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Selecting North Carolina Judges in the 21st Century

By Paul D. Carrington

Appointing judges for life was a late 17th century English idea aiming to protect a judiciary of noble status from domination by royalty. No constitution written since 1840 has adopted that practice. Electing judges was an idea of 19th century Americans who believed in the right to self-government and who sought to protect their judges from domination by sordid politicians. Merit selection of judges, subject to periodic retention elections, was an idea of early 20th century Americans who believed that law is a science or an arcane technology unrelated to politics and properly entrusted to experts. Many Americans in the 21st century have their doubts about the virtues of self-government, and no one believes that law in America is an apolitical technology that can be entrusted to elite experts.

Contested judicial elections, whatever their utility in the 19th century, are no longer defensible if political campaigns are conducted by costly television advertising that requires the contestants to raise and spend a lot of money in order to secure or hold judicial office. This is especially so when those costly means of campaigning are made almost immune to legal restraint as a result of extravagant interpretations of the First Amendment made by the Supreme Court of the United States that protect the right anonymously to attack the integrity of candidates. Presently pending in the North Carolina Senate is a bill (S. 1054) aiming to patch up our judicial elections. No one can believe that it solves all the problems, but it at least addresses them.

Merit selection, whatever its virtues in the first half of the 20th century, is likewise no longer defensible when judges and courts all over the nation are daily seen making "impact decisions" of the most overt political nature. While the American and North Carolina Bar Associations have long favored merit selection, it is an insurmountable problem to its adoption that so few voters

accept the premise of the scheme. It is also a problem that the periodic retention election has proved in recent times to be an invitation to costly electronic assaults on politically defenseless sitting judges.

It is therefore time to rethink the problem and revise the Constitution of North Carolina. To find a solution appropriate to our times, we need to lay aside both the idea that the courts can be entrusted to wholly independent lawyer-experts and the idea that political campaigns for judicial office are a constructive method of selecting judges. While it is essential to give the legal profession an opportunity to influence the selection process, it may be equally essential to allow voters a role sufficient to reassure citizens that the courts belong to them and to remind sitting judges that they govern with the consent of their fellow citizens and not by anointment.

It helps in thinking about judicial selection to sort out the judges by their different roles. Superior and District Court judges, the trial judges, are the most important because they have the most direct impact on individual citizens. They exercise great power and enjoy great discretion. Trial judges are also the hardest to select because their job tests qualities of character that are not ordinarily tested in the practice of law, or any other activity. While their political prejudices may influence their work, trial judges do not make law, and hence their politics are not really very important. To restrain trial judges from inappropriate conduct, the most important institution is appellate review. Additional restraint can also be provided by effective enforcement of sound standards of judicial ethics. Especially for trial judges who are exposed to so many opportunities to misuse their powers, this last is a very important feature of a sound legal system.
For these reasons, it would seem that the initial selection of the trial judge should be the responsibility of someone or some group accessible to the organized bar, but not controlled by them. The governor is the most obvious choice, not least because that officer is accountable to the electorate. It is, however, a problem that the governor's constituency is statewide and the trial judges serve local constituencies. Moreover, if the judges are to serve limited terms, a judge so appointed would not only be beholden to the governor for the opportunity to remain in office, but at risk of non-reappointment for reasons having nothing to do with the merits of his or her performance. Accordingly, the judges would lack sufficient independence to forestall political manipulation of the judicial process.

What is needed to select trial judges is a constitutional institution (call it a Commission on the Judiciary) composed of persons appointed by succeeding governors and Senate minority leaders to assure that the group is beholden to no constituency. Perhaps its members might be required to be of an age sufficient to make personal ambition no longer a factor in their judgments, making it likely that they will be inclined to give proper heed to the assessments of lawyers. This Commission might also take on responsibility for the enforcement of the standards of judicial ethics and the evaluation of judicial performance by lawyers and litigants. So far, this thinking tracks that of the advocates of merit selection.

The problem with such a Commission as an institution appointing judges is that this would disempower the community in which the trial judge sits and may be insufficient to liberate the judges from an unwelcome servitude, or appearance of servitude, to the elite class who put them on the bench. It is for this reason that merit selection is unsaleable in our time. Indeed, very few states ever seriously considered merit selection of trial judges, apparently for the reason that there was too much political resistance to the idea, especially in rural communities resistant to domination by state governments.

