before. With most books, I long for a list of characters and a plot summary to refresh my memory; a computerized "search" function would really help. It can take a long time to finish a novel when you have to read pages over and over again.

So I am offering a high tribute to John Hart, North Carolina's latest literary sensation, when I say that I read his novel *The King of Lies* in a couple of nights, sitting up later than I should, turning just one more page. And then one more. No backtracking; no repeats.

What an impressive first novel this is; heck, it would be impressive if it were Hart's fourth effort, or his 22nd. No wonder the publisher is giving it a big debut, and early reviews are glowing.

*The King of Lies* is one of those fine books that is both a gripping mystery/thriller and a fully fleshed, thoughtful work of literature. Set in Salisbury, it has the added bonus of being in the best traditions of Southern fiction—family ties and secrets, violence simmering barely beneath the surface, lush descriptions, a strong sense of place. The prose is lush and poetic without being overdone or self-indulgent.

This is the story of Jackson Workman Pickens, known to most people somewhat ironically (he concedes) as "Work." When we first meet Work, we learn that he's the son of a powerful, ruthless, and rich small-town lawyer. Work has limped along in his father's footsteps, taking up his profession but without the same enthusiasm or results.

His disenchantment with the legal profession is far from Work's only problem. His marriage to a socialite is in a slow, painful, downhill slide. The unsuitable woman he didn't marry is still the one he loves.

Their father's overbearing cruelties have badly, maybe permanently, damaged Work's only sister. And one shattering night a year earlier, their mother died in a fall, and their father disappeared.

Now, with the discovery of his body, their father's disappearance has become a murder case. And before long, Work finds himself high on the list of suspects. He knows he didn't kill his father, but he's hesitant to try to clear himself by finding out who did. He's afraid that his fragile sister might finally have been pushed too far.

It doesn't take much poking around in the past to crack the thin veneer of polite, upper-crust Southern society and expose some gritty secrets.

In less skilled hands, this story might become melodramatic. But John Hart keeps his plot and his prose under the kind of taut control that evokes the image of a skilled rider and a spirited racehorse.

Hart's characters are complex and achingly human. As the book progresses, Work learns a great deal about the past and his family. Even more important, though, is the understanding he gains about himself. The more Work confronts his own failings, the more honestly he looks at where he's been and where he wants to go, the more the reader identifies with and cares about him. Here is a man forced from his quiet desperation, a man at a crucial turning point.

Don't miss this book. The only problem with taking *The King of Lies* on vacation is that you'll finish it too soon. If you start reading it on the beach, you'd better load up on the sunscreen. ■



*Linda Brinson is the Book Page Editor for the Winston-Salem Journal.*

# The LAP and Addiction Treatment—Dogma vs. Science

BY ALAN V. PUGH

*"The worst of madness is a saint run mad."*
-Alexander Pope

The New York Court of Appeals, after a lengthy review of the texts and teachings of the "12 step" program of Alcoholics Anonymous (AA) in *Griffin v. Coughlin*, 649 NYS 2d 903 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997), concluded:

> The foregoing demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the AA fellowship entails engagement in religious activity and religious proselytization. Followers are urged to accept the existence of God as Supreme Being, Creator, Father of Light and Spirit of the Universe. In "working" the 12 steps, participants become actively involved in seeking God through prayer, confessing wrongs, and asking for removal of shortcomings. These expressions and practices constitute *as a matter of law*, exercise for Establishment Clause purposes,...AA books are overwhelmingly religious and literally urge performance of quite traditional devotional exercises in working the 12 steps.

Other appellate courts have concurred. (*See Kerr v Farrey*, 95 F,3d 472 (7th Cir.,1997), and *Warner v. Orange County*, 115 F. 3d 1968 (2nd Cir., 1997) *Also see The Requisition of God by the State*, 47 Duke Law Journal 785 (Feb. 1998). Yet as recently as the Fall 2006 edition of this *Journal*, the director of our Lawyers Assistance Program (LAP) flatly stated; "in fact and in theory AA is not a religion and promotes no religion." He then went on to assert as an established fact that chemical addiction is a disease.

The United States Supreme Court has twice been confronted by cases in which alcohol dependency as a disease was presented in mitigation, avoidance, or defense by litigants. Justice Marshall in declining to overturn laws penalizing public drunkenness, found in *Powell v. Texas*, 392 U.S. 514 (1968), that:

> Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none."...Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological, or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.

Likewise writing for the majority in *Traynor v. Turnage*, 485 U.S. 535 (1987), Justice White in refusing to overturn the Veterans Administration's characterization of alcoholism as a willful act, stated at pp. 550, 552:

> We are unable to conclude that Congress failed to act in accordance with §504 in this instance given what the District of Columbia Circuit accurately characterized as a substantial body of medical literature that even contest the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility...It is not our role to resolve this medical issue, on which the authorities remain sharply divided.

The LAP Director's article further states that, "AA is by far the most effective program in helping those suffering from alcohol addiction stay sober." Yet, Dr.William R. Miller, distinguished professor of Psychology and Psychiatry at the University of New Mexico found in his *Handbook of Alcoholism Treatment Approaches* (Hester & Miller, 2003), from an examination and comparison of 381 research studies of 48 treatment modalities, that AA ranked 38th in effectiveness. In commenting on AA using its professional moniker, "12-Step Facilitation," which he described as "treatment-as-usual," Dr. Miller wrote at p. 41:

> The generic "Minnesota model" program that continues to dominate US addictions treatment is broadly characterized by a milieu advocating a 12-step philosophy, typically augmented with group psychotherapy, educational lectures and films, AA meetings, and relatively unspecified general alcohol counseling often of a controversial nature. To fill in the complete set of treatment methods with the least evidence of effectiveness, one need add only videotape self-confrontation and a host of failed medications. The negative correlation between scientific evidence and treatment-as-usual remains striking, and could hardly be larger if one intentionally constructed treatment programs from those approaches with the least evidence of efficacy.

The LAP advocates abstinence as the only stable outcome of an addiction treatment program, but as Dr. Stanton Peele has pointed out in his book, *The Truth About Addiction and Recovery* (Fireside, 1991), numerous research studies demonstrate that moderation is statistically a far more likely outcome for those diagnosed as alcohol dependent than abstinence.

