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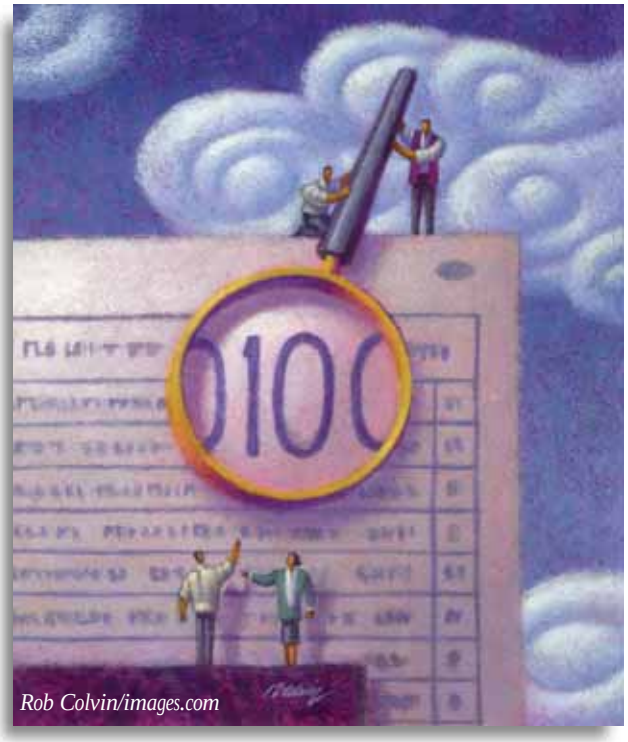
Examining North Carolina's New Tax Assessment, Refund, and Appeal Procedures

By Charles B. Neely Jr. and Nancy S. Rendleman

The following is part one of a two-part article. Look for the second installment in the Spring 2008 Journal.

The 2007 North Carolina General Assembly enacted sweeping reforms to the procedures for contesting tax assessments and for claiming tax refunds. These changes affect assessments and refund claims for corporate income, franchise, individual income, sales and use, and other taxes imposed and collected by the state.[1]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S.L. 2007-491 establishes new procedures to be followed by the Department of Revenue and taxpayers to resolve both assessments and refund claims within the department and, for the first time, provides for a prepayment appeal system under which a taxpayer may contest an assessment before an independent administrative law judge. The reform legislation also provides for new appeal procedures in the business court.

History

Prior to adoption of S.L. 2007-491, depending on the circumstances, North Carolina law had three different procedures by which a taxpayer could contest its tax liability. The traditional remedy for contesting tax assessments or for seeking tax refunds was found in G.S. 105-267, which traced its antecedents to the 19th century. Under G.S. 105-267, taxpayers could pay a tax under protest and seek a refund in superior court. Although not usually sought, trial by jury was available.

In the mid 20th century, G.S. 105-241.1 *et seq.* was adopted to allow taxpayers to contest an assessment through an administrative process, involving an appeal of the assessment on a prepayment basis to the secretary of revenue ("the secretary"), followed by an appeal to the Tax Review Board[2] on the record set before the secretary or his designee, with an appeal thereafter on the record to superior court. The taxpayer retained the right to forego this process, pay the tax, and sue under G.S. 105-267.[3]

The third alternative, G.S. 105-266.1, was adopted to allow for the recovery of "excessive or incorrect" tax payments by the filing of a claim for refund, followed by a hearing before the secretary, review of the secretary's decision by the Tax Review Board, and appeal thereafter to superior court. However, the courts made it clear that this remedy did not encompass constitutional challenges to the imposi-

tion of a tax,[4] and that constitutional challenges must be pursued under G.S. 105-267.

The statutory schemes created by these three statutes included different periods of limitations and different procedural requirements. Practitioners often found the interplay among the statutes to be confusing, and sometimes a trap. This confusion was compounded by court rulings which made it unclear whether constitutional challenges could be brought under G.S. 105-241.1 *et seq.* or only under G.S. 105-267[5] and what constituted a valid protest under G.S. 105-267.[6]

Taxpayers and practitioners representing taxpayers were particularly troubled by the lack of an independent prepayment hearing of assessment appeals outside the department. Under the appeals system set up by G.S. 105-241.1 *et seq.*, taxpayers' appeals were taken to an assistant secretary appointed by the secretary of revenue[7] whose office was located in the secretary's suite. Hearings were not subject to the rules of evidence, nor were the rules of civil procedure applicable. Taxpayer representation by counsel was not required.[8] The department resisted discovery, taking the position that taxpayers were not entitled to discovery in these hearings. Appeals from the secretary's decisions to the Tax Review Board and thereafter to superior court were on the record established before the secretary and were entitled to the deference given to decisions made in administrative appeals under G.S. 150B-51(b), unless the taxpayer opted to pay the tax and proceed under G.S. 105-267 with a trial *de novo*. Even though the department had worked in recent years to insulate its hearing officer from the department's influence, the statutory scheme did not lend itself to the independence taxpayers desired, nor did it provide for the statutory protections provided under the Administrative Procedures Act, G.S. 150B.

The council of the Tax Section of the North Carolina Bar Association had for some years taken the position that the tax appeals system demanded reform. In 2007, the North Carolina Bar Association formally endorsed the reforms set out in S.B. 242 (subsequently enacted as S.L. 2007-491). In 2004, the Council on State Taxation ("COST") had evaluated all 50 states' tax systems using a method that attempted to objectively analyze each state's treatment in its statutes of significant procedural issues that reflect whether a state provided "fair, efficient, and customer-focused tax administration." The 2004 COST study had ranked North Carolina 43rd of 50 states.[9] The 2007 COST study rated North Carolina even lower on the same criteria. *CFO Magazine* similarly ranked North Carolina "as having one of the least independent appeals processes in the country."[10] By 2006, North Carolina was one of only 15 states that did not provide an independent, prepayment appeals system.[11]

Confronted with criticisms of the tax assessment and appeal system, the General Assembly in its 2006 session directed its Revenue Laws Study Committee to study the system and to make recommendations to the 2007 session.[12] The Revenue Laws Study Committee made reform recommendations to the General Assembly as part of its report,[13] and these recommendations formed the core of S.B. 242.[14]

The new legislation repeals the statutes governing the administration and judicial review of disputed tax matters (generally effective January 1, 2008, except as noted other-

wise) and replaces them with a single unified procedure under which the procedure for handling tax refunds and reviewing tax assessments will be substantially identical. The new procedures are set forth methodically and logically. Appeals will be taken from a "final determination" of the department to the Office of Administrative Hearings ("OAH") where the record will be set and a decision made by an administrative law judge. Action by the secretary on the OAH's decision will result in the issuance of a "final decision" by the secretary. Thereafter a taxpayer may request judicial review in business court.

One remedy lost by taxpayers in the change to a unified tax appeal system is the right to pay the tax and proceed directly to court in a refund action under G.S. 105-267. This was a trade-off in the give and take of the legislative process. This remedy is available in the federal system, under which a taxpayer may sue for a refund in federal district court or the United States Court of Federal Claims, or proceed to tax court without payment of the tax.[15]

Requesting Refunds and Proposing Assessments

Refunds. The new legislation establishes a limitation period for requesting a refund of an overpayment of tax, for any reason, of three years after the due date of the return[16] or two years after payment of the tax,[17] whichever is later.[18] If a taxpayer timely files a return reflecting a federal determination, the period for requesting a refund is the later of one year after such return is filed or three years after the original return was filed or due to be filed, whichever is later. As under current law,[19] waiver of the statute of limitations by a taxpayer extends the time in which a taxpayer can obtain a refund to the end of the period extended by the waiver.[20]

A taxpayer may request a refund by filing an amended return reflecting an overpayment or by filing a claim for refund. Although the taxpayer must state the basis for the refund claim, the statement of the basis does not preclude the taxpayer from changing the basis for its claim thereafter.[21] Within six months of the date of the filing of the refund claim, the department must make the refund or partial refund (in which event the reason for the adjustment must be given), deny the refund and send a "notice of proposed denial," or request additional information concerning the requested refund. If the taxpayer provides the requested information, the department must act on the request for refund within the later of the end of the six month period, 30 days after receiving the information requested, or a time period mutually agreed upon. If the taxpayer does not respond, the department may deny the refund request.[22]

The notice of proposed denial of the refund must state the basis for the proposed denial. However, statement of the basis for the denial does not limit the department from changing the basis in the future.[23] If the department does not act on the request for refund within six months, the inaction is considered a proposed denial of the requested refund.[24]

Assessments. S.L. 2007-491 provides that the secretary may propose an assessment within the later of three years after the due date of the return[25] or three years after the taxpayer filed the return.[26] The periods of time for making an assessment or requesting a refund after the taxpayer files a return reflecting a federal determination are identical.[27]

The new legislation makes a significant change in the law regarding the ability of the secretary to make assessments following federal determinations. Under the old law, a correction or final determination by the federal government for a tax year opened up the entire return for that year to audit and assessment for any reason. Under G.S. 105-241.10, a taxpayer will be liable for additional tax only if the additional tax is the result of adjustments related to the federal determination. Similarly, the taxpayer will only be able to make a refund claim after a federal determination if the refund is the result of adjustments related to the federal determination. Except for adjustments related to the federal determination, this change to the law brings finality to tax years that under old G.S. 105-130.20 could remain open for audit and adjustment for extended periods of time—sometimes as much as six or seven years. The effective date for this change is for taxable years commencing on and after January 1, 2007.

The new legislation makes it clear that although a proposed assessment must set forth the basis for an assessment, the statement of that basis does not foreclose the department from changing that basis.[28]

The difference in the periods of limitation between G.S. 105-241.6(a)(2), which provides a two-year period after payment of tax for making a refund request, and G.S. 105-241.8(a)(2), which provides a three-year period after the taxpayer files a return for making a proposed assessment, raises the possibility that a taxpayer, under audit, might discover that it had a basis for a refund claim but the refund claim limitations period had expired. It has been department policy to allow a taxpayer caught in such a situation to provide information which would justify a reduction in the assessment even though the time for filing a refund claim has passed. The department intends to continue that policy of allowing an offset against an assessment although no refund will be allowed.[29]

As under prior law,[30] decisions of the secretary in making a proposed denial of a refund or in making a proposed assessment are presumed to be correct.[31]

Departmental Review of Proposed Assessments and Proposed Denials of Refunds

Under G.S. 105-241.11, a taxpayer who objects to a proposed denial of a refund or a proposed assessment may request a departmental review of the proposed action. The request for review must be filed within 45 days of the date the proposed action was mailed to or delivered in person to the taxpayer. The old law had allowed only a 30-day protest period. If no action is taken on a request for refund by the department within six months, the request for review must be filed within 45 days of the date that inaction by the department was considered a proposed denial of the refund (six months after the date of filing of the amended return or claim for refund).

Two points are worth noting. First, the potential for malpractice on the part of a practitioner and for loss of a refund claim on the part of the taxpayer exists if careful records are not kept of the date of filing the claim for refund, so that if the department does not act, the taxpayer knows to make a timely request for review. Second, taxpayers who plan to use the mail or a delivery service to deliver requests for review must allow for adequate time—and proof of delivery—to file their requests for review. A request for review is considered filed *only* when the department receives it, not when it is mailed.[32]

If the taxpayer does not file a timely request for review of a proposed denial of a refund, the proposed denial is *final* and is expressly not subject to further administrative *or* judicial review. If the taxpayer does not file

a timely request for review of a proposed assessment, the proposed assessment becomes final and is not subject to further administrative or judicial review. The taxpayer may, however, pay the tax and request a refund.[33]

If the taxpayer does make a timely request for review, the department must either grant the refund or remove the assessment, schedule a conference, or request additional information from the taxpayer. If the refund is not granted or the assessment not removed, the department must schedule a conference with the taxpayer, which may be by telephone or in person. Notice of the conference must be provided at least 30 days prior to the conference, unless the taxpayer agrees otherwise.[34] The conference is an informal proceeding designed to allow the department and the taxpayer an opportunity to resolve the case, identical to the informal process followed under the old law. The taxpayer may designate a representative to appear for him at the conference.[35] Failure of the taxpayer or a representative to attend the conference without prior notice to the department results in a statutory determination that the parties are considered unable to resolve the taxpayer's objection and the issuance of a final determination by the department.[36]

The taxpayer's representative at the informal conference need not be a lawyer. Under the department's procedures, the taxpayer's representative will be required to present a power of attorney, which may be obtained from the department's website (www.dor.state.nc.us), duly executed by the taxpayer and the representative.

According to the department, most appeals have traditionally been resolved with the informal conference. It is the authors' experience that the directors, assistant directors, and administration officers of the divisions who conduct such conferences, (e.g. the Corporate, Excise, and Insurance Tax; the Sales and Use Tax; or the Personal Taxes Divisions) are unfailingly professional, courteous, and knowledgeable, and will not hesitate to override the audit staff on a proposed assessment or to grant a refund if they are satisfied the taxpayer's position is correct.

Within nine months of the date the taxpayer files a request for review, unless the taxpayer and department agree to an extension, a final determination must be issued by the department.[37] The final determination must state the basis for the determination, which does not limit the department from changing the basis thereafter. During that nine-month period, the department and the taxpayer may agree on a settlement, may agree that additional time is needed to negotiate, or may fail to reach agreement, which will result in issuance of a final determination.[38]

One potential weakness in the new legislation is the failure by the General Assembly to address the situation in which the department does not timely issue a final determination. G.S. 105-241.14(c) makes it clear that failure to issue a notice of final determination within the required time does not affect the validity of a proposed assessment. However, the statute does not make clear what happens if the department fails to issue a notice of final determination. Presumably, the department will timely issue a final determination on a proposed assessment in order to expedite collection of the assessment. In the authors' experience, the department is heedful of mandates of the General Assembly and takes seriously its responsibilities under the statutes it is charged with administering. Hopefully, concern over protection of the state's fiscal status will not slow down the issuance of final determinations on refund claims. This potential weakness may need to be corrected in a technical corrections bill, however, because a taxpayer's appeal rights are triggered by the issuance of a notice of final determination. The legislation could be amended to provide that failure on the part of the department to issue a final determination constitutes a "deemed" final determination.[39]

Again, prudence indicates that taxpayers and practitioners should keep careful records of the time periods involved.