The need for citizen participation might be supplied by a procedure of Voter Confirmation, putting the name of the candidate nominated by the Commission before the electorate in the district in which the judge would serve. This would resemble the retention election, but would be conducted before the judge is allowed to sit on a trial. The only court I know to be selected in this way is the Supreme Court of Japan. Utah requires its judges to stand for a retention election in the third year

after their appointment; that is close to a confirmation election. The advantages of holding the election at the outset of a judicial career are that it gives a strong signal to both citizens and judges that the judges are servants to their constituents while making it difficult for an interest group to launch a televised personal attack on the candidate selected by the Commission.

To assure some integrity to Voter Confirmation, the Commission should be expected to publicize prospective nominations for comment and then to circulate a guide making the case for its nominations, including explanations of any endorsements but also any protests it may have considered. It should also be prepared to defend its nominees against electronic attack by political interest groups of whatever stripe.

After an initial term of six or eight years in which a judge can demonstrate the personal qualities needed to perform the work of a trial judge, the Commission might be expected to make a recommendation as to whether the judge should be retained for an additional period. That decision, too, would be put before the electorate for confirmation. Reconfirmation might be for a longer term, so that the two terms together might constitute for most judges a full judicial career. Court of Appeals Judges entertaining appeals of right have front line responsibility for keeping Superior and District Court Judges under restraint. This is a very different job from that of the trial judge. It requires close attention to the details of the record of the proceedings below and to laws and legal precedent cited by counsel. Many such judges, having learned in school that appellate judges make law, presume that they, too, should make some law by writing learned opinions on unsettled points of law. But in reality it is hardly so for the Court of Appeals, because anything they write of significance to anyone other than the parties will be subject to review by the Supreme Court. Hence, their qualifications to make law are of minimal importance in their selection. The qualities most needed in intermediate court judges is that they must be attentive to lawyers and to the conduct of the trial court, and faithful to the guidance of the Supreme Court. What is needed therefore is a process for selecting Court of Appeals Judges that will reinforce those traits. The need for adherence to the guidance of the higher court suggests that they should be selected by that court. This would make it clear where the ultimate responsibility for judicial lawmaking should lie. But the Supreme Court might be limited in its selection by requiring prior experience as a trial judge as a condition to the nomination. This would link the Court of Appeals judges to the institutions both below and Above them in the structural hierarchy and reinforce a correct sense of what their roles are.

Because of the nature of their work, there is very little to be said in favor of voters confirming or reconfirming the selection of intermediate court judges. There is little political content to their work. It is in no one's interest for such judges to be looking over the shoulder of the higher court to attract the approval of some group outside the judiciary. And their work is all but invisible, not merely to the electorate, but even to the profession. Voter Confirmation should therefore not apply to them. Their terms might be as brief as six years and renewable, or much longer if they were subject to removal by address by a supermajority of the Supreme Court when its members have lost confidence in an individual judge.

In contrast, it is clear to all that justices of the Supreme Court of North Carolina hold political office. Moreover, no one today would question the dictum of John Stuart Mill:
The disposition of mankind, whether as rulers or fellow citizens, to impose their own opinions and inclinations as a rule of conduct for others, is so energetically supported by some of the best and some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.

While restraints are needed, they are not easily fashioned. Citizens and lawyers can unite in the conviction that sitting Supreme Court Justices should be independent from the influences of interest group politics, but it is not obvious that a satisfactory alternative can be devised.
The Voter Confirmation process suggested for trial judges might in some respects seem to be a

reasonably agreeable method, except that the Commission should aspire to be as apolitical as circumstances permit in nominating trial judges. That won't work for the selection of Supreme Court Justices. Given the political importance of their roles, there must be a political forum in which interest groups can compete for the selection of high court justices whose politics they prefer. The Commission should not be that kind of forum.

I conclude that the best method of selecting Supreme Court Justices is appointment by the governor with the assent of a supermajority of the Senate. The supermajority requirement would be intended to prevent the appointment of persons known to be partisans of marginal political views that they might be tempted to impose on the people. Because governors and senators are themselves politically accountable to the people to be served if they seat a bad justice, the case for Voter Confirmation as an additional requirement is less strong. It would, however, serve to emphasize that the justices are not solely indebted for their power and status to partisan politicians, but also owe their power to all the people.