What is going on here? The director and

the people who run the Lawyers Assistance Program are good, well motivated individuals charged with the admirable goal of helping attorneys overcome their addictions and assisting them with mental health issues like depression.

Why do they seem to advocate absolutist positions about which the experts in the field disagree?

Part of the answer lies in the practice and history of AA and the 12 steps, and the fact that many people employed in the addiction treatment industry, and involved in our LAP, overcame their own addictions while practicing and participating in 12-step programs, primarily AA.

The 12 steps and the program of Alcoholics Anonymous was developed and set out by William (Bill) Wilson, an alcohol dependent stockbroker, in a book published in 1939 entitled *Alcoholics Anonymous* (AA World Services). Mr. Wilson was a member of an evangelical Protestant sect known as the Oxford Group when he had his "white light" experience that spontaneously ended his drinking. Drawing heavily on the five steps to purity advocated by Oxford Group members, he developed 12 steps to form the basis of a recovery program he outlined in his "Big Book" (as it is called in AA circles). This work is widely available in libraries and bookstores, and has sold millions of copies over the years.

Even a cursory review of the "Big Book" will show that the capitalized word "God" appears on over 100 pages, and that although alcohol is mentioned in only one of 12 steps, God is mentioned in five of the steps. It teaches acts and spiritual exercises quite familiar to most Christians including: recognition of the Deity (Step 2.); submission of self-will to God (Step 3.); examination of moral faults (Step 4.); confession (Step 5.); absolution (Step 7.); atonement (Step 9.); prayer and mediation (Step 11.); and evangelism (Step 12.). It is really a quite conventional, albeit dated, faith based self-help book. The LAP in its "contracts" requires that lawyers obtain a copy of "the Big Book," study it, and attend numerous 12-step meetings.

What becomes apparent is that the real message of the "Big Book" is much more than a program to stop drinking, it is nothing less than a program to live by, to practice the principles laid down as Mr. Wilson says, "in all our affairs" (Step 12). Adopting a belief system grounded in the AA philosophy is powerful psychological medicine indeed. It is a way of life. It is a manner of living and a matter of faith for those who stopped their addictive behavior after being introduced to its precepts. This is particularly true for the many reformed drinkers who are now employed in the 15 billion dollar-a-year addiction treatment industry in the United States. (Given our more severe problems it is ironic that the US is the only developed country in the world that uses 12-step facilitation as its primary modality of chemical dependency treatment.)

It is not an uncommon or surprising phenomenon for a practice, custom, or belief to persist and be zealously defended in the face of research and evidence to the contrary. Many of us have had the experience of cross-examining otherwise honest people who under oath will deny matters that are objectively true, or who will assert the truth of things objectively false or questionable, if the answer touches on their deeply held beliefs, their core self-image, or seriously affects their way of making a living.

This may be the key to the reason for the adamant position of the director in his *Journal* article. While there is no medical or scientific evidence that substance abuse is an incurable disease, is progressive, requires lifetime abstinence, or is most successfully arrested by 12-step facilitation, these very notions are held as fact by 12-step advocates. For a participant to question these propositions in the context of a 12 step recovery program is usually taken by treatment "professionals" to be evidence of something called "diseased thinking," of "self will run riot," or variously "denial," "grandiosity," "narcissism," or the "ego-self" ( which the LAP has evidently banned as an approved "Higher Power"), and other psychological concepts engrafted or jerry-rigged onto the folk wisdom of AA in order to browbeat the questioning dissident into submission. Acceptance of the explanation of the 12-step theory requires no less than the suspension of rational analysis. Questioning is met by a phalanx of pithy one liners. "Your best thinking got you here." "You can't be too dumb to get the program, but you can be too smart." "Take the cotton out of your ears and put it in your mouth." "We will gladly refund your misery." etc. There is even the concept of the "dry drunk" which was put forward by the director in an article in *The Campbell Law Review*. This is the bizarre notion that one can be abstinent from alcohol, but is not "sober" if one is not working a good 12-step program.

Ordinarily all this would be an interesting object lesson on the power of myth, but until this year, the LAP Committee had the authority under certain circumstances to convey to the grievance committee information obtained through its authority to investigate anonymous complaints of substance abuse; to require an attorney under penalty of contempt to submit to a substance abuse evaluation; to initiate a grievance against an attorney; and to petition a Superior Court Judge to suspend an attorney's license.

Fortunately the council has approved the elimination of Rule .0614 which previously authorized the LAP to file grievances in what it called the "force-to-treatment" rule. This deletion of Rule .0614 puts real meaning into the LAP's assurances of confidentiality. The removal of this authority is a real substantive reform which will strengthen the LAP and enable it to have more credibility with lawyers, which is the key to its effectiveness.

The LAP Committee in an effort to protect the State Bar as a state agency from potential liability under the establishment clause has now adopted supplemental rules which say on paper that the LAP will not recommend a treatment option with an "*arguably*-religious aspect without *mentioning* that secular treatment options *may* also be available." In what manner and with what conviction this will be conveyed, given the beliefs of the LAP Director, remains to be seen. A drug dependent attorney is not in much of a position to provide a credible informed consent at the outset of his or her search for help. If the LAP does not accept at least the possibility of pluralism on the subject of the nature and treatment of addiction, then lawyers who need professional help will continue by and large to be served up ersatz religion with a passing nod to the establishment clause. A more hopeful sign is the recognition by the LAP that "ultimately a patient must believe in what his or her treatment or aftercare is about *or this treatment will not work*."

The fact remains however that the program's PAL's logo remains the triangle enclosed in a circle, the international "recovery, unity, service" symbol of Alcoholics Anonymous, and despite receipt of information relative to the appellate decisions, and the other data set out in this article, the NCLAP website's mantra on disease, addic-

tion, and treatment has not been modified in three years. The site is replete with what are quite frankly some very peculiar apologetics on 12-steppism, and how that philosophy can be used to deal with addictions of all kinds including alcohol, drugs, nicotine, compulsive gambling, sex, spending, etc. Evidently all one needs to do is to take the "first step," (We admitted we were powerless over _____,) and fill in the blank. Hopefully these "steps" are not applied by the LAP to mental health issues like depression where admonitions that one is "powerless" and should suppress emotions like "anger" can be clinically harmful. There is even a "4th Step" form on the site where you can catalog your sins to assist you in taking the "fearless and searching moral inventory" required in Step 4.