Transition Rules

The department has mailed letters to taxpayers outlining procedures in the transition from the old law to the new under the authority granted to the secretary in G.S. 105-264.[40]

The department has decided that the last date for hearings before the assistant secretary under G.S. 105-241.1 *et seq.* was October 31, 2007. Taxpayers who had hearings scheduled on or before that date may either proceed with a hearing before the assistant secretary with review thereafter by the Tax Review Board and the superior court under old G.S. 105-241.2 *et seq.*, or may decide to have their appeals heard by the Office of Administrative Hearings after January 1, 2008. Requests for hearings on proposed assessments or refund claims previously filed under old G.S. 105-266.1 will be treated as "requests for review" under new G.S. 105-241.11.[41] That will trigger a review process under new G.S. 105-241.13, which will involve a conference on 30 days notice with the department. If no resolution is reached at that stage, the department must issue a notice of final determination within nine months of the request for review. During that nine-month period, the department may request additional information from the taxpayer. The department intends that the nine-month deadline for taxpayers who filed requests for hearing prior to January 1, 2008, will begin to run on January 1, 2008.[42]

Upon issuance of the notice of final determination, the taxpayer will have 60 days to petition for a contested case hearing in the OAH, where an ALJ will try the case under the procedures set out in Chapter 150B of the General Statutes, as described in the second installment of this article to be published in the Spring 2008 edition of the *Journal*. We estimate the time for discovery, hearing preparation, hearing, and issuance of a decision to be at least a year, perhaps more likely 18 months, although given the fact that these cases will be an entirely new type of case for the OAH, it could take longer. In addition, the attorney general's staff believes that it will need five new lawyers to handle the new caseload and these lawyers will not be available, unless internal resources are shifted, until well after July 1, 2008, assuming the General Assembly authorizes them. S.L. 2007-491 directs the Revenue Laws Study Committee to study that issue.

If a taxpayer wishes to pursue its traditional remedy under G.S. 105-267, under which it would pay the tax assessed and sue for a refund in superior court, *it must act quickly to pay the tax, request the refund, and sue before December 31, 2007*. The department will attempt to expedite a denial of the refund claim so the taxpayer can proceed to court.[43] If a taxpayer has already paid the tax and requested a refund pursuant to G.S. 105-267 which has been denied, the taxpayer must file a lawsuit in superior court prior to December 31, 2007, in order to preserve any right to a refund. Because G.S. 105-267 is repealed effective January 1, 2008, the right to file a lawsuit requesting a refund will be lost after December 31, 2007. ■

Charles Neely and Nancy Rendleman engage in the practice of state and local tax litigation

Appendix—Timelines under S.L. 2007-491

EVENT	PERIOD	REFERENCE
Taxpayer requests refund of overpayment	Later of 3 years after due date of return or 2 years after payment of tax	GS 105-241.6(a)
Taxpayer requests refund of overpayment after federal determination	Later of 1 year after return reflecting federal determination filed or 3 years after original return filed or due to be filed, whichever is later	GS 105-241.6(b)
DOR acts on refund request	6 months after refund claim filed or 30 days after taxpayer responds to DOR information request, whichever is later	GS 105-241.7(c)
DOR proposes assessment	Later of 3 years after due date of return or 3 years after taxpayer files return	GS 105-241.8(a)
DOR proposes assessment after federal determination	Later of 1 year after return reflecting federal determination filed or 3 years after original return filed or due to be filed, whichever is later	GS 105-241.8(b)(1)
Taxpayer requests review of proposed denial of refund or proposed assessment of tax	45 days after: (1) notice of denial or assessment mailed; (2) date notice delivered in person, or (3) the lapse of 6 months after the filing of a refund claim without action by the Department	GS 105-241.11
DOR sets conference to discuss request for review	30 days notice, unless taxpayer agrees to shorten notice	GS 105-241.13(b)
DOR issues notice of final determination	9 months after request for review filed, unless both parties agree to an extension of time	GS 105-241.14(c)
Taxpayer files petition with OAH	60 days after notice of final determination delivered or mailed	GS 105-241.15; GS105B-23(f)
Secretary issues final decision	60-120 days after receipt of official record from OAH	GS 150B-44
Taxpayer files petition for judicial review of Secretary's final decision in Superior Court of Wake County in accordance with procedures for mandatory business court case	30 days after service of final decision on taxpayer	GS 105-241.16 GS 150B-45
Complaint filed challenging facial unconstitutionality of statute as sole basis for tax appeal	2 years after dismissal by OAH of petition	GS 105-241.17

with the law firm of Williams Mullen Maupin Taylor in its Raleigh, North Carolina, office. The authors represented the Council on State Taxation in advocating for the adoption of S.B. 242, which contained the legislative reforms set forth in S.L. 2007-491 discussed in this article.

Part two of this article, which will appear in the Spring 2008 edition, covers appeals to the Office of Administrative Hearings, procedures on hearings of tax cases before administrative law judges, and review by the secretary of revenue of OAH decisions. The second installment will also deal with appeals of final agency decisions in tax cases to the North Carolina Business Court, including the scope and standard of review, and direct appeal to the business court, without hearing in the OAH, of facially unconstitutional tax statutes.

Endnotes

1. S.L. 2007-491 did not affect the state's property tax assessment or appeals process. For a discussion of North Carolina's property tax appeal system, see Charles Neely & Nancy Rendleman, "North Carolina Property Tax Assessment and Appeals Procedure," *NC State Bar Journal*, Winter 2001.
2. A three member board consisting of the state treasurer, the chairman of the Utilities Commission, and a member appointed by the governor.
3. G.S. 105-241.4.
4. *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E. 2d 780 (1977); *Central Tel. Co. v. Tolson*, 174 N.C. App. 554, 559, 621 S.E.2d 186,190 (2005).
5. North Carolina cases are replete with statements that indicate that G.S. 105-267 is the only statute under which the constitutionality of a tax statute or the constitutionality of the secretary's actions might be challenged. *See, e.g.*, *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E. 2d 780 (1977); *Bailey v. State*, 330 N.C. 227, 235, 412 S.E.2d 295, 300 (1991) (*Bailey* I). However, in *A&F Trademark, Inc v. Tolson*, 167 N.C. App. 150, 605 S.E.2d 187 (2004), the court of appeals (in affirming a superior court decision in which the superior court affirmed a Tax Review Board decision sustaining an assessment) addressed the taxpayers' constitutional arguments in a case which had arisen under G.S. 105-241.1 *et seq.* and not under G.S. 105-267.
6. G.S. 105-267 provided that a taxpayer must "demand a refund of the tax paid in writing from the secretary," and a long line of NC Supreme Court and NC Court

of Appeals decisions made it clear that the law meant what it said. *Kirkpatrick v. Currie*, 250 N.C. 213, 216, 108 S.E.2d 209, 215 (1959); *see also Buchan v. Shaw*, 238 N.C. 522, 523, 78 S.E.2d 317, 317 (1953) (dismissing action because plaintiff had not followed the procedures prescribed by G.S. 105-267); *Javurek v. Tax Rev. Bd*. 165 N.C. App. 834, 840, 605 S.E. 2d 1, 5 (2004) (holding that, because plaintiff did not comply with the procedure prescribed by G.S. 105-267, the superior court lacked subject matter jurisdiction); *Salas v. McGee*, 125 N.C. App. 255, 259, 480 S.E.2d 714, 717 (1997) (because plaintiffs did not comply with the statutory refund demand procedures in G.S. 105-267, the trial court was barred from hearing their action); *47th Street Photo, Inc. v. Powers*, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990) (holding that, in challenging a tax, plaintiff must proceed according to the requirements of G.S. 105-267). However, the NC Supreme Court held in *Bailey v. State*, 348 N.C. 130, 500 S.E. 2d 54 (1998) (*Bailey* II) that while claims of illegal or improper taxation are subject to the procedural requirements of G.S. 105-267, notice is only required to the extent necessary to provide the state with notice sufficient to protect the State's fiscal stability.

7. Under authority of G.S. 105-260.1.

8. *But see* G.S. 84-1 *et seq.* governing the authorized practice of law.

9. "Best and Worst of State Tax Administration: COST Scorecard on Appeals, Procedural Requirements," 11 *Multistate Tax Report*, March 26, 2004 at 137.

10. "Give and Take: As State Economic-Development Teams Offer Tax Breaks to Attract Companies, Revenue Departments Seek to Get That Money Back," *CFO Magazine*, Jan. 10, 2007.

11. "The Best and Worst of State Tax Administration: Scorecard on Tax Appeals & Procedural Requirements," *State Tax Notes*, May 14, 2007, at 475.

12. S.L. 2006-196.

13. Appendix E to Report to the 2007 General Assembly of North Carolina, 2007 Session, of the Revenue Laws Committee.

14. S.B. 242 was introduced in the Senate by Senator Dan Clodfelter, D-Mecklenburg, who tenaciously led the reform effort. Significant portions of HB 2038, introduced in the House by Rep. Pryor Gibson, D- Anson, were incorporated into S.B. 242 while under consideration by the House Judiciary-1 Committee, chaired by Rep. Deborah Ross, D-Wake, who, with Rep. Gibson, guided the bill through the House. The bill went through 21 drafts as legislative staff (Trina Griffin and Sabra Faires), representatives of the department, and the public commented on the evolving iterations, before the bill was presented to the Senate Finance Committee for consideration. In addition to COST and the North Carolina Bar Association, the bill was supported by the North Carolina Chamber of Commerce, the North Carolina Bankers Association and the North Carolina Retail Merchants Association.

15. For a criticism of this and other aspects of SB 242, see Jasper L. Cummings Jr., "New Procedures for Contested Tax Cases in North Carolina," *State Tax Notes*, September 3, 2007, at 635-39; for another perspective, see Kay Miller Hobart, "Lawmakers Adopt New Procedures To Review Tax Disputes," *State Tax Notes*, August 20, 2007, at 480.

16. The due date of a return is considered to be the extended "due date." A 1975 attorney general's opinion states that a claim for refund made within three years of the extended due date for filing a return is timely under G.S. 105-266. 44 N.C.A.G. 247 (1975). The department concurs in and has followed this opinion and intends to continue to do so. Telephone conference with Mr. Greg Radford, director of Corporate, Excise, and Insurance Tax Division, North Carolina Department of Revenue, September 12, 2007. *See* Corporate Tax Directive, CD-06-1.

17. Under G.S. 105-267, when tax payments were made in installments, the statute of limitations for a refund request did not begin to run until after the last installment payment of a tax was paid. *See Rent-A-Car Co. v. Lynch*, 39 N.C. App. 709, 251 S.E.2d 917 (1979). While there is no North Carolina Supreme Court case on this issue, federal cases cited in *Rent-A-Car Co.* support this decision in regard to federal estate tax. This precedent should continue to apply to the new statute.

18. See Appendix for an outline of time periods under S.L. 2007-491. The new limitations period is shorter than the former limitations period set forth in G.S. 105-267. Under G.S. 105-267, a taxpayer had three years from the date of payment of the tax to request a refund.

19. G.S. 105-266(c)(1) (current law, effective until January 1, 2008).

20. G.S. 105-241.6(b)(2). All statutory references to Chapter 105 hereafter are to the new law, unless indicated to the contrary.

21. G.S. 105-241.7(b).

22. G.S. 105-241.7(c).

23. G.S. 105-241.7(d).

24. G.S. 105-241.7(c).

25. S.L. 2007-491 extended the due date of corporate income tax and franchise tax returns by one month. G.S. 105-122(a)1, G.S. 105-130.17(a).

26. G.S. 105-241.8(a)(1). The filing of an amended return does not extend the statute for making an assessment, except as discussed below relative to federal determinations. Telephone conference with Mr. Greg Radford, director of Corporate, Excise, and Insurance Tax Division, North Carolina Department of Revenue, September 12, 2007.

27. G.S. 105-241.8(b); G.S. 105-241.6(b)(1).

28. G.S. 105-241.9(c)(1).

29. Telephone conference with Greg Radford, director Corporate, Excise, and Insurance Tax Division, NCDOR, September 12, 2007.

30. Old G.S. 105-241.1(a).

31. G.S. 105-241.7(f); G.S. 105-241.9(a).

32. G.S. 105-241.11(b).

33. G.S. 105-241.12.

34. G.S. 105-241.13(b).

35. *Id.*

36. G.S. 105-241.13(c)(3); G.S. 105-241.14(a).

37. G.S. 105-241.14(c).

38. G.S. 105-241.13.

39. Query whether a taxpayer could seek judicial relief to compel issuance of a final determination. *See, e.g.* G.S. 150B-44.

40. Letters of department to taxpayers dated September 7, 2007.

41. *Id.*

42. Telephone conference with Mr. Greg Radford, director of Corporate, Excise, and Insurance Tax Division, North Carolina Department of Revenue, September 12, 2007.

43. *Id.*

Early Lease Termination for Military Servicemembers and Their Dependents

By Michael S. Archer

Today's armed forces personnel and their families are uprooted with astounding frequency, with numerous deployments to the world's hot spots in addition to the periodic changes of duty station that have always been a staple of military life. Some of our marines and soldiers are going on their fourth or fifth combat tour. Both federal and North Carolina law provide some cushion to these frequent, jarring moves by allowing our warriors to terminate residential leases early without liability to pay rent through the entire contractual lease term. However, the rules are not well understood by landlords and military tenants.

Complicating matters is the fact that, in some circumstances, the tenant's move out liability may be different depending on which statute is applied. Further, some landlords use form leases containing military termination clauses that misstate the law, either by quoting outdated North Carolina law that has been amended, or by completely ignoring federal law, or both. This article is designed to explain the applicable statutes and the interplay between them in a manner both useful to

attorneys and accessible to landlords and tenants.

Q. I am an active duty servicemember (SM) and I have signed a lease for a 12-month period. There are six months left on the lease. Are there any laws that allow me to terminate the lease early and avoid paying rent for the rest of the lease term?

A. Whether you can get out of the lease early depends on the reason for termination. The Servicemember Civil Relief Act (SCRA), a federal law, allows for early termination in three instances:

- SM entered the lease before active duty military service;
- SM entered the lease while on active duty and then received permanent change of station orders; or
- SM entered the lease while on active duty and then received orders to deploy in support of a military operation in excess of 90 days.

Q. Are there any other laws that protect SM tenants and allow early lease termination?

A. Yes. In 2005, North Carolina passed an amendment to North Carolina General Statute 42-45. This statute allows for early lease termination when the SM tenant:

- Receives permanent change of station orders to depart 50 miles or more from the location of his current dwelling;
- Is "prematurely or involuntarily released or discharged from active duty with the United States Armed Forces;" or
- Is deployed for 90 days or more.

Q. These laws sound pretty similar. Which one should I use to terminate my lease?

A. In some cases only one of the laws will apply. For example, only the North Carolina law will apply when the servicemember is "prematurely or involuntarily discharged." On the other hand, only the SCRA will apply to leases entered into prior to military service. However, in many cases, such as when the servicemember receives PCS or deployment orders, both laws will apply. In such cases, use whichever law is most favorable to you under the facts of your case. You are entitled to the protection of both.

While the SCRA and North Carolina law have a great deal of similarity, there are subtle differences that can significantly affect how much rent you have to pay before you terminate your lease. Generally, if you have been in your lease for less than nine months, the SCRA will be more favorable to the tenant. How much you have to pay depends on the effective date of lease termination and liquidated damages.

Q. When is the effective date of lease termination under the SCRA?

A. Under the SCRA, lease termination is effective 30 days after the next rental payment is due following notice to the landlord. For example, suppose that your monthly rent is due on the 5th day of the month and that you deliver proper notice of termination to your landlord on April 28th. Your lease terminates, and your obligation to pay rent terminates, 30 days after May 5th.