To assure their independence, the terms of appointment of Supreme Court Justices should be substantially lengthened. In New York, it is 14 years, in the District of Columbia, 15. The purpose of such long terms is to diminish the vulnerability of sitting justices to manipulation by interest group politics. The risks associated with longer terms are much less with respect to high court judges because they exercise very little power solo. Longer terms lend stability to the institution and coherence to judge-made law. A 15-year term would generally be a career, for it would be a rare judge who would seek reappointment after serving such a term. Interest group pressure could be mounted on those seeking reappointment. If that is a concern, it could be prevented by restricting the justices to a single term.

By facing separately the problems of selecting trial judges, Court of Appeals Judges, and Supreme Court Justices, this scheme seeks to employ selection methods that are shaped by the different roles to be performed by different kinds of judges. Because the Supreme Court Justices serving long terms would be virtually invulnerable to interest group politics, the judiciary as a whole would be assured almost complete political independence. Yet if the court wandered too far from the conventional understandings, later appointees might be expected to restore its balance. Yet the trial judges would know that their jurisdiction derived from a vote of the people, and the Court of Appeals Judges would know that although they are independent of all politics, they are not independent of the law.

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A New Specialty: Animal Law

By William A. Reppy Jr.

"Animal law is one of the fastest growing fields" of legal practice, declares a December 2001 announcement of the inauguration of the National Center for Animal Law in Portland, Oregon.1 This does, indeed, seem to be the case in North Carolina. Animal law is now taught at Duke, the only law school in the southeast to offer the course. The first casebook on the topic was recently published by Durham's Carolina Academic Press.2 Justice For Animals,3 a statewide organization concerned with legislation and litigation affecting animals, has recruited a group of 25 members of the North Carolina Bar who have volunteered to do pro bono work on behalf of animals. Several of their ongoing cases are described below. Three decisions of the North Carolina Court of Appeals reported in the last half 2001 highlight several current issues in the field of animal law, and the state Supreme Court in November 2001 granted discretionary review in a case involving North Carolina's anti-cruelty statute.

Tort Cases

Animal related issues arise in all major areas of law: contract, property, wills/trusts, constitutional law, criminal law, and statutory remedies. However, a plurality of reported decisions are from the field of torts, most involving suits for damages done by or to domestic animals. One of the 2001 decisions of the North Carolina Court of Appeals has clarified that a person suffering injury inflicted by an animal—often a dog bite—can sue the owner or keeper of the animal on strict liability or negligence theories.4 Unlike strict liability suits in the products liability area where recovery does not require proof that the manufacturer or seller knew or should have known the product was likely to cause injury, the victim of an animal attack suing on a strict liability theory must prove that the defendant knew or should have known of the "viciousness" of the animal. The "should have known" version of scienter for this cause of actions shows that the "one free bite" rule is no longer an element of the strict liability tort in North Carolina, if it ever truly was. Damages recoverable in the strict liability suit seem no different than those in the negligence context (although in a case of wanton, reckless lack of control of a dog or other animal known to be vicious, punitive damages are recoverable5). The benefit to plaintiff in proving the strict liability case is that contributory negligence by him or her is no defense.

In the 2001 negligence case, Defendants' Rottweiler bit off part of Plaintiff's ear. Recovery was upheld on the theory that the dog's owners should have known that Rottweilers as a breed are aggressive and temperamental and thus should have kept their dog restrained.6 This guilt-by-breed theory seems the canine equivalent of racial profiling of humans. In December 2001, the city council of Garner considered an ordinance banning all Pit Bulls.7 It would be no "defense" to a charge of violating this kind of ordinance that a particular pet Pit Bull is entirely gentle, and in other states similar ban-the-breed ordinances have been held constitutional in the face of a variety of attacks.8 The Garner City Council, however, declined to enact this ordinance by a vote of 3-2.

The reverse tort situation where the plaintiff is the animal's owner suing a defendant who injured or killed the animal generates what is, nationally, the most "hot" topic among those concerned with animal law: can the plaintiff recover what can be called "emotional" damages arising out of death of or injury to a beloved pet? The majority rule nationwide is that damages are assessed as if plaintiff's injured or dead pet were inanimate, like a chair or clock.9 The owner recovers market value or replacement value only unless he or she can fit his cause of action into the tort of intentional infliction of emotional distress10 or, in some states such as North Carolina,11 negligent infliction of such distress.