So what needs to be done to help lawyers deal with and overcome substance abuse and at the same time protect the public? First, don't panic and throw up your hands. Statistically, natural remission without treatment for whatever reason is the most common outcome of substance abuse, particularly for well educated, middle class people. Second, lawyers needing or seeking help should be told the full story about the various approaches to addiction treatment and the disagreement within the scientific, medical, and psychological professions on the subject of addiction and abuse, and then allowed and encouraged to make a true informed consent to one of the variety of methods available to deal with the problem. (A brief intervention involving a couple of sessions and follow up with a medical doctor explaining the consequences of continued abuse has been shown to be among the most effective approaches.) Third, treatment programs should be tailored to the individual lawyer, not forcibly imposed through a one-size-fits-all mandate. The one constant in all modalities consistently shown to be effective is therapist *empathy*. Dr. Miller describes empathy as "skillful, active listening as opposed to a 'listen-to-me' authoritarian approach." Fourth, the State Bar has already taken steps to make the LAP a truly confidential diversion program which removes the cudgel from 12-step advocates, and establishes a firewall between the LAP and the grievance committee which is porous from committee to program, but impermeable from program to committee. If investigation reveals a substantive basis that an attorney has an addiction, and since most all treatment approaches require a period of abstinence, the public can be protected by insisting the attorney submit to regular and random urine screens. Attorneys must submit to random audits of their trust accounts. The principle is no different and would be just as effective in this context without tramping on the First Amendment or Section 13 of the North Carolina Declaration of Rights.

The State Bar and its LAP has the opportunity to significantly improve the ability to assist lawyers suffering from substance abuse, while protecting their First Amendment rights and their right to make an informed consent as to their treatment. I am confident that provided with enough credible information, a willingness to hear from a broad range of experts in the field, together with input from the membership, that the council will take advantage of this opportunity. While the issues discussed here might not affect you as a bar member directly, the fact remains that approximately $350,000.00 of your mandatory dues are appropriated annually by the council to fund the LAP. Since the State Bar is a state agency and bar employees are state employees, this is legally equivalent to tax money. You are required to attend LAP

CONTINUED ON PAGE 64

United States Postal Service

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| 1. Publication Title | 2. Publication Number | 3. Filing Date |
|---|---|---|
| North Carolina State Bar Journal | 0 0 0 1 - 5 0 4 9 | 9-29-2006 |
| 4. Issue Frequency | 5. Number of Issues Published Annually | 6. Annual Subscription Price |
| Quarterly | 4 | $10.00 |

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4)*
208 Fayetteville Street Mall
Raleigh, NC 28403
Contact Person: Jennifer Duncan
Telephone: 919.828.4620

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*
208 Fayetteville Street Mall
Raleigh, NC 28403

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*
Publisher *(Name and complete mailing address)*
Jennifer Duncan
208 Fayetteville Street Mall
Raleigh, NC 28403
Editor *(Name and complete mailing address)*
Jennifer Duncan
208 Fayetteville Street Mall
Raleigh, NC 28403
Managing Editor *(Name and complete mailing address)*
Jennifer Duncan
208 Fayetteville Street Mall
Raleigh, NC 28403

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

| Full Name | Complete Mailing Address |
|---|---|
| North Carolina State Bar | 208 Fayetteville Street Mall<br>Raleigh, NC 28403 |
| | |
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| | |
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12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☒ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

PS Form **3526,** October 1999 *(See Instructions on Reverse)*

| 13. Publication Title: North Carolina State Bar Journal | 14. Issue Date for Circulation Data Below: Fall 2006 (September) | |
|---|---|---|
| 15. Extent and Nature of Circulation | Average No. Copies Each Issue During Preceding 12 Months | No. Copies of Single Issue Published Nearest to Filing Date |
| a. Total Number of Copies *(Net press run)* | 21,400 | 21,850 |
| b. Paid and/or Requested Circulation (1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. *(Include advertiser's proof and exchange copies)* | 20,870 | 21,458 |
| (2) Paid In-County Subscriptions Stated on Form 3541 *(Include advertiser's proof and exchange copies)* | 0 | 0 |
| (3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non USPS Paid Distribution | 0 | 0 |
| (4) Other Classes Mailed Through the USPS | 0 | 0 |
| c. Total Paid and/or Requested Circulation *(Sum of 15b. (1), (2),(3),and (4))* ▶ | 20,870 | 21,458 |
| d. Free Distribution by Mail *(Samples, complimentary, and other free)* (1) Outside-County as Stated on Form 3541 | 50 | 50 |
| (2) In-County as Stated on Form 3541 | 0 | 0 |
| (3) Other Classes Mailed Through the USPS | 0 | 0 |
| e. Free Distribution Outside the Mail *(Carriers or other means)* | 100 | 100 |
| f. Total Free Distribution *(Sum of 15d. and 15e.)* ▶ | 150 | 150 |
| g. Total Distribution *(Sum of 15c. and 15f)* ▶ | 21,020 | 21,608 |
| h. Copies not Distributed | 380 | 392 |
| i. Total *(Sum of 15g. and h.)* ▶ | 21,400 | 21,850 |
| j. Percent Paid and/or Requested Circulation *(15c. divided by 15g. times 100)* | 98.2% | 98.9% |

16. Publication of Statement of Ownership
☒ Publication required. Will be printed in the Winter issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner: Jennifer R. Duncan, Director of Communications — Date: 9-29-2006

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PS Form **3526,** October 1999 *(Reverse)*

# The Enigma in the Courthouse Stairs

BY CANDACE ALLRED

Some people said Jessie Capewell had gotten where she was in life because of who she knew. At least it appeared that way. Her boss, the district attorney of Keokuk County, Sawyer Capewell, was her doting father-in-law. Jessie's mentor just happened to be the daughterless first lady of North Carolina. There were all the obvious signs she received preferential treatment. Sawyer steered the best cases her way and she was never burdened with the usual stint in juvenile or traffic court where other ADA's languished during their early careers. Jessie regularly prosecuted felonies to the frustration of her older and more experienced colleagues. Adding to their frustration was her near perfect conviction record.