Q. When is the effective date of lease termination under the North Carolina law?

A. Under NC General Statute 42-45, as amended, your lease terminates 30 days after the next rental payment is due after the landlord receives proper notice of intent to terminate, OR 45 days after receipt of notice, whichever is shorter. Here's an example. Let's say that the rent is due on the 5th of the month. You provide proper notice to terminate on April 6th. Your lease terminates 30 days after May 5th or 45 days after April 6th, whichever comes first. In this case, 45 days after the April 6th notice is shorter and is, therefore, the effective date of lease termination. However, if you terminate under North Carolina law and you have been in your lease less than nine months, you may also be required to pay liquidated damages.

Q. What are liquidated damages?

A. Liquidated damages are a penalty that may be imposed to compensate a party to a contract in the event certain things happen. In the case of early lease termination, liquidated damages are imposed not by the lease itself, but by the North Carolina law. Thus, if you terminate your lease under North Carolina law, you may be required to pay rent through the effective date of termination and the applicable liquidated damages.

Q. Under what circumstances do I have to pay liquidated damages?

A. Whether you have to pay liquidated damages depends on which statute you use to terminate your lease and how long you have been in your lease prior to termination. If you terminate your lease under the SCRA, you do not have to pay any liquidated damages, period. You must pay rent through the effective date of lease termination, but there are no further charges resulting from early termination.

If you terminate your lease under North Carolina law, you will be required to pay rent through the effective date of termination of the lease. In addition, you may be required to pay liquidated damages if you have completed less than nine months of your lease term. If you have completed less than six months of the tenancy, the maximum liquidated damage amount is one month's rent. If you have completed at least six months of your tenancy but less than nine months, the maximum is one half of a month's rent.

Q. It sounds like I always have to pay more under the North Carolina law. Can you think of any situation in which both laws apply that I would want to use North Carolina law rather than the SCRA to terminate the lease?

A. Yes. The North Carolina law will result in less expensive termination when you have been in your lease for nine months or more and you deliver notice to terminate more than 15 days before the next monthly rental payment is due.

For example, let's say that you have been in your lease over nine months and the next rental payment is due April 5th. It is March 6th when you decide to deliver notice of intent to terminate. Under the SCRA, the effective date of termination is 30 days after April 5th. You will wind up paying two months rent. Under the North Carolina law, the termination date is 45 days after delivery of the notice. (Remember, under NC law, termination date is 30 days after the next rental payment is due or 45 days after delivery of notice, whichever comes first.) Since you have been in the lease for at least nine months, there are no liquidated damages. Thus, in this scenario, you wind up paying 45 days rent under the North Carolina law and two months rent under the SCRA.

Q. What if the landlord quickly re-rents my residence to another tenant? What is the effect on liquidated damages?

A. The landlord is not entitled to liquidated damages under the SCRA. Even under North Carolina law, the landlord is

not entitled to liquidated damages unless he or she suffers actual damages; that is, despite reasonable efforts, is unable to re-rent the premises. Thus, for example, if the landlord rents the residence two days after you terminate your lease, the liquidated damages may not be greater than two days' rent.

Q. What kind of notice must I provide to the landlord?

A. The notice requirements under both statutes are the same. You must provide *written* notice and a copy of your military orders to the landlord. Or, instead of military orders, you can provide a letter from your commanding officer verifying the reason that you are terminating the lease; e.g., that you received PCS orders, that you have been involuntarily or prematurely discharged or released from active duty, or that you have been ordered to deploy in excess of 90 days.

Q. What about civilian spouses who sign the lease? Are their lease obligations terminated as well?

A. The North Carolina statute was passed to assist service members whose military duties cause them to leave the area. Therefore, termination by the servicemember terminates the spouse's obligation as well. However, the text of the North Carolina statute does not address that issue.

The latest version of the SCRA, on the other hand, makes it very clear that termination by the SM tenant terminates the obligations of the spouse and any other military dependent that may have signed the lease as well.

Q. What if my spouse signed the lease but I did not? Can my spouse use the SCRA or North Carolina law to terminate the lease?

A. If the spouse signed the lease on behalf of the servicemember;,such as by using a power of attorney, then the lease is covered to the same extent as if the servicemember signed the lease However, if the civilian spouse signed a lease in her own capacity and the servicemember did not, there is no protection under either statute.

Q. My lease has a military clause that addresses early lease termination. What effect does that clause have on my ability to terminate early?

A. Many leases contain so called "military clauses" that discuss the circumstances under which a servicemember can terminate a lease prior to the expiration of the lease term.

Many of them attempt to explain the law but get it wrong because they fail to take into consideration SCRA and/or they fail to take into consideration the 2005 amendment to North Carolina law. In any event, under the law, the lease can give you more lease termination rights than you would otherwise have under the statutes; however, the lease can not take any of these rights away. Any lease provision that affords you with less protection than you are given under the SCRA or the North Carolina statute is void.

Q. Is there any way that the landlord can make me waive or give up my right to early lease termination?

A. The North Carolina statute specifically says that its protections can not be waived or modified under any circumstances.

SCRA lease termination rights may be waived, but to be legally effective, such waiver must comply with certain requirements, including, but not necessarily limited to, the following:

- The waiver must be in writing;
- The waiver must be on a document separate from the lease;
- The waiver must be signed by the servicemember; and
- The waiver must specify the legal instrument (such as the lease) to which it applies.

If a landlord requires you to waive SCRA rights as a condition of renting the premises, we strongly suggest that you consider taking your business elsewhere and reporting the matter to the nearest legal assistance office and the base housing and housing referral office.

Q. What happens if neither the SCRA nor the North Carolina lease termination statutes apply to my case?

A. If neither of the lease termination statutes applies, you should review the lease to see if it gives you any special lease termination rights. Since leases are typically written entirely by landlords, chances are there won't be any special protection, but it's worth checking out. Assuming that neither statute applies and there are no special termination rights provided in the lease, then you are bound by the terms of the lease contract. If you leave the premises early in breach of the contract, the landlord is entitled to damages you caused as a result of the breach. These damages include the loss of rent due to any vacancy of the premises during the lease term. The landlord must take reasonable steps to mitigate the damages; that is, to re-rent the premises. The landlord may withhold the security deposit to satisfy these damages and may also sue you for any additional damages not covered by the security deposit.

Q. My landlord claims that I caused physical damage to the residence and is therefore withholding my security deposit and threatening to sue me for the cost of fixing the damage in excess of the security deposit. Can he or she do that?

A. This article addresses only a certain kind of damage—loss of rent due to the early termination of a lease. A landlord is also entitled to compensation for the tenant's destruction or physical damage to the premises beyond ordinary wear and tear. The rules concerning such physical damage are not within the scope of this article.

Q. Can I terminate the lease early if the premises are seriously damaged by flood, hurricane, or some other event that I did not cause?

A. North Carolina General Statute 42-12 provides that if the rental residence is damaged so badly that it cannot be made reasonably fit, except at a cost in excess of one year's rent, the tenant may terminate the lease without penalty. However, the tenant must pay rent up to the time of the damage and must notify the landlord of intent to terminate *in writing and within ten days* of the damage. Read the lease carefully. This provision of the law only applies if the lease does not contain some other arrangement concerning destruction of the premises. Many of them do.

Q. What if I have other questions about lease termination or other rights as a tenant?

A. Contact a private attorney or your legal assistance office. In either case, when you meet with legal counsel, make sure to bring a copy of your lease, any correspondence between you and your landlord, any eviction notice, and any other pertinent documents, photos, or records. These records can help your attorney to properly advise you. ■

Michael S. Archer serves on the North Carolina State Bar's LAMP Committee. He is a retired marine and now works as a civilian in the marine JAG office at Camp Lejuene.

No! Arbitrators Do Not Simply "Split the Baby"

By William K. Slate II

Old canards are long lived: "judges just turn criminals loose," "all politicians are corrupt," "arbitrators just split the baby." Unsubstantiated generalizations, of course, abound in all aspects of life and sometimes it is difficult to ascertain the origins for a repeated "urban myth." The notion that arbitrators simply "split the baby" or evenly divide assets when awarding cases continues to be suggested in some circles. And while the data prove quite to the contrary, it is more difficult to ascertain the genesis of such assumptions.

It is sometimes suggested that an exasperated losing party will offer such an explanation when confronted with having to explain a given result. This may have more likely been the case historically when arbitrators typically delivered laconic and conclusionary written awards without the benefit of supporting explanations. The very manner in which arbitrators arrive at their awards is itself sometimes misunderstood, and one school of thought suggests that a compromise result is simply easy to achieve.[1] Several authors have asserted the occurrence of a "split-the-baby" result,[2] although the scant empirical record illustrates contrary results.[3]

The 2007 Study

In an effort to analyze this question yet again, research staff of the American Arbitration Association recently undertook a review of all closed international arbitration cases which were administered during calendar year 2005. The administration of those cases was conducted by the International Center for Dispute Resolution (ICDR), which is the international division of the American Arbitration

Association.

To understand the ultimate data set examined in detail, it is important to know that 473 commercial arbitration cases were finalized in calendar year 2005. Of those, 32% of the cases reached an award; 39% were settled by the parties; and 17% were withdrawn. This means that 153 cases reached a final award in that calendar year and were initially considered for review. Subsequently, 42 of those cases were removed from the study due to the presence of a significant non-monetary award or incomplete information at the time the research was conducted. As a consequence, 111 international commercial arbitration cases administered by and awarded through the ICDR in 2005 constituted the final sample for the research here discussed.

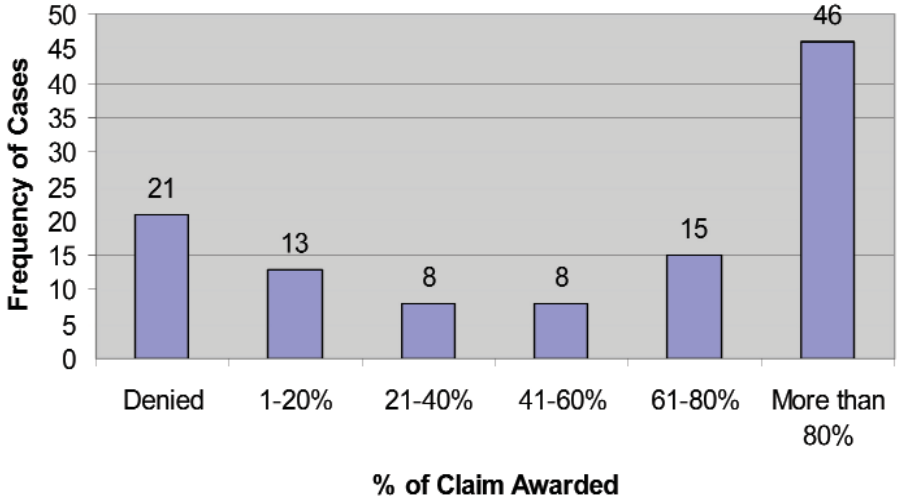
Research Methods

In analyzing the referenced cases, the files of the sample cases were reviewed for the final claim, counterclaim, and amount awarded information. The monetary value of the award in each case was then measured against the file claim and counterclaim amounts. The comparisons were then charted and graphed to reveal trends in the awarding of cases. Claims and counterclaims were maintained separately for analysis purposes. Since each counterclaim represents a unique new claim, we measured it against the corresponding counterclaim award only.

The primary findings from the study are set out in the Graph A.

The "U" shape of this bar graph demonstrates the greater incidence of decisive arbitral awards over "split" awards as demonstrated by the shorter bars in the center. Fully 21 of the 111 claims (19%) were denied, receiving 0% of the asked for value of the claim. Thirteen cases (12%) received up to 20% of the claim value. Forty-six cases (41%) were awarded a significant proportion (greater than 80%) of the claimed amount. The preponderance of cases in this study were found to represent decisive arbitral judgments in favor of the claimant or the respondent. Eighty cases totaling (72%) were observed within 20% of a full denial or full award of the claim.

A wider view of divided awards, considering the 31%-70% range represents 20 of the 111 cases or 18%.



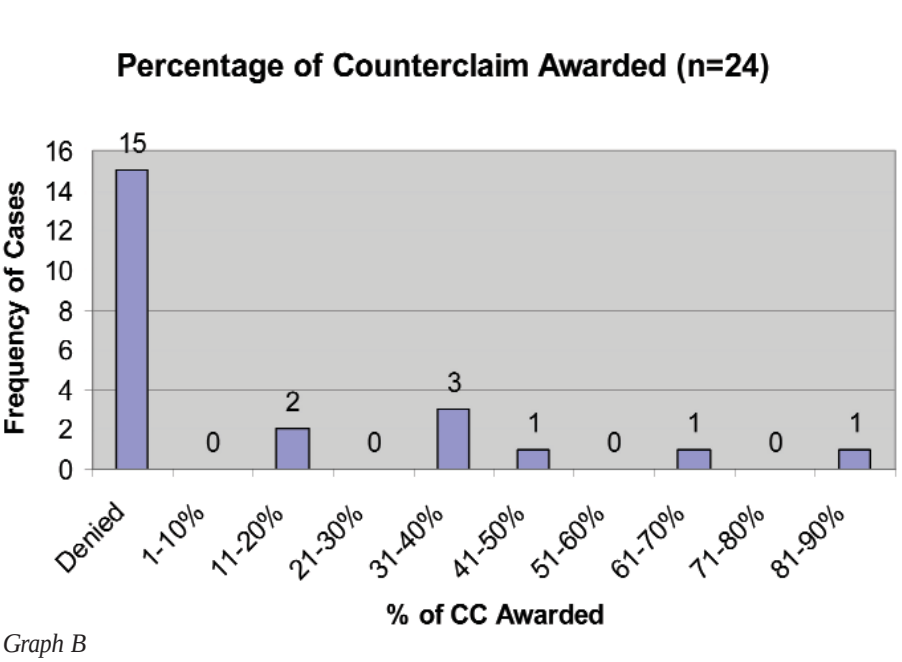
Graph A

It is important to note that the cases concluded by awards falling in the spread of 41%-60% of claims (only eight cases) tend to involve complex, multi-part claims, or require the valuation of large-scale damages. The award documents for those cases are often reasoned, describing in detail the claims, responses, testimony, and conclusions of law in addition to the final arbitration award. 93% of the studied cases were awarded outside the claim midrange.

Counterclaims

See Graph B below. Respondents among the 111 cases studied lodged 24 counterclaims. The graph representing the data related to those 24 counterclaims is set out below.

Nearly two-thirds (63%) of the referenced counterclaims were denied, receiving no monetary award. Only one counterclaim (4%) in this sample received an award in the middle range of 41%-60% of



Graph B

the amount claimed. These results, including a significant propensity to deny counterclaims all together, and a very small occurrence of split awards among counterclaims, echoed the findings of a larger AAA study reviewing all commercial awards issued in calendar year 2000. That study with a much larger sample size found 71% of counterclaims denied and similarly 4% of counterclaims awarded in the midrange.