The majority rule's notion that loss of a pet dog or cat is more akin to loss of a chair than wrongful death of a human relative is considered by most pet owners to be utter nonsense. The paucity of North Carolina law in this area, however, opens the door to possible adoption of the minority rule of Hawaii and a few other states where emotional damages are recoverable.12 An early North Carolina case held that when the pet killed by the defendant has no market value (as is usually the case), the owner still can recover some damages.13 The nature of such damages was not mentioned. Probably this case was adopting an often-applied rule that when the pet has no market value, the value to the owner is the measure of damages.14 Some states have included sentimental value as one factor to consider in measuring damages based on value to the owner.15 It would seem illogical for the law to allow sentimental damages for killing of a mutt but not for an equally beloved unspayed AKC-registered bitch who has a market value of several hundred dollars and whose case is not subject to the "value to the owner" measure of damages. Thus a sound claim for emotional damages in addition to market value can be made.
In a 1913 North Carolina case where a trespasser wilfully shot a pet dog16 in the plaintiff's presence over her protest, the court approved an award of damages based on evidence that "the alarm and shock caused by defendant's conduct had caused her great suffering." Today a recovery in this situation could be explained under the rubric of the tort of infliction of emotional distress, intentional or negligent, but these torts were not recognized in 1913. The case implies that, wholly apart from punitive damages, when the killing of the pet is intentional, emotional damages are recoverable.

In a 1936 case where judgment of nonsuit against a dog-owner plaintiff was reversed, the court said that, contrary to ancient doctrine, dogs now are viewed as property "subject to all the incidents of chattels."17 Since emotional damages were not at issue, the quote is dictum and should not preclude a holding that pets are a special kind of property for loss of which emotional damages can be recovered.

If North Carolina ultimately adopts the majority rule that treats damages for loss of a pet the same as that awarded for loss of an inanimate item of property such as a chair, it will face the issue of whether veterinary malpractice claims are subject to the rule for suits alleging malpractice by a physician attending a human patient that there can be no recovery absent testimony of an expert witness establishing negligence.18 Some courts hold veterinarians should not have the benefit of that rule when the damages they must suffer for "malpractice" are limited to market value of the pet involved plus probable inability to collect a fee for services.19
Justice for Animals receives at least once a month a report of a pet having been shot or otherwise killed by a private citizen or government employee. JFA volunteer Mike Hubbard, a Raleigh lawyer, is seeking injunctive relief on behalf of owners of a dog killed by a worker at the Wake County Animal Shelter within 48 hours of being placed there for 10-day quarantine (a bailment) as well as for owners of a cat similarly killed before the shelter had any right to do so.20 In a case factually identical to the Wake County quarantine case, Durham attorneys John Bourlon and Jeffrey Howard are seeking $10,000 in compensatory damages for the killing of their client's young dog, $10,000 for intentional infliction of emotional distress, and $10,000 or more in punitive damages.21

Constitutional Law

In a case pending in federal court in the Middle District of North Carolina,22 the evidence shows a city's police department on several occasions implemented an official policy of shooting to kill wandering dogs, even, in one instance, after an animal control officer chased the animal back to the premises of its owner. Suit was brought by Charlotte attorney Brandon Fernald, a Justice for Animals volunteer, under 42 U.S.C. § 1983, the civil rights statute, alleging state action in violation of the Fourth Amendment (as incorporated into the Fourteenth Amendment). Whether the trial court will follow decisions in several federal circuits that such a killing is a seizure of property23 remains to be seen. The successful plaintiff in a section 1983 action may recovery

attorneys fees.24 Although attorneys fees are seldom awarded in animal-related litigation, in a case with indirect ties to North Carolina—it involved the estate of Doris Duke of the family that founded Duke University—counsel representing dogs named Minnie, Foxie, Rodeo, and Robert was awarded a fee of $100,000 this year.25

Raleigh attorney Rick Gammon recently convinced a prosecuting attorney to drop charges against a woman who kept at least seven dogs for violating a Cary ordinance imposing a two-dog limit.26 The successful argument was that the ordinance was so arbitrary as to deny substantive due process, although Gammon also contended that the ordinance violated the equal protection rights of dog lovers because its two-animal limit did not apply to cats, birds, or any other pets. The city soon repealed the ordinance.27

A new theory for finding a statute void for vagueness—a due process violation—was created by the trial court in a suit brought by the operator of a pigeon shoot to enjoin application to his activities of the state's anti-cruelty statute.28 When the suit was filed, the cruelty statute protected—subject to various exemptions discussed below—"every living creature." That could make it a misdemeanor, reasoned the trial judge, to squash an insect, shoot a snake, or step on a snail. The General Assembly could not so have intended, the judge believed, which meant the statute was unconstitutionally vague. In response the General Assembly narrowed the scope of section 14-360 to "every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings." This did not cure the vagueness, held the trial court. As of this writing the case is before the North Carolina Supreme Court.