In law school she had gained the adoration of the first lady, Claire Morrow, by winning several oratorical competitions and earning the only "A" Morrow gave out in her first year legal writing seminar. Two years of female bonding ensued as the pair embarked on Moot Court Competitions across the country, picking up trophies and downing a few frozen margaritas along the way. Morrow arranged a series of choice internships for Jessie beginning with a split summer between southeastern powerhouses, Teague & Lynch and Brown & Davies. Claire's influence culminated with a clerkship at the Fourth Circuit Court of Appeals, despite Jessie's sub par grades. Jessie repaid the favor by organizing a well attended golf tournament which raised thousands of dollars for the governor's election campaign.

Connections like these could take a young lawyer places. She could have gone anywhere, but the gravitational pull of her home town drew Jessie back to the small coastal community of Cantril, North Carolina. To be sure, Jessie was ambitious, all of her hard work and diligent social climbing had not been in vain. Her aspiration was to become a judge, to be a powerful somebody in the place that made her feel lowly since birth. And the sooner she became a judge, the better. Her desire was born from a promise she made to her ailing father many years back. It was a promise she was determined to keep.

Circumstances were ripe in Keokuk County for the governor to appoint a new judge to the district. Political pressure to fill Judge Hokely's seat with a jurist from his own party was mounting, though the old man proclaimed he would not step down until he was carried out of the courtroom on a stretcher. His stance angered Jessie and the other members of the local bar who hovered over his seat like vultures. If only he would step down, Jessie knew she would be a shoe in. Time was running out for her and it was unlikely she would ever have such connections to the governor's mansion again.

The judicial appointment weighed on Jessie's mind, but she tried not to let it distract her from her caseload. After all, loosing some easy drug cases would not bode well in her quest to become judge.

"Mr. Masser, like I said, all the state is willing to do is reduce the charge to felony possession," Jessie said with a stack of manila files bouncing on her hip and a patent leather attaché swinging from her grip. She strutted down the hall of the courthouse, her conservative black pumps clicking against the hard wood like the hooves of a show pony.

Jim Masser struggled with a response, but he was winded just trying to keep up with her rapid gait.

**The Results Are In!**

In 2006 the Publications Committee of the State Bar sponsored its Fourth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of five committee members. A submission that earned third prize is published in this edition of the *Journal*. The second and first place stories will appear in the next two editions of the *Journal*, respectively.

"My client had only 1.6 ounces on him, that's just one tenth away from making this thing a misdemeanor," his tan blazer billowing open as he tried to keep up.

"Well, that's his bad luck. I think you're forgetting some evidence tended to show he meant to share with his buddies. Felony possession is on the table until Monday afternoon. Just let me know," she said unrelenting in her stride.

Jessie used her quick pace to intimidate, it was a little trick she had picked up. Jessie could walk faster in pumps down halls and up stairs than any other attorney. Half of those old guys still smoked and nearly all of them sported middle aged guts. It left her in the position of barking out plea offers over her shoulder, while opposing counsel panted like whipped dogs. They were too proud to ask her to slow down.

"Look, he's never been convicted of anything remotely violent," Jim Masser groveled, "He's had a rough life Ms. Capewell."

Masser had to stop and take a breather. Jessie took mercy and swiveled around on her two inch heels to examine his haphazard dress. Masser's furrowed brow sprouted moisture. His suit was mismatched with too small

pants a lighter shade of Khaki than his blazer. The short sleeved dress shirt sticking to his torso crumpled in the humidity. Jessie's outfit remained crisp despite the sweltering August heat and the fact that she was wearing panty hose. Her mother told her that ladies always wore nylons, and no matter what the temperature, Jessie subscribed to that mantra.

"Then I am very sorry for him. But I won't hesitate to try this case," she added raising a well groomed eyebrow.

"I'm going to speak with Tom Capewell about this," he said in anger. He didn't really think anything would come of it, but he felt compelled to say something nasty. His client had been found with two separate baggies, and he knew Jessie could make a sale or delivery charge stick. Even though he had ten times the experience of Jessie, experience was no match for her relentless youthful stamina. She prepared longer, harder, and more diligently than any other attorney he had ever come across, and she lacked the bureaucratic complacency of other ADA's. *Damn Tom for assigning her to this case!*

"Do what you must," it was more important that Masser respect her than be her friend.

"Ms. Capewell! Ms. Capewell!" Jessie turned to the excited voice. Marjorie Freeman, a summer intern at the DA's office was running towards Jessie.

"What is it?" she asked bewilderedly, though not too concerned. Marjorie was an excitable young girl.

"There's an important phone call for you. It's… Claire Morrow."

Finally, Jessie thought, this was the phone call she had been waiting for, maybe the governor was going to force Judge Hokely's hand. Jessie shoved the files she had been carrying into Marjorie's chest and trotted down the hall with Marjorie following after.

"Like the Claire Morrow of Teague & Lynch, like Claire Morrow the governor's wife?" asked Marjorie.

"Yes, *the famous* Claire Morrow," Jessie said feeling a bit charitable at the sight of her doting intern. "Maybe I could introduce you when she comes to Cantril." And she would come to Cantril, for Jessie's swearing in, of course.

"Omigod, that would be awesome!" Marjorie said darting ahead of Jessie and opening the office door for her.

Jessie shooed her out of the room—this would be a private call. She took a deep breath and picked up the receiver.

"Professor Morrow, how are you?" her glossed lips parted with a knowing smile.

"Jessie, dear, are you going to call me that forever?" She laughed. "It's Claire, just plain Claire, how many times to I have to tell you?" Though she knew Jessie would never call her by her first name, and she really didn't want her to, both women were too fond of decorum.

"How are your boys?" The conversation should begin with pleasantries—Claire would get to the point soon enough, best not to appear too needy Jessie thought.

"Stephen is actually out your way, he's sailing up the coast on a schooner with some friends. And Joseph, like most 14 year olds has discovered girls. The governor's up to his eyeballs in commitments for campaign season. So, I guess you must know why I am calling," she said, her voice trailing off in a sing-songy manner.

Jessie could hardly contain herself and began twirling a tight clasped pony tail around her thin finger.

"It's always nice to hear from you Professor Morrow, is there any way I can be of assistance to the governor?" she inquired coyly.