Results of the Study

The analysis of both the final awards in chief and the counterclaim awards in the study clearly contradict the belief that a majority of arbitration cases will result in an evenly divided award, or a "split the baby" outcome. Awards in the majority of cases studied were decisive and arbitrators typically did not deliver evenly divided awards in either the claim or the counterclaim categories.

Past AAA Research

Prior to the 2007 study here discussed, the American Arbitration Association conducted two prior studies exploring the "split the baby" phenomena. The first was a widespread review of 4,479 domestic and international awards concluded during calendar year 2000. The second such study published in 2002 was a careful review of 54 randomly selected international commercial arbitration cases awarded between calendar years 1995 and 2000. In each of those studies the results produced similar findings: in the 2000 case study only 9% of all awards fell within the 41%-60% of "amount awarded" category, and in the 2002 study 10% of all awards were in the midrange. The inescapable conclusion being that most arbitrators tended to award a large percentage of the claim made, or little to none of the amount sought by the claimant. Only a small proportion of those cases demonstrated an award that was "split" or divided near the halfway mark of the claim—again, consistent with the statistics in the instant study.

One may properly ask, "Will the third conclusive study in the past seven years put the myth to rest?" In optimism, I would suggest that the answer might be yes—especially if the factual results are stated affirmatively, "No, arbitrators do not simply split-the-baby!" ■

William K. Slate II is president and chief executive officer of the American Arbitration Association.

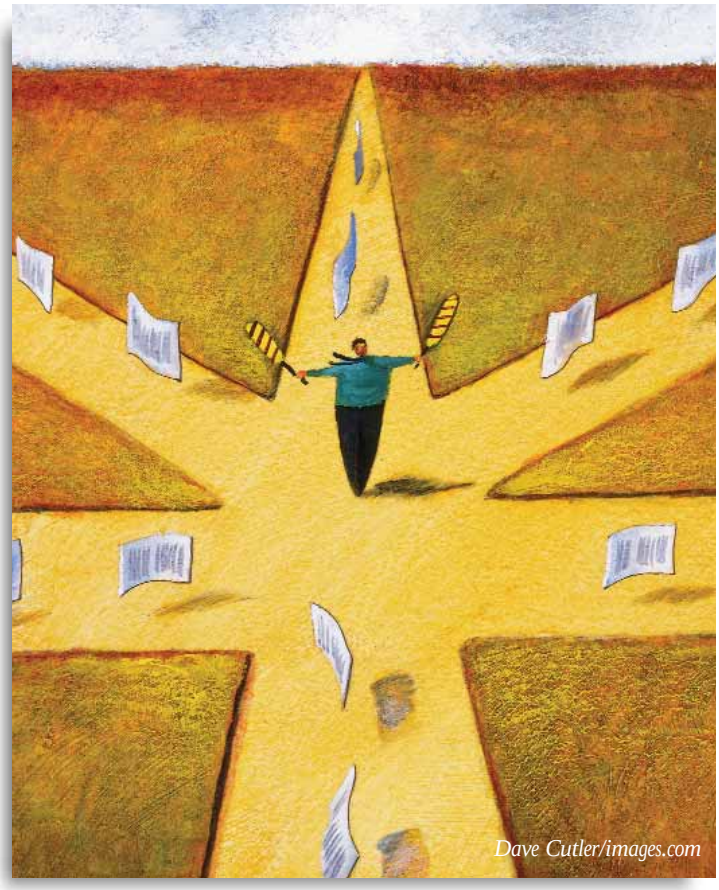
Endnotes

1. The Conciliation and Arbitration of Industrial Disputes - 11: "The Machinery of Conciliation and Arbitration: An Analysis," *Ind-US. Lab. Rev.* 5 (2) (1926) 582; Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" *Indus. Rel.* (1966) 38-52; Charles Feigenbaum, "Final Offer Arbitration: Better Theory than Practice," 14 (8) *Indus. Rel.* 313 (1957).
2. *Id; See also* F.A. Starke & W.W. Notz, "Pre-and Post-Intervention Effects of Conventional vs. Final Offer Arbitration" *ACAD. MGMT. J.* 24 (1981) 832-850.
3. Contra Max. H. Bazerman & Henry S. Farber, "Analyzing the Decision-Making Processes of Third Parties" *Sloan Man. Rev.* 27 (1) (1985) 39-48; Henry S. Farber, "Splitting the Difference in Interest Arbitration" *Indus. Lab. Rel. Rev.* 35 (1981) 70-77; Max H. Bazerman, "Norms of Distributive Justice in Interest Arbitration" *Indus & Lab. Rel. Rev.* 38 (1985) 558-570.

Case Flow in the North Carolina Court of Appeals[1]

BY SAM HARTZELL

The words of 19th century politician William Gladstone, "justice delayed is justice denied," have become such a part of the modern lexicon that they are familiar to even casual observers of the legal system. While the truth of this statement is rarely—if ever—disputed, little attention has thus far been paid to the speediness of the North Carolina Court of Appeals. This paper attempts to take a comprehensive look at case flow in the North Carolina Court of Appeals and compare the speed at which cases move to the standards put forward by the American Bar Association Guidelines.



Dave Cutler/images.com

The American Bar Association (ABA) published *Standards of Judicial Administration Volume III* (the "ABA Guidelines") in 1994 to "assist in achieving case flow management that is efficient, productive, and produces quality results." According to the Guidelines, "75% of all cases should be resolved within 290 days from filing notice of appeal" and "95% of all cases should be resolved within one year of the filing of the notice of appeal."[2] In 2005, court of appeals cases took roughly twice as long.

Background

Since 1967 the North Carolina Court of Appeals has functioned as the intermediate appellate court for the North Carolina judicial system. In calendar year 2005, the court's 15 judges, sitting in panels of three, ruled on 1,635 cases, 40% of which were decided by published opinion. In contrast, during 2005 the North Carolina Supreme Court decided 96 cases. Thus, the court of appeals is the appellate court that decided the great majori-

ty (95%) of appeals in the North Carolina judicial system, and the pace at which cases move through the court of appeals effectively determines the speed of the appellate process in the North Carolina Courts.

The court of appeals makes its opinions available on its website (www.nccourts.org/Courts/Appellate/Appeal), and the opinions include introductory language identifying both the date of the lower court ruling appealed from and the date on which the case was "heard" by the court of appeals.[3] The North Carolina Court of Appeals Electronic Filing Site and Document Library can be accessed through the court's website, and it identifies the dates on which records on appeal are filed with the court. From these sources it is possible to identify the following dates for each case:

- the date of the lower court ruling that is the subject of the appeal
- the date on which the record on appeal was filed with the court of appeals
- the date on which the parties' briefs were submitted
- "hearing" date in the court of appeals
- the date the court rendered its decision

From these dates it is possible to draw conclusions about which steps in the appellate process account for the greatest delay.

Under the sponsorship of a Summer Undergraduate Research Fellowship made available through the UNC-Chapel Hill Office of Undergraduate Research and financed by the University of North Carolina General Administration's Undergraduate Research Fund, data was compiled on court of appeals cases decided during 2005.[4] In addition, information on cases decided in June 2007 has also been presented for the purpose of contrasting the 2005 information with information from mid-2007.

Average Duration of Cases on Appeal

Cases decided by the court during 2005 were decided, on average, approximately 15 to 17 months after the estimated date of the notice of appeal.[5] "Average" is a term with multiple arithmetical meanings. The *mean* time for an appeal—total aggregate time for all appeals, divided by number of cases—was 16.39 months. In contrast, the median appeal time—the appeal time of the case precisely in the middle of the pack—was 15.61 months. Median time may be a more informative average because it is affected less by the small number of cases that took an unusually long time: 34 cases decided in 2005 had an appeal time of over three years, and these cases had a substantial effect on calculation of the mean.

Figure 1 shows the mean and median appeals times for cases decided by the court during 2005. The distribution for the appeal times of all the 2005 decisions by the court of appeals (criminal and civil) is shown in Figure 2.

Figure 1: Median and Mean Time between Notice of Appeal and Final Ruling by Type of Case

Components of Delay

The data examined permit conclusions about the duration of various phases of the appellate process. The ABA Guidelines prescribe time standards for the various stages of an appeal.

Preparation of Record on Appeal

The first stage of the appeal process is preparation of the record. The ABA Guidelines state that this function should be completed within 30 days from the filing of the notice of appeal.[6] Without taking a look at the actual data, it was clear that North Carolina was unlikely to meet this standard; the North Carolina Rules of Appellate Procedure require that the record be filed within 50 days under ideal conditions, and the timeframe allowed balloons quickly if there is disagreement over the content of the record. The data confirms this hypothesis: nearly 97% of North Carolina appeals decided in 2005 failed to meet this guideline.

Figure 2: Months between Notice of Appeal and FInal Ruling

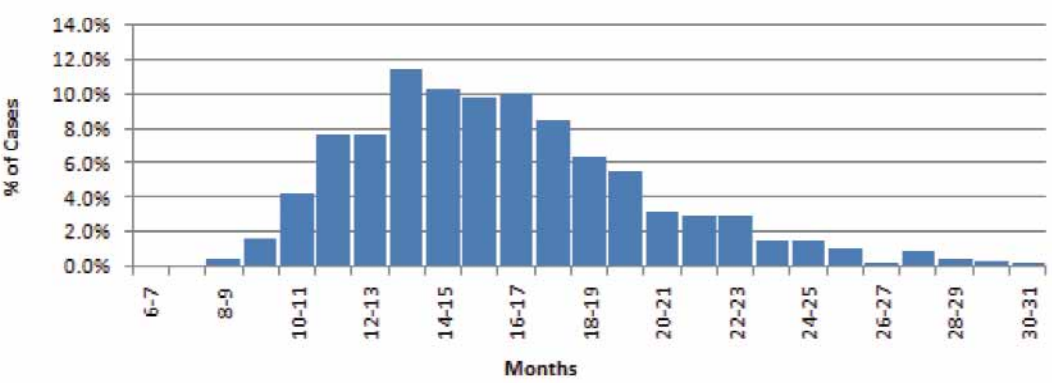
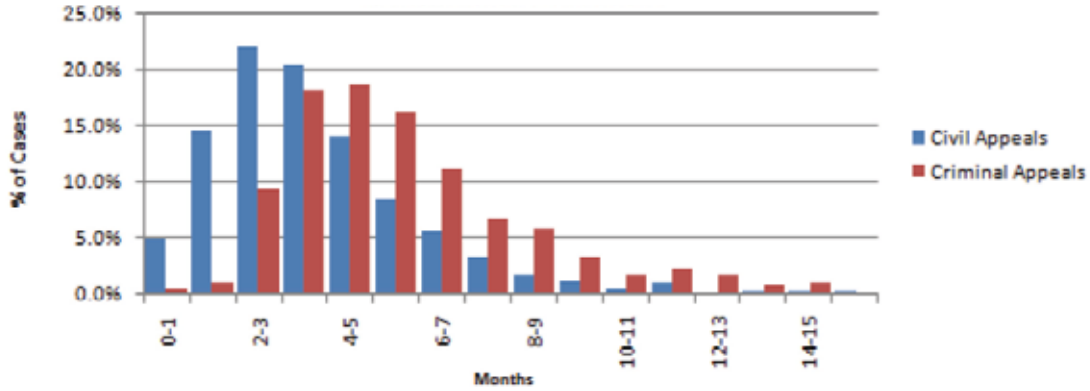


Figure 3: Months between Filing Notice of Appeal and Submission of Record



Median times required to prepare the record were 3.4 months (103 days) for civil cases and 5.2 months (158 days) for criminal cases.

Transcripts are generally part of the appellate record, and the significance of transcripts to appeal delays is well recognized. The ABA Standards of Judicial Administration cite transcript preparation as the single greatest cause of appellate delay.[7] In 2003 then Chief Justice I. Beverly Lake Jr. advised the General Assembly that "the lack of sufficient court reporter resources is probably the single factor most responsible for extreme delay in appellate review of cases."[8] In fiscal 2003-04, the North Carolina court system had the equivalent of 105 full-time court reporters with an annual salary budget of $4,275,986. In fiscal 2006-07, the number was 107, but the budget had been increased to $5,394,002.[9]

As shown in Figure 3, in criminal cases the record was submitted on average (median) 1.8 months later than in civil cases. Criminal appeals were disproportionably likely to have record preparation take longer than one year (4.8% of criminal cases vs. 1.7% of civil cases), and rarely in criminal cases was the record on appeal submitted within two months of notice of appeal (1.7% of criminal cases vs. 19.5% of civil cases). The shortage of reporters cited by Chief Justice Lake may help explain the disparity between criminal and civil cases, as criminal cases are more likely to require a transcript.

Briefing

The ABA Guidelines suggest that appellants' briefs be due "within 50 days of the filing of the record," and that appellee briefs be filed within 50 days after appellant briefs. Under the ABA Guidelines, 103 days is the maximum time that should elapse between submission of the record on appeal and filing appellee's brief (because cases are scheduled for oral arguments before any reply briefs are filed, reply briefs do not affect the overall progress of appeals and can therefore be disregarded). Roughly 40% of court of appeals cases met the ABA Guideline. Median time was 3.74 months (113 days), about one week slower than the Guidelines propose.

Setting the Hearing

The ABA Guidelines suggest that oral argument be heard within 55 days of filing of appellee's brief, and that cases submitted without oral argument be submitted to the assigned panel within 35 days of appellee's brief. For comparison purposes, this paper uses 55 days as the ABA Guideline. More than 98% of cases decided in 2005 exceeded the 55 day maximum suggested by the guidelines. The median time taken was 4.17 months (127 days).

Deciding the Case

The ABA Guidelines set out complicated recommendations for the time involved in preparation of appellate opinions: 90 days generally, 125 days for "cases of extraordinary complexity," plus up to 15 additional days for dissents.[10] Direct comparison to the ABA Guidelines is difficult because the language of the guidelines is purposely ambiguous to allow flexibility. However, by any standard, this aspect of the North Carolina appellate process is fast: the court of appeals' average (median) case decided in 2005 took only 70 days from the "hearing date" to publication of the decision, 20 days faster than the more stringent standard of 90 days. Treating the ABA Guideline as 90 days, over 60% of court of appeals cases met this standard.

How Typical was 2005?

In order to determine whether 2005 data is relevant to the pace at which appeals are currently being processed, data from June of 2007 was compared to data from 2005.[11] The results of this comparison suggest that cases in the court of appeals were moving at roughly the same pace in 2007 as in 2005. Median time for the preparation of the record decreased by 10 days. Briefing took longer by approximately 43 days, but it took approximately 38 fewer days for cases to get to their "hearing" date. Deciding the case took 21 fewer days. Overall, the median time taken to resolve an appeal dropped by 26 days, but this is well within the variation seen between months in 2005. Statistical modeling estimates the probability that the difference in overall time taken to resolve appeals was due to natural month-to-month variation to be 72%.[12] Put differently, there is good evidence that the increase in speediness is not meaningful. For a comparison of June 2007 to 2005 as a whole, see Figure 4.