Statutory Interpretation

The anti-cruelty statute contains several broad exemptions which raise major issues of interpretation. One exemption is for cruelty in the form of "lawful activities for the purposes of . . . training or for purposes of production of livestock . . . ."29 In a 1974 case30 the defendant beat his dog and tied it up. A hole in the ground was filled with water, and for 15 to 20 minutes defendant would hold the dog's head under water for 45 seconds, raise his head, and then resubmerge it for 45 seconds. After this defendant hit and kicked the dog. The defense was that the defendant was "training" the dog not to dig holes in the ground. Judgment of conviction was reversed for failure to have instructed the jury to acquit if it believed the defendant's testimony that his subjective purpose was to train the dog not to dig holes in defendant's yard.

On the other hand, the prosecuting attorney for Camden County in 2000 brought cruelty charges against two employees of a hog farm captured on videotape beating injured hogs. The two pleaded guilty (or no contest) to misdemeanor violations after the prosecutor agreed to drop felony charges.31 These defendants surely could have testified that they subjectively considered what they were doing to be part of the process of raising livestock, disposing of animals that could not be sold due to injuries. Clarification is needed as to when, if at all, a cruelty defendant's subjective belief triggers the exemption.32

Another exemption covers cruelty committed in "the lawful destruction of any animal for the purpose of protecting the public . . . ."33 The district attorney for Robeson County recently declared this barred him from prosecuting workers at the county's animal shelter who employed severely painful methods of euthanasia of excess animals, readily provable via videotape.34 The only apparent "protection" of the public from the killings was reducing the cost of running the shelter. Judicial precedent interpreting the quoted exemption is clearly needed.

Standing

Much litigation over animal issues involves standing of a private party to obtain relief, frequently

when a government agency has declined to enforce a statute enacted for the benefit of animals. The casebook Animal Law devotes more pages to issues of standing than to any other topic, and two of the three state court appellate decisions reported in the last half of 2001 concerning animals resulted in holdings of lack of standing.35 However, by statutes unique to North Carolina, standing is broadly conferred on any person—defined to include not only citizens but "any nonprofit corporation, such as a society for the prevention of cruelty to animals"36 even though the person has no "possessory or ownership right in an animal" allegedly suffering cruel treatment37—to seek an injunction against cruelty in order to protect "every useful living creature."38 The court is granted discretion to place the animal[s] at issue in the custody of the plaintiff.39

Fayetteville attorney Larry McGlothlin recently invoked these statutes to seek on behalf of Justice for Animals and a citizen of Robeson County an injunction against use of cruel methods of euthanasia at that county's animal shelter.40 Animal law specialist Mariana Burt of Apex has employed the statutes in several citizen-suits objecting to animal cruelty that could not be brought in any other state due to lack of standing.

Resources

The Animal Legal Defense Fund, a nationwide group of lawyers and law students concerned with animal law issues, has a library of briefs and pleadings, available online41 or by contacting ALDF, addressing most issues arising in animal-related litigation. The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York42 conducts frequent (and well-attended) symposia on legal issues related to animals. "Animal Law," a review published annually by the students at the law school at Lewis & Clark,43 offers many useful articles and notes.