"Thank goodness, I knew you wouldn't make me beg. With fundraising season underway, we hope you could organize that wonderful golf tournament again. This year we'd love to have a reception at your father-in-law's river house. How does that sound dear?" Jessie felt somewhat dejected, but she knew in politics a price must be paid for favors.

"The Capewell family would love to help. Actually, Luke and I are living at the river house now. My in-laws moved into a condo last year by the coast. They thought we'd be able to better care for the place."

Jessie's eyes drifted to the glossy photograph on her desk, the one Claire had given her. It was of the two of them slouched like dressed up rag dolls on the grand staircase of the governor's mansion. The picture was taken after the Governor's Ball three years earlier. Claire was so well preserved for her age, it appeared the two were blond sisters, though Jessie was 20 years her junior.

A short pause hung in the air as Jessie waited for a response. None came, so Jessie took her shot.

"Has the governor given any thought to Judge Hokely situation? Things have sort of deteriorated, he rambles on so. In traffic court the other day, he gave a sermon that went on for over an hour. Something about when he was at Okinawa, blah, blah, blah…"

"Yes, several attorneys from the area have called to air their concerns," Claire offered.

"His wife told one of the clerks that Judge Hokely had never even served in the South Pacific. Besides, even as old as he is, he's too young to be a WWII vet. He's losing his mind for sure. I don't mean any disrespect, the man's a legend around here, but we can't get through the calendar with these outbursts and his three hour lunches," Jessie lamented.

"That's a shame, he used to be so on top of things," Claire sighed.

"It's more than just a shame. Judge Hokely's antics are gaining notoriety, and not in a good way. Yet he insists he'll run for another term. Times are different now, what was once considered charming or idiosyncratic behavior is hindering the court. Judge Hokely is a dinosaur and bad for the party. He is leaving the door wide open for those with different political affiliations to launch successful campaigns. But if someone from the party were already on the bench..."

"You're right and the governor realizes these things, but he can't very well force someone to step down."

"The governor is the most powerful politician in the state, surely there are ways to apply pressure," Jessie argued knowing how much both the Morrows enjoyed being reminded of how powerful they were.

"Now Jessie dear, you know the governor doesn't operate that way." Jessie's throat tightened, she thought to herself *that's exactly the way the governor operates*.

"I know you want to be a judge," Claire softened her tone, knowing her words wounded the ambitious protégé, "and no one would like seeing a young woman put on the bench more than me. But you're only 30 years old, you have some time. Look, why don't you come to Raleigh and let me set you up in something here. Do you know what a fabulous lobbyist you would be? You would make the biggest splash up here in Raleigh, earn ten times what you're making in... wherever it is you are exactly. The governor even has connections in Washington, DC. You could go there. Dear, why are you wasting your talent in that little town you seem to be stuck in?" Claire stopped with the niceties and started getting frank.

"But I want this. I want," she took a breath, her eyes welling up, "to be a judge in Keokuk County. Like you said, I've sacrificed

a lot to be here." Jessie rarely let her emotions get the best of her, but this was the best shot she had. Claire was wrong, time was limited for Jessie.

"My advice is to think about the alternatives I'm offering. Your talents would be better spent elsewhere. Judge Hokely was elected to his post, we have to respect that. No one can force him down. Only the hand of God can pull that man off the bench."

* * *

It wasn't often Jessie left work early, so it shocked her husband when she came bursting through the door at three p.m. with tracks of mascara running down her cheeks.

"Jessie, baby, what in the world?" he was naturally distressed at seeing his usually impeccable wife strung out. She held up her palm to him to prevent him from coming nearer.

"I don't want to talk, just meet me out on the dock with a highball, a stiff highball." Luke Capewell wasn't good for a lot of things, but he made a superb highball. Of course he was already home on a Friday afternoon, readying his fishing boat for the weekend. Competitive fishing was the other thing he was good at, though his chosen profession was part-time dentist.

As ordered, Luke rushed out in his deck shoes and golf shirt to his ruined wife. He believed the situation warranted a pitcher of highballs.

"Sugar, now I know you didn't lose a case," he said divvying out liquid into a plastic cup. Jessie was perched on the edge of a white Adirondack chair staring intensely into the river.

"No, it's nothing like that. Claire Morrow called today to ask about hosting the golf tournament again. I thought the governor wanted to appoint me to Judge Hokely's seat, but she said the governor is not going to force him to step down," Jessie gulped a healthy dose of cocktail. "The old loon was boasting in court the other day, he would stay until they carried him out on a stretcher."

"Jess, I can't believe you're all worked up about that. It will happen, sugar, soon enough you'll do it. You're only 30 for crying out loud. Besides…this will give you more time to concentrate on a baby," he said tenderly rubbing her tensed thigh.

"Oh please, if I devote half the time to child rearing as the other judges do to golf our kids will be fine. The problem with this place is that everyone's scared to death a woman might get a little power," Jessie sounded bitter but, Keokuk County was one of the few jurisdictions in the state that had never elected a female judge or district attorney to office.

Luke hugged Jessie from behind peppering the back of her neck with little kisses.

"It's so nice out. How about I whip us up a plate of shrimp scampi and some of those little red potatoes you like. We could take dinner out on the boat with another pitcher of these," he offered holding up a half empty glass.

"Whatever, but just so you know, that's not going to fix things. Should I ask your dad to call Governor Morrow? No, wait, that's too obvious. I'll enlist Judge Buckman, he's got some pull in the party doesn't he?" she said looking up, but Luke had already retreated to the kitchen.

Jessie pulled out her cell phone. It was time for the most dreaded part of her day.

"Hey Momma, it's me. How's Daddy?" she asked. Jessie would have liked to stop by on her way home, but since things had gotten really bad, her dad refused to see her. He was too proud to let his children see the sickly skeletal frame that remained of their father's once robust body.

"Not too good. The Hospice nurse came by to give him some pain killers. Maybe you should come in the morning…." Her mother's voice cracked under the strain of tears. "Look sweetie, I better go, I hear him coughing."

"OK Momma, I'll see you in the morning. Take…" but her mother had already hung up before she could finish, "…care of yourself."

Jessie balled up her fists and stared defiantly at the river. Undoubtedly, the cancer was a result of the sawdust he breathed year in and year out as a laborer in the local paper mill. The oppressive Weiner Paper Mill made millionaires of a few local townspeople, including her husband's ancestors, while keeping everyone else in dead-end jobs. Not to mention, the mill made the county filthy with its raw repulsive smell.