Sources of Delay

The principal cause of delay for cases decided by the North Carolina Court of Appeals in 2005 was the time taken to prepare and submit the record. (See Figure 4.) If records on appeal had been submitted within the time recommended by the ABA Guidelines, appeals during 2005 would have moved more quickly by approximately three months.

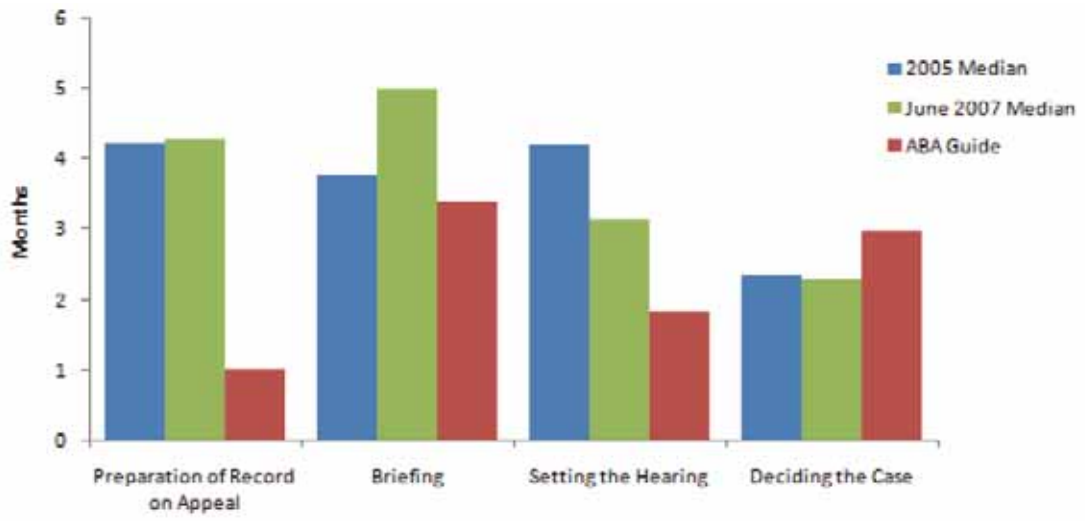
The second most serious cause of delay was the time required to schedule "hearings"—oral argument, or submission of cases without argument. If arguments had been scheduled as quickly as recommended by the ABA Guidelines, appeals would have moved more quickly by approximately two months.

Policy Implications and Conclusion

Cases in the North Carolina Court of Appeals move substantially more slowly than

ABA Guidelines suggest, even though the judges on the North Carolina Court of Appeals decide more cases per judge than the average for state appellate courts.[13] Cases in the court of appeals also move substantially more slowly than cases in the federal courts of appeals: median time for resolution in the federal appellate courts was 11.8 months, 8 months in the fourth circuit, as opposed to 15.6 months for the North Carolina Court of Appeals.[14] The key area in which increased efficiency may be possible is the preparation of the record on appeal. Transcript preparation is one issue, but preparation of the record could apparently also be expedited by changing the process by which the record on appeal is settled. The federal system, in which records of appeal are handled by clerks of court rather than by counsel, and which dispenses with assignments of error, may be a model worth consideration. Finally, attorneys in individual cases have the ability to affect the speed at which their particular appellate record is prepared and, consequently, the speed at which their case moves through the appellate court.

Figure 4: Court Performance vs. ABA Guidelines



From the data on cases decided during 2005 by the North Carolina Court of Appeals, a couple of broad conclusions can be reached. First, appeals move slowly, and criminal appeals move more slowly than civil appeals. Second, there is some backlog in the court of appeals, as evidenced by the amount of time taken to schedule a hearing after briefs have been submitted. This may be less true as of June 2007 than it was in 2005, but hearings are still scheduled much more slowly than the guidelines suggest. Third, the judges on the court of appeals do not appear to be the cause of delay. Fourth, the time spent in preparation of the record on appeal is responsible for the greatest delay, and there is evidence to suggest that this is due, in part, to court reporter resources. And fifth, the attorneys involved in an appeal can greatly affect the speed of the appellate process, particularly by speeding up settlement of the record. ■

Sam Hartzell is a senior political science and philosophy major at The University of North Carolina at Chapel Hill. He plans to attend law school in the fall.

Endnotes

1. I would like to thank Professor Vanberg at the University of North Carolina, Jerry Hartzell, and clerk of the North Carolina Court of Appeals John Connell for their help throughout this process. I would not have been able to write this without them.
2. American Bar Association, Standards *Relating to Appellate Courts* (1994).
3. While all opinions contain language "Heard in the court of appeals," most appeals are decided without oral argument.
4. Analysis omits eight opinions with incomplete information. In addition, the data excludes 20 cases remanded from the North Caroline Supreme Court, and 79 cases heard pursuant to a grant of certiorari.
5. The date of notices of appeal is not provided in the court's opinions and is not available from the Electronic Filing Site. Dates of notices of appeal were therefore estimated by adding 30 and 14 days to civil and criminal cases, respectively. *See* Rules 3(c)(1), 4(a), N.C. Rules App. Proc.
6. *Ibid.*
7. *Ibid.*
8. *State v. Berryman*, 360 N.C. 209, 227, 624 S.E.2d 350, 363 (2006) (dissent of Brady, J.).
9. Information supplied by Jennifer L. Green, NC Administrative Office of the Courts, July 16, 2007.
10. American Bar Association, *Standards Relating to Appellate Courts* (1994).
11. June 2005 was also compared to 2005 as a whole to see whether June is a representative month. There is no evidence to suggest that it is not.
12. Based upon a "two-tailed heteroscedastic difference of means" test.
13. Court Statistics Project, *State Court Caseload Statistics*, 2005 (National Center for State Courts, 2006).
14. US Courts. "Court of Appeals." 2005. *Federal Court Management Statistics*. 15 8 2007 www.uscourts.gov/cgi-bin/cmsa2005.pl

2008 Meeting Schedule

Below are the 2008 dates of the quarterly State Bar Council meetings.

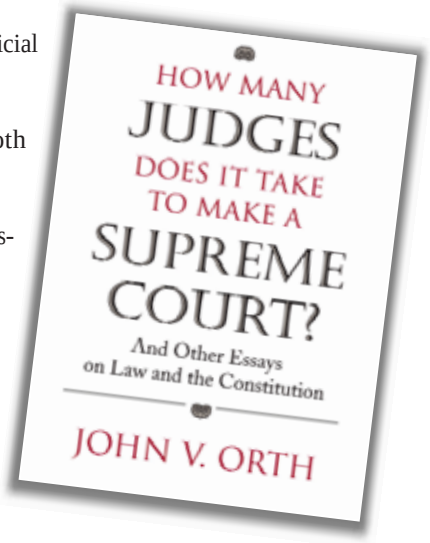
January 22 - 25	Sheraton Capital Center, Raleigh
April 22 - 25	Sheraton Capital Center, Raleigh
July 15-18	Carolina Hotel, Pinehurst
October 21 -24	Sheraton Capital Center, Raleigh
	(Election of officers October 23, 11:45 am)

How Many Judges It Takes to Make a Law—

John Orth Illuminates the History of Judicial Activism

BY GARY R. GOVERT

When it comes to energizing the base, "judicial activism" is an issue that seems to work for both the right and the left. Everybody, it seems, dislikes the other side's judges.



Long a rallying point for political conservatives, who complained bitterly about liberal judges remaking the law in their own image, charges of judicial activism have now come full circle. Since the end of the most recently completed Supreme Court term, the media have been full of op/ed columns and news analysis concerning the Court's hard right turn. The Bush Administration, these commentators say, has been ruthlessly effective in shaping an activist, conservative Court that will not hesitate to overrule—expressly or *sub silentio*—almost any liberal precedent that gets in its way. If not for Justice Anthony Kennedy's occasional spasms of moderation, the argument goes, the Court's right wing would have its way entirely.

It is tempting to dismiss griping about judicial activism, from both the right and the left, as so much sour grapes—yet another example of the side that is losing complaining about the other side not playing fair. But complaints like these are a serious matter. Charges of judicial activism imply that judges who decide matters in accordance with their political or ideological predilections, especially in the face of contrary precedent, are somehow acting inappropriately, unconstitutionally, or even immorally. The legitimacy of the court system itself is called into question.

University of North Carolina law professor John Orth's latest book, *How Many Judges Does It Take to Make a Supreme Court?* (University Press of Kansas, 2006), shines some much needed historical light on the often narrow and intensely partisan debate over judicial activism. Drawing on nearly a thousand years of English and American jurisprudence, the essays collected in *How Many Judges* not only show that judges have been making law pretty much forever—hardly a shocking revelation—but also that judges for centuries have been quite adept at husbanding their legislative power. More importantly, the essays show how the controversy over judicial activism is rooted in the collision between the common law's tradition of strong, ambitious judges and the separation of powers principles prominently enshrined in American constitutions. Add to that collision what Orth calls a "paradigm shift" in the way lawyers and judges think about the very nature of law, and the elements are in place for the fights over judicial activism that have assumed such a prominent place in contemporary politics.

"The common law began," as Orth tells it, "not with rules but with courts." English courts were created before the first parliament was summoned, at a time when the law was assumed to be part of the natural order of things, known or capable of being known by lawyers trained in the requisite reasoning skills. One of the principles of justice recognized by those early lawyers was that like cases should be decided alike, which required some kind of record to be kept. As a result, the first law reports—precursors of today's mammoth electronic libraries—began to appear in the 16th century.

These reports inevitably became sources

of positive law—what Orth calls "a very special form of legislation." The early reports, however, were not always accurate or reliable. This provided an opening for creative and ambitious judges like Lord Mansfield, chief justice of King's Bench from 1756 to 1788, who frequently disregarded the reports as he went about reshaping English commercial law. In an effort to enhance their own lawmaking power, Mansfield and other innovative judges saw to it that more reliable, contemporaneously produced reports recorded their decisions. This special form of legislation became what Orth calls one of the "secret sources of judicial power."

Another was an American innovation. Prior to Chief Justice John Marshall's tenure on the United States Supreme Court, opinions typically were delivered *seriatim*—one judge after another expressing his views. Marshall, who presided over the Court at a time when its status as a co-equal branch of government was in doubt, institutionalized the practice of issuing unitary opinions. He and his successors were aware that presenting a united front tended to enhance their power, so a norm of unanimity developed—to the point that the American Bar Association's Canons of Judicial Ethics stated (until 1972) that "judges constituting a court of last resort should use effort and self restraint to promote solidarity of conclusion." Unanimity may be less normative now, but appellate courts still strive for it when they can.

Common law judges found ways to preserve their lawmaking power even as modern legislatures attempted to bring the rule of statutory law to bear on nearly every subject under the sun. Legislatures, as Orth points out, often aid and abet judicial lawmaking by enacting statutes that are so loosely drafted that they provide wide latitude for creative construction—for example, the Sherman Act, which Orth calls "little more than a legislative directive to the courts to create a comprehensive body of antitrust law." Even when a statute is tightly drafted, judges typically approach it from the point of view of prior case law, occasionally using that precedent to construe the statutory language in ways its authors never imagined.

Constitutions also get this common law treatment. This is partly because they are replete with common law terms and concepts that beg for judicial construction—"due process," for example, the meaning of which is almost entirely derived from case law. In addition, the very existence of a written constitution tends to empower the courts *vis-a-vis* the legislature. According to Blackstone, who wrote in the absence of a written constitution, "If the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." Americans, at least since *Marbury v. Madison* (1803), have seen things differently. We see our written constitutions as laws—indeed, as higher laws that take precedence over any mere statute. "At the root of the reasoning in *Marbury*," Orth writes, "lies a simple syllogism: courts interpret the law; the Constitution is a law; therefore, courts interpret the Constitution." Orth is at his descriptive and analytical best when he describes how Marshall, dealt a very weak hand in *Marbury*, deftly turned constitutional limits on the Court's jurisdiction into primary custody of the Constitution itself.

In the wake of *Marbury*, "[j]udicial review joined statutory construction and analogical reasoning in the judicial toolbox." This tool helps the courts to deter executive and legislative mischief and thereby helps to preserve the government of limited powers envisioned by the founders. But at the same time, judicial review contributes to a public perception that judges themselves are frequent violators of the Constitution's limits on government power.

Americans are taught that dividing government into three separate and independent branches safeguards liberty by preventing any one branch from becoming too powerful. Intertwined with this belief in a system of checks and balances is the popular notion that each branch of government has a separate function with respect to the legal system: the legislature makes the laws, the executive administers and enforces them, and the judiciary acts when there is a question that calls for interpretation of the law or the exercise of impartial judgment. This neat division of labor does not actually exist in the modern state—witness the myriad executive branch agencies that combine all three functions—but the ideal, and its connection to the preservation of liberty, remains a fixture in the popular imagination.

There is an obvious tension between this ideal and the common law tradition of judges making and remaking the rules of tort, contract, and property law—let alone seeming to make and remake the Constitution. Arguably contributing to this tension is what Orth calls a "paradigm shift" in the way that lawyers and judges think about the nature of law itself, especially the common law.

Until well into the 19th century, most Western legal scholars, schooled in natural law theory, viewed the common law essentially as reason woven into the fabric of the universe. "So high an authority as Sir Edward Coke was on record that 'reason is the life of the law,'" Orth writes. The role of lawyers and judges was to find and apply preexisting law according to the rule of reason. Courts might succeed or fail in that task, but the law would still be the law, even if misinterpreted or misapplied. Recalling the Supreme Court's 1842 decision in *Swift v. Tyson*, Orth notes that "Justice Story, repeating the traditional view of the nature of the common law, actually denied that the rules declared by the courts were 'laws' in the usual sense of that word: 'In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.'"

But as Orth points out, "While well grounded in history, Story's view was already losing its hold even as he spoke." Within a few decades, Oliver Wendell Holmes, directly contradicting both Coke and Story, would say "[t]he life of the law has not been reason: it has been experience," and "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." The common law was no longer seen as reason woven into the fabric of the universe, but as a product of the minds of lawyers, judges, and indeed anyone attempting to divine what a court might do—or ought to do—with a particular set of facts. Orth points to Harvard professor John Chipman Gray, who at the beginning of the 20th century "ridiculed the notion of a sort of latent law only awaiting discovery by the judges when he asked: 'What was the law in the time of Richard Coeur de Lion on the liability of a telegraph company to the persons to whom a message is sent?'"

How Many Judges is peppered with illustrations of the paradigm shift and its effect

on both individual cases and the general development of English and American law. A certain ambivalence about the paradigm shift suffuses the book, however, and is perhaps most evident in the title essay. When asking how many judges it takes to make a Supreme Court, Orth anticipates that whatever number bubbles up in the reader's mind, it is likely to be odd, not even. Hardly anybody wants the game to end in a tie. But this response, he demonstrates, is predicated on some distinctively modern assumptions.