"Jessie, you be sure and get your education, so you don't end up like your dad," he told her the night before his first surgery.

"Yes sir. I'm going to be an attorney," she'd said proudly.

"But why stop there? You should go all the way and be a judge. There's no higher calling in this world greater than being a judge. Everyone respects a judge from the lowliest mill worker to the richest man in town. They're all at the mercy of a judge. That's my dream, to see my baby Jessie in a black robe one day pounding her gavel," he grinned.

"If that's your dream, then it's my dream too," she'd told him combing sweaty tendrils out of his eyes.

"Promise you'll do it, that you'll get your education and be a judge one day," he pleaded.

"I promise."

Jessie's father survived his first bout with cancer. She was thankful for the good times that followed He'd been able to attend graduations and give Jessie away on her wedding day. He boasted to everyone that would listen, his little girl was going to be a judge. Even when people scoffed at his overalls and his grimy working man's hands, he'd kept faithful. The cancer came back last year and took a vengeful turn on him. Jessie knew he did not have much time left, if only she could be appointed judge before he passed on.

Luke emerged with two hot plates fragrant with garlic and butter. They decided to dine on the dock instead of their boat. Jessie did not feel much like eating, but she did not want to appear ungrateful to her husband. He had been taking the brunt of some undeserved abuse lately. She sat with her tan legs swinging from the side of the dock, kicking up tiny splashes of water. The river grew darker as the sun disappeared, until, at length, it was nearly black. Luke did not pressure her to talk, he knew from experience to just let Jessie be lost in her own thoughts. Eventually she'd come back to him.

* * *

Like other rural courthouses in North Carolina, Keokuk County had fallen into disrepair. During summer months the building hummed like a bee hive because every lady in the Clerk's Office brought her own fan to work. For years rumors circulated that the building would eventually be air conditioned. Unfortunately, the better part of the budget had been spent on costly metal detectors. The fire marshal warned that the antiquated electric wiring system would not support a portable fan plugged into every available socket in the building, but the staff refused to heed the warning.

Periodically the lights would flicker under the strain and occasionally the wires would

short. The courthouse might lose power for a minute or two, but eventually things would come back up.

On one such morning, a few days after the devastating phone call from Claire Morrow, Jessie found herself in district court. Normally she spent working hours prepping for felony trials in Superior Court, but the district attorney asked her to straighten out the calendar mess in traffic court while her incompetent district court counterpart ADA was on vacation. As requested, Jessie and Marjorie arrived early and negotiated the entire criminal docket. By the time 9:15 rolled around only a few stragglers remained. If only Judge Hokely would favor the court with his appearance, the calendar could be cleared and everyone could move on with the day.

"Where's the judge?" Jessie inquired to a plump clerk who was nose deep in a trashy romance novel.

The clerk did not reply but pointed upward to Judge Hokely's chambers. No doubt he was upstairs leisurely perusing the local paper or perhaps watching a morning chat show on television.

"Well can you get him and tell him we're ready?" she said pulling her lips taught across her teeth in a sort of condescending smile.

"I suppose I could," the clerk said peering over the top of her paperback. She proceeded to rise from her chair slower than any human being Jessie had ever seen.

"I don't have all day. I'll get him myself," she said tearing off across the gallery.

* * *

As predicted, Jessie discovered Judge Hokely planted in front of his television with the daily crossword puzzle resting on his lap. Jessie tapped on the judge's open door.

"What is a six letter word for mystery, fourth letter is a 'g'?" he asked without looking up.

"Judge Hokely, everyone is waiting for you. Are you ready to come down?"

"Just a minute. I've only got a couple more. Six letter word for mystery, do you know what it is?" he said peering over his glasses.

"Enigma, a six letter word for mystery is 'enigma.' Now, let's go Judge Hokely, we don't want to keep people waiting," Jessie said in a way one might speak to a toddler. The lights flickered on and off, but Jessie and the judge barely acknowledged it.

"Enigma, I never would have gotten it," he said rising from his chair. "You're Tom Capewell's daughter-in-law, pity I don't get to have you in my courtroom. You're clever aren't you, and purdy as a picture," he said winking at her.

"We really need to get downstairs. I'm trying to clear the calendar. Things are getting a little backed up." Jessie was relieved Judge Hokely had gotten up from his chair, but perturbed by the "purdy" comment.

As the two approached the elevator, the power went off, but did not flicker back on immediately.

"We better take the stairs, judge. We don't want to get stuck in the elevator if the power goes out."

Nothing in the world sounded better to Judge Hokely than being stranded all day in an elevator with an attractive young blond. While his mind drifted to that particular fantasy his eyes drifted to Jessie's posterior. They stopped at the landing and the lights flickered off again, this time they stayed off for a moment. The judge's hand then drifted where his eyes had been, just briefly, a nice little pat. He had perfected the move over the years; just enough for him to get his jollies, but too little of an indiscretion for anyone to articulate a viable complaint.

"Look, you dirty old man," Jessie said grabbing the offending hand. "What do you think you're doing? Keep your hands to….."

The judge was clearly startled—he had never gotten this reaction before. Then, in the dark, at the top of the staircase, it all came together for her. Jessie felt her own power, felt the frailty of the old man teetering on the landing. His bony wrists tensed in her grip, he opened his mouth like he might say something, but no words came out. The injustice of the speechless man standing in the way of her dream was too much. Who was he to deny her the judgeship she and her sweet father had dreamed of together?

Jessie winced and closed her eyes dreading the gruesome scene, but things weren't as gory as she imagined. No spattering of blood and guts polluted the stairwell. The judge's arms and legs weren't twisted in any unnatural fashion, the way she feared his limbs might be rearranged from the violent fall. Only his neck appeared crooked, as if it had collapsed onto his left shoulder in a deep shrug. Judge Hokely had not even screamed, only a dull clunking sound was made as his head hit the first floor landing.

The lone haunting image that Jessie would carry with her from that day forward was the terrified look in the judge's opened eyes. Those eyes, frozen in their final frame, created the sorrowful and maddening expression of a man who had been done in by his own silly indiscretions.

* * *

In the end, the hens in the Clerk's Office took the brunt of the blame for Judge Hokely's untimely demise, but most people dismissed the incident as a freak accident. Even the judge's family did not feel particularly bitter about the fall. His son remarked at the funeral service, that it was somehow fitting the good Lord had taken his daddy in the courthouse, the place the judge loved most. Jessie's father-in-law used the incident as leverage to get the legislature to approve more funds for courthouse renovations. By the following August an HVAC system had been installed, all in honor of the late Judge Hokely.

The morning of Jessie's swearing in, her family assembled at the river house for a celebratory brunch. As a little gift, Claire Morrow had arranged to have the gathering catered by some fancy outfit from Raleigh she employed for her ladies' luncheons. The gesture delighted her mother and father, who mustered enough strength to attend the festivities for what was likely his final outing.

Getting up to leave, Jessie pulled on her new robe and could not help noticing it fit her perfectly; black was her color. Today she would become a judge in front of her father. He would leave this world peacefully, satisfied that Jessie had made something of herself. No longer was she just the daughter of a down and out mill worker, she was arguably the most powerful woman in the county. Jessie smiled at the determined face in the mirror. Maybe she wasn't the smartest or most gifted attorney, maybe she was not as sophisticated as the other girls in her law class, maybe she had to play a little dirty, but those things didn't matter. She had succeeded on her own. By the time she reached the bench, she was adept at shoving her way to the top. ■

*Candace practices law in Chapel Hill in the area of estate planning. She lives in Cary with her husband and they are expecting their first baby in March. She dreams about one day writing and publishing a novel.*

# An Interview with Our New President—Steven D. Michael

**Q: What you can tell us about your roots?**

I was born in Lexington, North Carolina, but my family moved to Winston-Salem in 1958, where I grew up, graduating from Reynolds High School in 1967. I was the middle of three children and grew up in a family where both parents worked long hours, which meant that you learned to be self-reliant. I mowed yards and did odd jobs for neighbors in junior high school to earn spending money, and in high school I held part-time jobs to finance my social life and have money for college.

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

I attended East Carolina University and was not considering becoming a lawyer even though that was the career my father thought I should pursue. I had a period of active military duty coming up after graduation and had been accepted by Duke University for graduate school for the fall of 1972. During my active duty time, I came to realize that a law degree could open a lot more opportunities for the future and came home one weekend to take the LSAT. I hand carried my application to Chapel Hill in the spring of 1972, and shortly thereafter received notification that I was invited to join what would become the class of 1975. I would be less than candid if I did not admit that I was not really committed to being a lawyer during my first two years of law school. It was not until I worked for Raleigh lawyer, William G. "Buck" Ransdell, during the summer after my second year that I really understood what lawyers did and the difference they made. I worked on an appeal of two death sentences that had been imposed on a man from the western part of the state and spent the summer researching and working on the brief. By the time I had finished, I was able to tell Buck that I believed that the client should and would get a new trial. The North Carolina Supreme Court granted the new trial. I continued to work for Buck part time during my third year of law school on a number of interesting cases involving prominent individuals from Wake County. Besides possessing a keen intellect, Buck was honest, professional, cared about his clients, and was a zealous advocate on their behalf. He, as much as anyone, cemented my desire to be a lawyer and provided the early guidance that has benefitted me throughout the years.

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

My practice today is principally mediation, arbitration, and general civil litigation. After law school, I worked for Ransdell & Ransdell for two years essentially supporting the firm's trial practice, but also handling a number of matters on my own. I wanted to get more trial experience and though it was hard to leave two lawyers who treated me very well, I became an assistant district attorney in Wake County and prosecuted criminal cases for the next three years. When I was ready to leave, an opportunity to do trial work for a firm on the Outer Banks of North Carolina became available. I have been on the Outer Banks since 1981, forming the firm I presently practice with in 1984, and have continuously practiced with the firm except for a period in 1991 and 1992 when I served as a Superior Court Judge.

**Q: If you had not chosen to become a lawyer, what do you think you would have done for a living?**

Had I not become a lawyer, I unquestionably would have gone into the teaching field. During my second year of undergraduate school, it became my goal to teach at the college level. If not for the military duty time, I likely would have continued on that path.

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

A letter to the editor in our local newspaper criticizing attorneys and the legal system made me angry and I decided that I wanted to be a State Bar Councilor so I could help improve the image of the profession. I have discovered what a big task this is and I hope to be able to use this year to continue to work on how the public views us.

**Q: What has your experience on the council been like and how has it differed from what you anticipated?**

I really did not have more than a general

idea of how the State Bar operated when I arrived. When I attended my first quarterly meeting, I was quickly impressed that this was a professional organization in all respects, doing very serious business. The level of professionalism, civility, and debate was impressive. One of the officers told my group of new councilors that we would make friends we would keep for life, and that has been true. It is without a doubt one of the most rewarding periods of time in my life and has made me a better lawyer and person.

**Q: You live in a relatively small community on the coast, near Virginia, that is far removed from Raleigh. Does geographic diversity on the council really matter?**

While all lawyers share many common concerns, there has long been a perception in more rural parts of the state that the State Bar is controlled by the big firms and not concerned about the problems of small town lawyers. That is simply not the case and the councilors adequately represent all segments of the legal community. Maintaining geographic diversity insures that all the lawyers of the state feel like their views are represented.

**Q: In your opinion, does it make sense for lawyers to be regulating themselves? Is it good public policy? Do we deserve the public's trust?**

I honestly believe that lawyers are their own toughest critics and are the ones most likely to impose upon themselves rules that protect the public. It has been my own experience in my 11 years with the State Bar Council that the councilors are able to put aside their self interest and the interest of lawyers when it conflicts with public interest. During the last few years, not only have we opened our disciplinary process to public scrutiny, but we have also made a tremendous amount of information concerning the activities of the State Bar and the disciplinary proceedings against lawyers easily available to the public, particularly on our website. As long as we continue to follow the principal that our decisions must be in the public interest, then we earn and deserve the public's trust.