"If an odd number of judges is so obviously desirable," Orth writes, "it is curious (one is tempted to say odd) that the premier common-law courts, the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer, operated for so many centuries with four judges each." Closer to home, the original number of justices on the United States Supreme Court, as provided in the Judiciary Act of 1789, was six. Congress changed the number of justices on the Court frequently during the nation's first century—several times in an effort to either grant or deny a particular president an appointment—but seemingly without a great deal of concern over whether the number was odd or even. It wasn't until 1869 that the number stabilized at nine (although there had been nine, because there were nine federal circuits, from 1837 to 1863). In England, it was not until about 1875 that the appellate courts were regularly composed of an odd number of judges.

"The felt need for an odd number, so that a 'tiebreaker' would always be available, suggests a changed perception of law, at least at the level of a court of last resort," Orth writes, "a perception that law, like electoral politics, is a matter of votes, not a matter of fact on which well-trained jurists would most often agree."

Judges who think of the law as reason-based or divinely ordained may or may not be less likely to depart from precedent—less likely to be "judicial activists"—than those who take the more modern view. But no matter how judges' personal or political views actually affect their judging, a public perception that such opinions are likely to be outcome-determinative in controversial cases is potentially problematic. This is particularly true when (as seems to be the case at least in America) the non-lawyer segment of the population still largely conceives of law in the more traditional way and still understands separation of powers to imply limitations on the lawmaking function of the courts.

There can be little doubt that many members of the public—not to mention politicians at all levels of the executive and legislative branches—currently view what goes on in appellate courts as what Orth calls "the continuation of politics by other means." Judicial confirmation hearings, to cite just one example, are conducted as if the federal appellate courts, and the Supreme Court in particular, should be expected to function as annexes to the Oval Office (albeit somewhat untrustworthy ones). The question is what, if anything, to do about this.

The answer from the political right typically involves reversing the paradigm shift, at least to some degree, and restraining the influence of ideology through textualism, originalism, or the attainment of Olympian objectivity—as when Chief Justice Roberts, at his confirmation hearing, compared the job he was seeking to that of a baseball umpire. Those on the left deride any such pretense of objectivity. "In deciding whether diversity in the classroom is a compelling governmental interest, how can a judge's own views and experience not matter?" Duke law professor Erwin Chemerinsky asked in a recent issue of the *Boston University Law Review*. "In deciding whether recounting ballots in the Florida presidential election violated equal protection, does anyone believe that the five-four decision was not composed along ideological lines?" Even as non-left an authority as Judge Richard Posner, writing in the same journal, described Roberts' remark as "tongue-in-cheek" and "especially unconvincing."

Posner, a Reagan appointee to the federal appellate bench, thinks judges should take themselves less seriously and be more conscious that their decisions "are rarely the product of an analytical process that can be evaluated in terms of truth or falsity, or right or wrong." Such an attitude, he believes, might make them more hesitant to thwart the legislative will in the name of the Constitution—less likely, in other words, to be what the public perceives as judicial activists. Chemerinsky, for his part, wants to expose all theories of neutral, value-free decision making as fundamentally fraudulent. He advocates simply accepting that court decisions on important constitutional issues will always turn largely on the presiding judges' political ideologies and appears not to be worried that public perceptions of judicial activism will threaten the legitimacy of the courts. Such a concern, he writes, "grossly underestimates the public."

Perhaps. But ours is increasingly a world in which public policy and law are influenced, and can be almost instantly transformed, by the latest barrage of information, misinformation, and disinformation. In such an environment, it may be more important than ever to protect and preserve the courts' ability to restrain the constitutional mistakes and excesses of the legislative and executive branches. If lawyers and judges overestimate the public's tolerance for what it perceives to be judicial activism, the courts may eventually lose the moral authority to perform this essential function. ■

Gary Govert works in the Consumer Protection Division of the North Carolina Department of Justice.

What is Going on Here?

BY G. STEVENSON CRIHFIELD

There is a saying that the more things change the more they stay the same. Put another way, maybe some things never change.

I have been involved in the grievance process both at the judicial district level and the State Bar level for a good many years, and I am also involved with the Attorney/Client Assistance Program (ACAP) of the State Bar. These activities involve questions regarding lawyers' conduct and the way they practice law.

Not all lawyers' actions are sanctionable when they occur on an isolated basis, but can become sanctionable and subject to discipline when they become chronic and repetitive. Examples, for purposes of this article, are in Rule 1.3 regarding diligence and Rule 1.4 regarding communication. We have all heard ourselves and others say that the State Bar gets upset when I don't return my clients' phone calls. Of course that's not true until and unless it reaches the level of being so much a part of your practice profile that clients are properly upset.

Rule 1.3 refers to reasonable promptness in representing clients and points out that procrastination is widely resented. This is true even though the client's case may not be harmed in some way. Also, the lawyer is advised under the comments section to control their workload in a way that avoids shortchanging clients along the way. Paragraph 1.4 regarding communication tells us that we are supposed to promptly inform the client regarding their case and to keep the client reasonably informed about the status of the matter.

Even though the lack of promptness on an occasional basis is rarely the cause for professional discipline, when a lawyer chronically engages in violations of Rule 1.3, it is a proper subject for discipline. Likewise, a failure to communicate with clients (put another way, return their phone calls) on a chronic basis can result in discipline.

Another area that is a constant source of problems, and resulted in the implementation of the fee dispute program at the State Bar level, is the charging and collecting of legal fees under Rule 1.5. In regard to fees, it is improper for a lawyer to charge a clearly excessive fee and we should remember that there are seven bases for judging whether a fee is excessive. Lawyers should have a written fee agreement in every case unless it is the most uncomplicated of legal matters. To do otherwise asks for difficulties. It is also necessary for the lawyer to clearly distinguish between a deposit against fees to be earned and a true retainer. We see numerous written agreements that are ambiguous at best and incorrect at worst. This leads to unhappy relationships between lawyers and their clients and results in the grievance process and the fee dispute resolution system being implemented.

Fee disputes often arise out of misunderstandings and failure to advise the client about costs of litigation in certain situations and to not fully explain what the costs are of pursuing a certain legal strategy.

The vast majority of calls to the ACAP revolve around these kinds of issues. Typically the State Bar receives about 20,000 calls a year from clients complaining about lack of communication, lack of efficiency and promptness in handling cases including procrastination, failure to communicate, and fee disputes. In the second quarter of 2007 there were 167 requests for fee dispute resolutions.

Something that aroused my curiosity are statistics from a book regarding the English legal profession from 1800 to 1988. English solicitors are generally comparable to members of the American Bar. What do you think the clients in England complained about? They include delay, inefficiency, cost, lack of information and communication, overcharging, creating work for themselves (churning), and what I will call poor personal relations including lack of consideration, unfriendly attitudes, and discourtesy.

Why do lawyers engage in activities that lead to these kinds of complaints? Is it the kind of work we do or the kind of people we are?

One reason may be the poor job we do educating clients about how the system works, how much it's going to cost, and what the client can anticipate including the amount of communication from the lawyer. Being involved in domestic relations work, I have found that clients will call and ask questions about how things are going when they aren't. This is a function in some instances of the way the legal system works. If we did a better job of educating our clients about what is likely to occur, they might be more accepting of the situation in which they find themselves.

An issue that is sometimes overlooked is the fact that people prefer to spend their money for things that give them pleasure rather than pain. Being involved in the legal system is usually painful for a client. The client is particularly distressed that he has to pay someone to help him in a painful situation. As a result, the client can become very

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The Great Grayson County Bar Third of July Picnic and Softball Extravaganza

BY KEN CAMPBELL

Dawn broke heavy o'er Grayson County that fateful day. The steel-gray skies bode naught but ill for the festivities and for me.

I know, that was a bit melodramatic, but the day was very important for me. It was the 40th anniversary of Grayson County Bar's annual July third picnic and softball game. I'd finally reached my year to supervise the event; a rarely-offered rite of passage for young Grayson County lawyers.

Eyeing the dreary morning through my bedroom window, I could barely force myself to rise on one elbow. *"This can't be,"* I thought, *"not on my watch."*

Warily I reached for the remote on the bedside table and aimed it at the TV. As the low rumble of distant thunder gently shook the room, I feared the worst.

When the television jumped to life, a local forecaster was mid-spiel. I held my breath as she pointed to various squiggles superimposed on the map behind her.

Halleluiah! The storm would bypass us to the north and soak someone else. I took a second to thank the Lord and ask Him to please spare my northern neighbors any serious flooding.

In much better spirits, I jumped from the bed and dressed. Ordinarily I would have worn a proper softball uniform, but not that day. That day I was management. There was a cookout to coordinate, not to mention events for the kiddies and the ever-important softball game. I needed to wear my best khaki shorts and oxford-blue button-down shirt. Boat shoes of course, no socks.

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I should mention a few things about Grayson County. We're in an oft-forgot eastern part of North Carolina, about three counties away from any major city. County seat Buffington, population about 2500, is also our largest city. That's where I live and practice law.

Buffington was named for a Revolutionary War hero, but he wasn't your run-of-the-mill Patriot. He was actually British Colonel Wearin Buffing, an officer credited with several key losses that secured Eastern North Carolina as a patriot stronghold.

Evidently, Colonel Buffing got his commission the old-fashioned way; through patronage. In England, the Buffing family was well regarded and quite wealthy, with considerable land holdings in the Carolinas. When the king issued a call to arms for the Buffing family to aid the war effort, Wearin was the only son to step forward. Or maybe I should say he was shoved forward. Seems the rest of the sons were pretty well tied up tending to whatever they had to tend to at home.

Wearin was a young bachelor with no children, so his married brothers and cousins considered him the obvious choice to defend the crown in the colonies. He was also the least aggressive of the lot and put up little resistance to going. The family's largesse to the king's war coffers more than compensated for Wearin's lack of military experience.

At first, Wearin resented his "banishment" to North Carolina. He was sent to Grayson County where the family had its major landholdings. His troops overran the county easily enough—most of Grayson County's militia was fighting at King's Mountain, near Charlotte—but after that, Wearin didn't have his heart in the fight. Finding the locals to be a likeable lot, he wished them no ill will. In fact, he found Grayson County a rather pleasant place to stay.

To keep the king happy, Wearin made occasional token sorties into neighboring counties. His troops rapidly gained a reputation for arriving with advance warning, downing a few ales with the locals, and going back home within a day or two. However, Wearin's reports to the crown were full of glowing praise for his men's valor in the face of withering enemy resistance.

After the war, Wearin announced that he wished to become a North Carolinian himself. Local politicians arranged amnesty for him and he soon started a farm on the family holdings. He was far more successful at farming than fighting and as the estate prospered, a small town grew around it, eventually becoming Buffing Towne, now our fair city of Buffington.

By the way, I am Harold Buffing, a direct descendent of the colonel, and I am no more aggressive than he was. I suppose that's why I

The Results Are In!

In 2007 the Publications Committee of the State Bar sponsored its Fourth Annual Fiction Writing Competition. Ten submissions were received and judged by a panel of six 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.

practice mostly in real estate and probate, trying to stay out of the courtroom. The old Buffing estate still stands and I am now the proud owner of that drafty money pit.

Unfortunately, the Buffing name doesn't curry the favor it once did in these parts. I have had to make my own way and that day in July was part of the making.

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I would say that Grayson County was one of those fabled places that time forgot but for one thing: Congressman McElvaney. A county native, Old Congressman Mac remained a Washington, DC, fixture for so long that they'd named a federal building for him. Oh, maybe not as prestigious as the Rayburn building, but still pretty impressive. I believe it houses a subdivision of the Federal Bureau of Weights and Measures or something like that.

The primary reason Congressman Mac stayed in office forever was his extraordinary effectiveness at bringing home the pork. For such a sparsely populated county, Grayson always has been blessed with just about everything it needs, state of the art. It's even had several things it doesn't need, state of the art.

Our courthouse could host court sessions for four surrounding counties as well as our own. The CSI units at our sheriff's office and police departments make the Raleigh folks drool. The district attorney and his staff enjoy office suites as fine as any you'd find at a private Raleigh law firm. All of this, of course, has been vital to our nation's welfare for one reason or the other.

Congressman Mac was an attorney himself, at least by title. He hadn't practiced since he first set foot in Washington but he was principal rainmaker for McElvaney Pritchard & Associates. Since Pritchard met his reward in '78 and McElvaney was a partner in name only, the "& Associates" did all the work. Naturally, there was a fair amount of turnover in associates.

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Our county bar was a fairly small, tight bunch, much like an extended family; a very dysfunctional family but a family nevertheless. Every July, the private-practice side of that family was called upon to man the "Angels" softball team. The Angels were always sponsored by the McElvaney Pritchard firm and were Congressman Mac's pride and joy. They hadn't lost a game in 39 years.

The Grayson County District Attorney's office, usually rounded out by local law enforcement officers, was always the opposing team—the "Devils." Much like basketball teams who played the Harlem Globe Trotters, the Devils knew they were expected to put on a good show and gracefully lose. After all, the DA and local law enforcement knew who brought the pork home. It wasn't that bad a concession, all things considered.

Team rosters were rotated from year to year so everybody had a chance to play. (A few cynics said it allowed off-year lawyers to actually enjoy the Independence Day holiday.) Congressman Mac didn't play of course, but he always watched from shaded reserved seats behind the Angels dugout. Did I mention the softball field was state of the art? Anyway, July Fourth week and Christmas were about the only times Congressman Mac made it home to Grayson County and he enjoyed the game immensely.

Most years a select committee of seasoned county bar members chose one of their own to organize the day's events, but every five years or so they'd defer to a rising member of the bar. Having been in practice for only four and a half years, I was the newest member of the bar and still rising, so it was my turn.

Organizing the Third was a plum for young Grayson County lawyers because it put them in the spotlight for Congressman Mac, who might then include them when his office had excess work to sprinkle around. He was old-fashioned like that, never forgetting that older attorneys took him under their wings and referred clients to him when he first struggled to build a practice.

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So this was my day to bask in the spotlight. I had everything planned with military-style precision and everything would be extra special. For example, I rented a huge inflatable castle-shaped slide from Buffington Amusements, which no one had done before. I just had time to meet the delivery truck if I hurried to McElvaney Park.

Sure enough, the truck arrived only a few minutes after I did. I showed the driver where to deliver the castle and its air blower, not far from the ball field itself so parents could keep an eye on the kids and the game at the same time.

There was one small hitch in the delivery; somebody forgot to include hold-down stakes. The driver said, "It's heavy enough to stay put without 'em, but I'll try to swing by with a few after my next delivery." Thus reassured, I asked the driver to inflate the magical castle and I headed for the picnic area.

I'd arranged for my secretary, Delilah Puryear, to oversee the cookout. Delilah was a roundish little redhead who kept my office running with machine-like precision. She arrived at nine on the button and I met her in front of the charcoal grills. I told her the hot dogs had to be done in time for the seventh-inning stretch, which lasted long enough for everyone to enjoy the picnic. Congressman Mac always supplied the hot dogs, buns, and condiments. Members of the private bar and DA's office and their staffs brought everything else. Law enforcement folks didn't have to bring anything; it was our treat.