**Q: You've had a great deal of experience with the Bar's disciplinary program. How do you think it's working? Is there anything about it you'd like to see changed?**

It is no secret that my emphasis this year will be on the disciplinary process. I am in the process of appointing a Disciplinary Advisory Committee to help with a smooth transition with our new chief counsel. I have no significant concerns about how our disciplinary process currently works and do not start with the idea that something is wrong. I want to see if there are ways to improve the process, such as speeding it up without comprising the quality of work and decision making. It is my hope that the Disciplinary Advisory Committee and State Bar staff will be able to come up with some bench marks to use as goals for the disciplinary process to move through. Every case is different and should be treated accordingly. However, we need to ensure that we move matters quickly through the process because lawyers, clients, and the public all have an interest in having the matter concluded in a timely fashion. I see no major changes being necessary, but simply look towards a more formalized plan to aid the process.

**Q: Do you think there ought to be a "statute" of limitations applicable to grievances?**

In light of the Disciplinary Hearing Commission's decision in the Honeycutt and Brewer matter, which the State Bar has appealed, we have undertaken a study of whether or not there ought to be a "statute" of limitations. There has been a proposal offered by a special sub-committee, which in essence does away with our current statute of limitations. I personally prefer to have a statute of limitations similar to the one that we currently have in force. It makes sense that there has to be a time when grievances, other than felonious, criminal misconduct, are simply too old to be dealt with. I think Tom Lunsford's humorous article in an earlier State Bar *Journal* (Summer 2006) clearly illustrates the difficulty inherent in trying to reconstruct events that are remote in time. We have tabled further discussion of the current proposal until we have a decision by the North Carolina Court of Appeals.

**Q: The council is currently considering whether the State Bar ought to accept responsibility for providing and paying for counsel for indigent lawyers charged with disciplinary offenses or alleged to be incapacitated by some sort of emotional or mental disability. How do you feel about that?**

I favor providing counsel for attorneys alleged to be disabled by some sort of emotional or mental disability and think our rules currently allow the DHC Hearing Committee to do this if justice requires. However, indigent lawyers present a totally different question. It is a difficult issue because of the serious consequences that may befall the attorney; however, I do not support the proposal. I cannot support the proposal. Using an extreme example, it would be difficult for me to justify to the lawyers of North Carolina that we would take a portion of their dues to provide a legal defense in a disciplinary proceeding for an attorney who has embezzled his client's funds and spent them. We all already pay a Client Security Fund assessment that may cover the loss to the client occasioned by the attorney's misconduct.

**Q: Over the past several years, the State Bar has spent increasing amounts of its budget to enforce the prohibitions against unauthorized practice of law and to assist lawyers who have become or are becoming impaired by chemical dependency and/or mental illness. Are these trends likely to continue?**

When I first came to the State Bar Council 11 years ago, I was assigned to what was then known as the Unauthorized Practice of Law Committee and we did not seem to have a lot to do. I served on the committee for nine years and, during those years, I watched the explosive growth of complaints to the committee about individuals and companies involved in the unauthorized practice of law and the harm they cause to the public. There is no question that this will continue to be an area of increasing concern as we attempt to protect the public from unlicensed and unregulated vendors who do significant harm. Besides those who actually set up shop, the internet provides an unlimited ability for individuals from anywhere in the world to offer services to North Carolina residents

and this will likely continue to grow.

It is unfortunate that the number of lawyers with chemical dependency and/or mental illness also tends to increase with the growth of the group of lawyers which we serve. Despite the large amount of resources devoted to these issues by government, private groups, and the State Bar, it seems likely that as our membership grows, these problems will grow proportionately. Our current program administered by Don Carroll does a terrific job; however, at some point we will have to decide how much more of the State Bar's limited resources can be devoted to this and may need to consider using alternatives and referrals outside the State Bar.

**Q: You were a leading advocate for the imposition of a requirement that lawyers appearing pro hac vice in North Carolina tribunals be registered with the State Bar. Why did you feel so strongly about that and do you think the rule is going to be effective?**

For years, lawyers from other states have been allowed to practice on a limited basis in the courts of North Carolina. In doing so, they have agreed to be subject to and bound by our rules. Unfortunately, we had no way of knowing who they were, where they had been admitted, and the matters in which they had been admitted. Since they are subject to our regulation, I felt that the State Bar should have a record of these individuals in the event we had to have some interaction with them. I think that when we started the process, we had guessed that there might be 200 pro hac vice admissions per year. There is a $25.00 fee that is collected for each pro hac vice admission and through the third quarter of this year, we have collected a little over $11,000.00 in fees, which translates to approximately 450 pro hac vice admissions. It is obviously occurring in greater frequency than we anticipated. The form which has to be completed also contains a gentle reminder for out-of-state attorneys working in North Carolina that they need to check with their tax advisors as to whether or not they owe any income tax to the state of North Carolina. I believe the rule is effective as it appears compliance is high and we now have a record of the out-of-state attorneys subject to our regulation.

*With his wife, Loretta, looking on, Steve Michael is sworn in as president of the State Bar by Chief Justice Sarah Parker*

**Q: What else would you like to accomplish during your year as president?**

I will use my year to support professionalism and civility among the members of our profession and to encourage lawyers to be active not only in the organized bars, but also in their communities. I will ask the district bars and the Bar Leadership Institute of the North Carolina Bar Association to consider the issue of ethnic and gender diversity, and to encourage young, talented, minority lawyers to get involved in the State Bar and the North Carolina Bar Association. I will also continue to participate in the programs that we put on for the district bars to give local lawyers an opportunity to put faces with the names of State Bar staff members so that they will feel more comfortable in calling on them for advice. It is extremely important for lawyers to understand that the State Bar staff is first and foremost here to help them avoid problems.

**Q: Tell us a little about your family.**

Loretta and I have been married for over 36 years and she is my biggest supporter and my kindest critic. I think all of my fellow councilors and officers who have gotten to know her understand what a capable and valuable asset she is. We have two sons, both of whom are married. My youngest son Josh and his wife Claire live in Durham, and Josh attends UNC. Our oldest son Kevin and his wife Lora live in Summerfield, North Carolina, and have given us two grandchildren, Zack who is six and Brooke who is four.

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

First and foremost is the enjoyment I get from being with my family. We are a very close knit group and see each other often. As any one of them will tell you, I am completely taken with my grandchildren and enjoy spending as much time with them as I can. Outside of family, I enjoy traveling, amateur photography, and being the home and office handyman. ■

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

I hope that they will know me well enough to remember me as a friend and as a good lawyer with a sense of humor. ■