Traditionally everybody showed up willy-nilly with the side dishes. Amazingly, people brought a good variety most years, including the usual chips, beans, salads, deserts, and so forth. But last year we had some duplication so I decided to assign dishes to assure a perfect balance. I gave the list to my receptionist, Carla Blackacre, so she could call everyone and tell them what to bring.

Having given Delilah precise instructions on when and how to cook the hot dogs and where to place the side dishes, I hurried over to the ball field to be sure all was well there. On the way, I glanced at the foreboding skies. Not a drop of rain had fallen yet and the clouds seemed to be heading northeasterly. To the southwest the sun shone brightly. In spite of faint rumblings to the north, I felt pretty secure.

The ball field was in perfect condition and the dugouts were stocked with plenty of water and snacks.

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As a special treat for the smaller kids that year, I hired Blinky the Magical Clown. I'd never seen him perform, but one of my boys told me how Blinky kept the kids at a friend's birthday party in stitches for hours. I knew the parents at the picnic would appreciate that. Carla made the arrangements for me.

Blinky wasn't due to arrive until ten. According to Carla, all Blinky needed was a quiet corner with a small table and stool. Having chosen a grassy spot within sight of the ball field, I fetched the card table and

kitchen stool I'd loaded into my van the night before and took them to the performance area. When I set up the table and stool, I noticed the lack of shade in that part of the park and wished I'd ordered some sort of open tent or something.

Next stop was the volleyball nets for the teenagers. The nets were up just like they should be, but all I could find in the ball locker next to the court were two half-inflated volleyballs and a flat basketball. I made a mental note to contact the resident athletic director.

About this time, I saw the Buffington Amusements driver unfolding the inflatable castle on the far side of the ball field so I ran over to see what I could do. He was tugging at a corner asking, "Which way you want the stairs to face, Bud?"

I hadn't given much thought to orientation of the device so I told him, "Whatever you think best." He stepped back, looked at the field, looked at the sky, looked like he was making some sort of mental calculation, and then left it where he'd dropped it.

I helped the driver finish unfolding the castle after which he dragged the blower over and hooked it to the inflator hose. Soon the flat rectangle began sprouting turrets and stairs and eventually grew to be a full four-walled castle. An arched doorway opened through one wall and the opposite one was adorned by a bouncy outside staircase. At the top of the turret-flanked staircase, kids could hop onto a steep inflated slide and zip down to a huge interior cushion.

The driver gave me some instructions on keeping the edifice inflated and jumped into his truck. I asked him about the ropes coming out from under the castle and reminded him of the promised hold-down stakes. The truck made too much noise for me to hear his response, but he smiled and waved, so I took that as a good sign.

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By the time everything was set up it was nearing noon. I wasn't sure where the time had gone. I did know that the term "time flies when you're having fun" did not apply in this instance. Guests were already arriving, the first few having parked themselves every which way near the ball field. That's when I remembered that the local Boy Scouts always helped with car parking, a detail I forgot to note on the careful checklist I'd compiled months before. I lamented that maybe I should have taken a few minutes to go over the list with one of the veteran planners, but I was afraid they'd think less of me if I couldn't figure out how to put together a simple picnic and ball game.

I reasoned that these folks were responsible adults who could figure out a sensible parking pattern. Besides, the law officers were used to traffic control and surely they'd work it out. I felt better.

I was about to fix a few things I'd made mental notes of when I spied Congressman Mac's Cadillac. Mrs. McElvaney was at the wheel as always. The congressman always used a chauffeur in the capitol and he'd practically forgotten how to drive. I noticed Mrs. Mac driving haltingly and realized she probably needed someone to guide her to a parking spot. By this time the parking lot was a complete mess.

I jogged to the front of the Cadillac and caught Mrs. Mac's eye and then personally led her to a spot very close to the McElvaney Pritchard dugout. She got out, handed me a quarter, and said, "Thank you so much dear. Are you the troop leader? All your little ones must be off with their families this year." At a speed I found surprising for an 80-year-old woman, she was on Congressman Mac's side of the car helping him find his way to their special seats behind the dugout.

I pocketed the quarter and looked toward the picnic area. Delilah definitely needed my assistance with the bowls people had piled helter-skelter on the tables. But before I could take the first step toward the picnic area, I noticed with horror that a deputy's wife and son were occupying the McElvaney seats behind the dugout, the only seats with backs and cushions built in. Mrs. Mac was still busy helping the congressman make his way toward the dugout, so I rushed over to intervene. The mother was more than willing to move, but sonny wouldn't hear of it and started to let out a yawl. I fished the shiny quarter out of my pocket and laid it on the bench about four rows back and junior went for it. His mama got up to join him just as the McElvaneys reached their seats and settled in.

Next I hightailed it to the picnic area where Delilah stood pulling at her hair. I asked her what was wrong and she pointed to a retreating Great Dane saying, "He, he, he…"

Before I could ask for further elaboration, I saw that the dog had several packs of hot dogs in his maw. Several more empty packs littered the ground around the grills. Knowing how easily Delilah gets upset, I very gently asked her, "Why didn't you stop him?" Instead of an answer I got a flood of tears. Delilah gulped out something and I repeated what I thought I heard, "Frosting and smiling?" A nearby teenager elucidated, "She said the dog was frothing and snarling." He muttered something else too low for me to make out.

As soon as I could calm Delilah, I extracted a wad of bills from my pocket and stuffed it into her hand saying, "Get to the store quick and buy some more." When she looked at her hand kind of cross-eyed, I realized she was holding a wad of Monopoly money. I wasn't sure how that got into my pocket, but I made a mental note to have a talk with my sons. I fished out the real money and shooed her toward her car. She took two steps and the flood resumed. She turned back to me and sobbed, "Everybody's parked every way from Sunday and my car's hemmed in."

Since my car was safely parked on the other side of the ball field, I fished out my

keys and told her, "It's all right, take mine. If you hurry, there's still time to get the hot dogs cooked by the seventh inning. Take the back park exit."

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Looking at my watch, I realized the game should start soon and decided I'd better check on Blinky. Seeing a herd of kids around the area where I'd left the card table, I assumed Blinky was already entertaining them with witty prestidigitations. I assumed wrong.

Blinky was lying on the ground comatose while the kids ransacked his bag of tricks. I rushed to Blinky's side, figuring he must have suffered heat exhaustion from wearing that heavy costume in the hot sun.

Sliding a hand under Blinky's neck, I lifted his head and began to unbutton his vest and shirt to cool him off. That's when I realized Blinky was not a he but a she. She popped her eyes open and said, "Hey babe, we on a date?" I nearly took drunk from the alcohol fumes on her breath.

I hissed, "Blinky, have you been drinking already this morning?"

She answered, "Heck no, I been entertaining an all-night lodge party. Just got here." Spying some kids removing a few peculiar items from her bag of tricks, Blinky staggered to her feet muttering something about "party favors, wrong bag." She grabbed the sack from two confused-looking boys and wandered off to find her car.

I stood speechless, wondering how to keep all these kids entertained. Then I remembered the magic castle and scooted them all in that direction. I didn't have time to see if anyone was supervising the castle; I had to get the ball game organized.

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Arriving at the ball field nearly out of breath, I noted with relief that the teams had aligned themselves in their dugouts, ready to play. About that time I heard distant sirens. An assistant DA, his face an odd shade of purple, approached me and said, "There's a huge pileup near the park entrance. Traffic's backed up 'cause people can't find a parking space and it looks like a bunch of the deputies'll be tied up for a few hours untangling the mess. Now we're short a player."

I was about to suggest how they could round out their team when Congressman Mac shuffled up to me and said, "You go ahead and play for the Devils." I started to protest that there was too much for me to oversee, but he would not hear it, muttering something about "preventing more problems."

I protested further that it wouldn't be fair to my fellow barristers to take the other side but the Angels team insisted that I do the right thing and help the DA fill his roster. Apparently some of the Devils agreed with me that this would be an unfair arrangement because they began to protest, but Congressman Mac had only to raise his hand and they stopped.

As I headed for the Devils dugout, I looked in vain for the return of my car and Delilah with the hot dogs. At least the castle slide was a big hit; I could see a horde of kids milling around waiting for their turn to use it. I realized that I'd never had the chance to talk to the recreation director about the missing volleyballs.

By about the fourth inning it looked like everything was going to turn out OK after all. From my post in left field I could assess various activities. I saw Delilah return with the hot dogs and some of the teenagers helped her stoke the charcoals. The flames looked a bit high but I attributed that to the larger grills here at the park. Besides, I was glad the teens found something constructive to do since they couldn't play volleyball.

Turning my attention to the castle, I noticed that most of the kids were actually congregated around the outside watching something. My heart nearly stopped as I saw a boy do a handstand on the upper-most turret, and then flip onto the slide. Soon another boy duplicated this feat, adding a few more daring moves. I was aghast and impressed at the same time.

At the top of the seventh inning I managed to steal away to the picnic area and check on Delilah's progress. When I arrived, Delilah was in tears yet again, her cheeks nearly as red as her hair. The teens, who had taken over the cooking, were competing to see who could blacken the hot dogs best. I told Delilah to get hold of herself and come with me to uncover and organize the various side dishes. Getting them all uncovered proved to be rather dismaying. Every bowl contained either cole slaw or baked beans.

I asked Delilah, "How in the world did this happen? I gave Carla explicit instructions on who was to bring what."

Between sobs she replied, "Carla lost your list. She knew who she was supposed to call, but not what they should bring and then she kept forgetting what she told the last person to bring so she just kept repeating herself."

At least organizing the side dishes wouldn't take as long as I'd feared.

I noticed that the wind had picked up a bit and I was glad there would be a cool breeze for the picnic. Looking up, I marveled at how we seemed to be nearly under the dividing line between bright sunshine and menacing storm clouds.

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Soon the umpire called time-out and hungry folk streamed from dugouts and bleachers. I thought it best to let Delilah wrangle the thundering hordes and sped over to the castle to direct kiddies to the food.

At the castle, I learned that the daredevil gymnasts were neighborhood kids showing off. After hearing something about bets being made, I reminded the kids that gambling was illegal as I herded them toward the picnic area. From my vantage point at the castle, it appeared that Delilah had things well under control, so I stayed put.

Soon I noticed Delilah kind of curled up on a bench and, deciding she might appreciate a little help, I moseyed over to the picnic area to see what I could do. About the time I got there the umpire hollered, "Sky's too iffy, we need to cut the stretch short and finish the game." Everyone cheered and rushed back to the bleachers and dugouts.

***

The Devils had shown admirable restraint throughout the game, always staying just a run or two behind the Angels. By the bottom of the ninth the Angels were ahead by three but the Devils managed to get the bases loaded. And it was my turn at bat.

As they'd done all day, the outfielders moved in closer when I came to bat. As I stepped up to the plate, I glanced toward the castle. The daredevils were at it again. This time one of them was doing a swan dive directly from the turret onto the slide. Delilah was trying to stop them to no avail. I didn't have time to do anything; I had to concentrate on the pitcher.

Just standing there watching the strikes fly by me didn't seem too sporting. I planned to

pop a high fly that would be easy for a fielder to catch before too many runs came in. Taking my stance, I waggled the bat a few times waiting for the pitch. Then fate intervened.

I don't know if you're familiar with windshear, but I learned what it is that day. As soon as the ball left the pitcher's hand my mind must have shifted into high gear because everything seemed to go into slow motion. The ball was perfectly centered over the plate and I took an easy swing. It popped up as I wanted it to, but then things took an eerie turn.

From somewhere within the divide of gray skies and blue, a swirling stream of air had been building on itself, gaining strength and intensity until it burst groundward as my ball went skyward. Air stream and ball met, decided they liked each other, and took off together. The ball spiraled crazily upward for a few seconds. Confused outfielders and infielders, looking up as they scrambled for the ball, collided with each other.

The ball dropped a few feet and suddenly darted upward toward the centerfield fence. Momentarily stunned, the Devils on base just stood there. Suddenly their instincts kicked in and they started running. I guess the adrenaline rush was too much for me because I forgot I was supposed to help the Devils lose and started my own mad dash around the field. As I rounded second, I could hear some of the Angels holler something quite unangelic, but by then I was too distracted to pay heed.

My distraction was the castle, floating several feet above the ground, presumably on the same wind that carried my ball aloft. One of the daredevils teetered on the edge of a turret but soon disappeared into the bowels of the floating structure. Apparently Delilah had tried to stop the castle's ascent, because she was hanging on to a rope, being dragged across the grass. Eventually she let go and flopped to the ground, where she lay watching the castle float away. Fascinated and horrified as I was by this turn of events, I couldn't stop running. I kept my eye on the spectacle in the sky as I rounded third. In fact, by this time nearly all eyes were on the spectacle.

Having been torn from its air supply the castle slowly deflated and gently drifted back to earth, albeit on a rather oblique path toward the parking lot. It deflated completely as it landed atop a car, and there was the daredevil staring at us from atop the congressman's castle-draped Cadillac.

As all this transpired I hurried toward home plate. My pop fly had landed just inside the center field fence. An outfielder who was still standing scrambled after it and threw it toward home.

As I raced toward home I looked directly in front of me for the first time. The Angels' catcher stood in the middle of the plate, mitt outstretched. Forgetting I hadn't worn athletic shoes, I tried to slow my forward momentum, only to trip over my own feet. Not many people saw what happened next, mostly the catcher, the umpire, and old Congressman Mac and his wife—who'd been watching intently for the outcome of the game. Most everybody else still stared at the deflated castle draped over the congressman's car.

According to the ump, I did a double summersault rivaling anything in Olympic competition. As the ball whizzed over me toward the catcher, I slid toward home plate head first with my hand inadvertently outstretched. Just before the ball hit his mitt, my fingers touched home plate. The umpire yelled "safe" and the Devils won their first game in 40 years. I think I heard a stunned DA say, "The prosecution rests," but I could be mistaken.

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Some say Congressman Mac thought I had real guts to defy him and win the game. Some say he probably thought I needed a keeper. They were all trying to comprehend why he asked me to become a partner a week after the game. After the congressman died last year, Mrs. Mac herself confided that she talked him into it. She thought I should be rewarded for providing the most entertaining July Third they'd had in 40 years.

That was the last year of the Great Grayson County Bar Third of July Picnic and Softball Extravaganza. Can't say who it was, but somebody convinced the congressman that the players might rather spend the holiday with their families, and he agreed. We play a few times during the summer now and don't worry about who wins and who loses.

Oh, Delilah's fine. I gave her a couple of weeks off to rest and she came with me to the new McElvaney Buffing law firm. She's my chief legal assistant now. ■

Kenneth R. Campbell, a 1984 graduate of Campbell Law School, is a partner in the firm of Prevatte, Prevatte & Campbell in Southport. Writing as K. Robert Campbell, he has authored a suspense novel, The Fifth Category, *and will soon release a sequel called* The Fourth Estate *(more information can be obtained at author-campbell.com). He also scripted a two-act comedy,* Radio Play, *and along with composer Dean Powell, has finished a musical adaptation of Dickens'* A Christmas Carol *to be staged in Southport for the 2007 Christmas season.*

What is Going on Here (cont.)

resentful, at least subliminally, over the way the client's life is affected by the legal system. Lawyers would be wise to cultivate good human relationships with their clients so that no client believes that the lawyer's conduct and attitude is exacerbating the client's frustration and pain.

In 1954, Prentice Hall did a survey in the state of Missouri. This was the first survey ever done regarding lawyers. Laymen listed the following factors as contributing to satisfaction with their lawyers: friendliness, promptness, courteousness, not being condescending, and keeping the client informed. The most negative factors listed included exhibiting a superior, bored, or indifferent attitude; being impatient or impersonal; failing to inform the client; and being rude or brusk. I admit that lawyers who are overworked or under stress could easily exhibit a number of those tendencies or attitudes. But for the good of the profession, as well as the individual lawyer, we need to be more attentive to avoid these situations because if we exhibit a positive attitude toward our client, the client is more likely to overlook what they believe is unnecessary delay or other factors which might be violations of the Rules of Professional Conduct.

In any event, I hope that the members of the Bar will consider these issues carefully and try to take steps through our CLE programs, our Inns of Court, and Bar Associations to do a better job dealing with these problems. ■

Steve Crihfield is a State Bar Councilor and member of the State Bar's Publications Committee.

An Interview with Our New President—Irvin W. Hankins III

Q: What can you tell us about your roots?

I am a native of Charlotte. My mother's family on all sides has been in Mecklenburg County since the time of the Revolutionary War. My father was born and raised in Forsyth County. My wife, Bobbie, was born and raised in Lenoir County, which was home for both of her parents. I was educated in the Charlotte public schools, and went to both undergraduate school and law school in Chapel Hill. My wife, my oldest daughter, and my son-in-law are also UNC graduates, along with numerous other family members. I am proud to be a native son of the Old North State, and as you can see, am a Tar Heel born and bred.

As a young person, I spent a lot of time with my grandparents, aunts, uncles, and cousins. Family has always been important to me. My mother was a calm example of complete reliability. My father was an infantry officer in World War II. He believed in hard work and was a tough task master. I learned a great deal from him. He was in the funeral business in Charlotte. While working for my dad during high school and in the summers, I learned that service to one's client is essential. He would not accept procrastination or inattentiveness to detail and expected you to be accountable. At the same time, he stood behind you, whatever happened, when things went bad. I was fortunate to have good role models for parents.

As a junior and senior high school student, I was devoted to football. I had good coaches and learned the value of teamwork, preparation, and commitment. I think very fondly of my time on the gridiron.

After college and before law school, I served in the navy. That was a very valuable learning experience for me. Much of what I know about management, leadership, and organizational concepts, I learned in the navy.

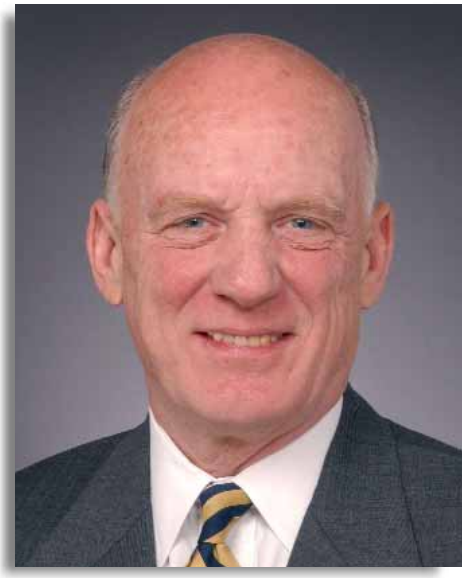
As a young lawyer, I worked directly for two great mentors, Bill Poe and Joe Grier. They were true professionals and excellent attorneys, and I have always strived to conduct myself as a lawyer as they did.

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

As a young person, I admired the lawyers in our community and the contributions made by historical figures who were lawyers. I began to think about law school in high school, but I did not make a final decision to go to law school until my last year in the navy. I was in the navy for four years between undergraduate school and law school. My resignation from the navy was effective in June 1972, and I entered law school in August 1972.

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

Currently my practice is focused on civil litigation. I have handled litigation for Duke Energy since I started practicing with Parker Poe in 1975, and I am our firm's Duke Energy relationship partner. I am presently also handling accountant malpractice cases and various other commercial litigation. Since 2002, my last year as managing partner of Parker Poe, I have served as its general counsel and in that role, I provide advice and counsel to the firm and its attorneys. When I began practicing in 1975, our firm had 15 attorneys, and most of us were engaged in a general civil practice. I did a little bit of everything in the beginning. Over time as the firm grew, we gradually specialized and organized the firm into substantive practice groups. I am a member of our Litigation Department. From 1986 until 2002 I also served as Parker Poe's managing partner and for about 20 years on its Management Committee or Board of Directors, as it is now called.



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

My first duty assignment in the navy was as gunnery and fire control officer on the USS Manley (DD-940). I then went to the USS Courtney (DE-1021) as weapons officer, followed by a short term as chief engineer, and then operations officer. At the time I resigned, I had been accepted for navy post graduate school and destroyer school. My ships were deployed and at sea for most of my four years of active duty, and I thought we were engaged in valuable and exciting work. I enjoyed my service in the navy and seriously considered a career as a naval officer.

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

In 1996, my friend Jerry Parnell asked me to run for the one year remaining on Bob Sink's unexpired term as a councilor for Mecklenburg County. Bob had just been selected as the State Bar Vice-President. My friend and partner, Jim Preston, had been on the council and served as its president in the

1980's, and I knew from him that it was a good and valuable experience. With the support of Jerry, Bob, and Jim, and other friends, I was elected. I have learned much, gotten to know some extremely fine people, and enjoyed the experience more than I ever anticipated.

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

When I began my service on the council, I had no idea that it would continue for over ten years. I also had not focused on the significant tasks ahead for the Bar arising out of growth, complexity, and change in the practice of law. Many difficult issues have arisen that were unexpected. In the process, I have learned much about our profession and the responsibilities we have to the public as attorneys.

Q: Can you tell us about the most difficult issue you've faced while serving on the council?

The most difficult issue which I have faced while on the council was whether to grant reinstatement for attorneys who had been disbarred. I can recall two of these situations, and in each case, it was extremely hard to decide what to do.

Q: You live in North Carolina's largest city and practice with a large firm. Do you think you can understand and empathize with those lawyers who live and work in the vast rural areas of the state?

Yes, I do. To begin with, our firm was not always large. When I began with our firm as a summer clerk, it had only 12 lawyers and, in many respects, was then a confederation of single practitioners all engaged in a general practice. Beginning at that point, I have experienced all of the pains of growth and change. In addition, my wife is from Pink Hill in the east, a small town of 500 people. Through 37 years of marriage, I have been in close contact with the small town environment of Pink Hill. My wife's parents and her two sisters are still there. Her first cousin, George Jenkins, is a single practitioner and a Bar Councilor from Lenoir County. Her brother, Billy Brewer, is a single practitioner in Raleigh. I have many close friends in small firms across the state. I believe that the North Carolina Bar is a collegial group from Murphy to Manteo, and I feel a connection with all of it.

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?

Yes. Lawyers are in the best position of anyone to regulate other lawyers. The practice of law is unique and requires a special sense of duty. Lawyers are human and must be subject to regulation and discipline to protect the public and to maintain the public's trust. The majority of lawyers uphold that trust without fail for the whole of their careers. These lawyers have a special reason to be sure that others in their profession do not cause the profession to be tarnished by improper conduct. It has been my experience that lawyers take that responsibility of self-regulation and discipline very seriously, seeking to be fair and to protect the public. The legal profession as a whole is more serious about its ethical rules and the enforcement of those rules than any other profession about which I am aware. The public can be confident that its trust is fully justified by the commitment of the legal profession to live by its covenant of trust with the public, the Rules of Professional Conduct.

Q: What about the disciplinary system? Are we doing a good job? Where can we improve?

I believe our disciplinary system is working well. We have an extremely able staff which works hard to address complaints and process grievances in a timely manner. We will be adding additional staff and new equipment in the near future to assist with the workload. We need to work harder to deal with grievances as quickly as the circumstances permit and to achieve reasonable consistency in the discipline imposed.

Q: You had a chance to observe closely the State Bar's recent disciplinary action against the former district attorney from Durham County. What were your impressions?

The Duke lacrosse case was unusual. We are seldom required to deal with a situation about which there is so much publicity. The grievance arose out of a high profile criminal proceeding in progress under the supervision of the court. The court has concurrent authority to discipline lawyers, and the State Bar normally will refrain from taking action while a matter which is the subject of the grievance is pending and under the court's direct supervision. In this case, the evidence of rule violations was so clear that the decision was made to proceed with the filing of a complaint even though the criminal proceeding was not complete. At the time the results of the investigation of the grievance were first presented to the Grievance Committee, it appeared that there might be additional rule violations which had not yet been fully investigated. We wanted to have all of the claims against the respondent before the Disciplinary Hearing Commission in the same proceeding. The additional rule violations and information about them became quickly known after the Grievance Committee decision to file a complaint, and we were able to proceed on all claims in a single proceeding before the DHC and without delay. We had to be very careful to avoid making public statements which might have been wrongfully interpreted or prejudiced the outcome. Our officers received many inquiries, and our President Steve Michael and our Executive Director Tom Lunsford handled the responses in an excellent manner. I believe our general counsel Katherine Jean and her staff did a superb job in managing the case and presenting the matter to the DHC. I think that the disciplinary process worked in the way that it was designed to work and am pleased that commentators around the country have complemented the manner in which the case was handled by the State Bar.

Q: You've had a great deal of experience with the Bar's ethics program, having served as Ethics Committee Chair. What's that been like? Are lawyers paying attention? Are they more or less "ethical" than they used to be?

When I graduated from law school, "ethics" was not a required course. The only ethics question on the bar exam in 1975 was, "Can you take a criminal case on a contingency fee?" I had the general idea at that time that so long as you followed the golden rule you would be OK in the practice of law. The ethical obligations of attorneys have become much more complicated over the last 30 plus years. I think the Ethics Committee brings a great deal of experience and knowledge to tough questions that do not always have clear answers. Committee votes that I have witnessed show that reasonable minds can differ on many ethics questions. We have one of the most experienced ethics counsels in the country in Alice Mine. She provides great guidance to the Ethics Committee and to the lawyers of North Carolina on the tough issues that arise on a day-to-day basis. I encourage all lawyers to seek guidance on ethics questions about which they may be unsure as they arise. Today there is a substantive body of formal ethics

With his wife, Bobbie, looking on, Irvin W. Hankins III is sworn in as president of the North Carolina State Bar by Justice Mark Martin.

opinions interpreting the Rules of Professional Conduct. Our Rules of Professional Conduct are our covenant of trust with the public, and the Ethics Committee is a resource for everyone, providing guidance as to what the rules require in particular situations. Of all the committee work that I have done while on the State Bar Council, I enjoyed my time on the Ethics Committee the most. I think the lawyers of North Carolina do pay attention to the decisions of the Ethics Committee, and I believe lawyers are more ethical today than ever before. In the past, many lawyers, by lack of awareness, ignored some ethics rules. Today those rules and our obligations are better known and better understood. I think that the general level of awareness about the ethical responsibilities of lawyers is at a higher level today than ever before.

Q: During the past year the State Bar has sought to increase access to justice by petitioning the Supreme Court for mandatory IOLTA and by seeking legislation to permit "retired" lawyers to provide pro bono legal services. Do you think these initiatives will improve the situation? Should the profession be doing more to make the legal system more accessible?

I believe that mandatory IOLTA and the Pro Bono Emeritus Rule will increase the availability of legal services for the poor in North Carolina. In North Carolina, the various legal services organizations carry that burden, and these new initiatives should make more resources available to legal services. These are important initiatives which I have supported. Mandatory IOLTA should result in a substantial increase of funds available. For instance, in South Carolina, when the same rule change was enacted, the funds available increased by 50%. I think we must see how it works here in conjunction with the pro bono emeritus concept before deciding whether any other steps should be taken by the State Bar regarding this problem. More may be required by society in general to address this problem of legal services for disadvantaged citizens. I do not believe this burden should be borne solely by the legal profession.

Q: Is it true that the State Bar is running out of space in its current headquarters in downtown Raleigh? If so, what do think should be done to address the situation? Is it important for the Bar to remain in downtown Raleigh?

Yes. We have recently initiated a study about our future needs which John McMillan, Tom Lunsford, and I have worked on during the past nine months. We have concluded that the State Bar needs to be in a position to occupy new quarters by about January 1, 2012. I am establishing a Facilities Planning Committee to be chaired by Vice-President Bonnie Weyher which will work over the next year to put a plan in place to permit that to occur. We have engaged a local architectural firm to assist that committee in its work. I believe that our State Bar headquarters should be a functional facility which can accommodate a growing bar for the foreseeable future, at least 25 years. I also believe our State Bar headquarters has a symbolic importance. It should be seen as a symbol of the rule of law and the importance of attorneys in a free society. For that reason, I think it should be at the center of government, in downtown Raleigh, as close as practicable to the capitol, our Supreme Court, and our court of appeals. Architecture, location, and presence can convey a powerful message, and that is what I would like to see in the appearance of our State Bar building for the future. I hope that we can achieve such a presence, commensurate with our resources.

Q: Will it be necessary to increase the State Bar dues in the near future?

Yes. Recently it has been necessary to employ additional personnel to cover a higher volume of new litigation and administrative demands. These needs have arisen because of the effort to pursue entities engaged in the unauthorized practice of law; the increasing number of complaints and grievances handled by our staff; the complexity of the cases litigated, such as the Duke lacrosse case; and the fact that the State Bar must defend itself with respect to suits filed testing the validity of such things as the LAP program and the judicial election surcharge. We must also recognize that we are running out of space and that we must prepare for a move. Acquiring and upfitting a larger facility for the bar will require a financial investment, and we must commence that process now so that we can accrue resources over the years ahead before the time to move has arrived. We are very attentive to the need for "black ink" and fiscal responsibility regarding the budget of the State Bar. To cover the needs that I have mentioned and to make up for the expenses in excess of budget caused by the unexpected events of 2007, the Finance and Audit Committee believes that a $30 annual increase in bar dues is necessary beginning in the year 2008.

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

I hope that my year as president can be stable and crisis free, permitting us to focus on improving the State Bar's efficiency, response time, and consistency and on the implementation of initiatives begun over the last two years. These initiatives include mandatory IOLTA, pro bono emeritus, new facility planning, and practice group operating concepts for the office of counsel. When we occupy a new facility, I want to remember fondly that I was a participant in the effort. Most importantly, I want to be the trumpet for the message that trust is the key to the long term strength of the

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