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Endnotes

1. See www.lclark.edu/org/ncal. The Center may be contacted at ncal@lclark.edu.
2. Pamela D. Frasch, Sonia S. Waisman, Bruce A. Wagman, and Scott Beckstead, Animal Law (2000).
3. www.justiceforanimals.org; jfa_nc@juno.com
4. Hill v. Williams, 144 N.C. App. 45, 547 S.E.2d 472 (2001), petn for rev. den.
5. Hunt v. Hunt, 86 N.C. App. 323, 357 S.E.2d 444, aff'd per curiam, 321 N.C. 294, 362 S.E.2d 161 (1987). Punitive damages could not exceed $250,000. N.C. Gen. Stat § 1D-25.
6. Hill, 144 N.C. App at 48, 547 S.E. 2d at 474. The decision departs from odd dictum that in a "dangerous dog" case the victim could not proceed on a theory of negligence but was limited to the strict liability recovery with its requirement of proof the owners knew or should have known that the animal was in fact vicious. See Williams v. Tysinger, 328 N.C. 55, 399 S.E.2d 108 (1991). If a dog injures someone while running loose off its owner's property in violation of a leash law, negligence per se seems to be established. See State v. Powell, 336 N.C. 762, 446 S.E.2d 26 (1994).
7. News & Observer, Dec. 19, 2001, p. B3 ("Garner allowing pit bulls to stay").
8. E.g., Garcia v. Village of Tiejeras, 767 P.2d 355 (N.M. App. 1988); American Dog Owners Ass'n v. Cty of Yakima, 777 P.2d 1046 (Wash. 1989). But a total ban on all dogs of a certain breed no matter how gentle a particular pet is seems every bit as arbitrary as the Cary ordinance limiting pet owners to two dogs, which Wake County prosecutors refused to enforce because they considered it unconstitutional. See discussion infra.
9. See Annot., Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals, 91 A.L.R. 5th 545 (2001).

10. Plaintiff must prove extreme and outrageous conduct plus severe emotional distress. Waddle v. Sparks, 331 N.C. 73, 414 S.E.2d 22 (1992).
11. Johnson v. Ruark Obstetrics & Gynecology Assoc., 327 N.C. 283, 395 S.E.2d 85 (1990)(emotional distress must be severe).
12. Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981)(dog owners who did not see dog die due to defendant's negligence recover emotional damages); Knowles Animal Hosp. v. Wills, 360 So.2d 37 (Fla. App. 1978).
13. Dodson v. Mock, 20 N.C. 282 (1838).
14. Annot., Damages for Killing or Injuring Dog, 61 A.L.R.5th 635, 656-57 (1998).
15. E.g., Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084 (Ill App. 1987).
16. Beasely v. Byrum, 163 N.C. 3, 4, 79 S.E.270, 270 (1913)
17. Jones v .Craddock, 210 N.C. 429, 431, 187 S.E. 558, 559 (1936). That a domestic animal is trespassing on defendant's property does not create a privilege to kill it. State v. Neal, 120 N.C. 613, 27 S.E. 81 (1897).
18. One aspect of the rule demanding expert testimony where malpractice on a human patient is alleged was declared unconstitutional in Anderson v. Asimos, 553 S.E.2d 63 (N.C. App. 2001), petn for rev. pending.
19. See Animal Law, supra note 2, pp. 204-212; Annot., Veterinarian's Liability for Malpractice, 71 A.L.R. 4th 811 (1989). Beck v. Henkle-Craig Live Stock Co., 171 N.C. 698, 88 S.E. 865 (1916), may be a case where a veterinarian was held liable without expert testimony, but the trial court in William v. Reynolds, 45 N.C. App. 655, 263 S.E.2d 853 (1980) apparently considered such evidence essential.
20. Strays that are picked up by animal control officers and taken to an animal shelter must be held for 72 hours before being euthanized. N.C. Gen. Stat. § 130A-192.
21. Herald-Sun, Nov. 2, 2001, p. C6 ("Owner sues over puppy's death").
22. Altman v. City of High Point, No. 1:00CV00671.
23. E.g., Fuller v. Vines, 36 F.3d 65 (9th Cir. 1994).
24. 42 U.S.C. § 1988(b).
25. New York Daily News, Jan. 5, 2002, p. 8 ("Dogs' lawyer gets 100G"). The lawyer had succeeded in a legal battle dating back to 1994 in enforcing a trust for her dogs in the will of the billionaire tobacco heiress. For terms of the trust and some of the legal issues on which counsel prevailed, see "Estate of Doris Duke," New York Law Journal, August 6, 1997, p. 24 (Surr Ct., New York County).
26. News & Observer, June 26, 2001, p. A1 ("Dismissal takes teeth out of Cary 2-dog law").
27. News & Observer, Nov. 10, 2001, p. B1 ("Cary law puts pets on equal pawing").
28. The judgment was reversed for lack of standing in Malloy v. Easley, 551 S.E.2d 911 (N.C. App. 2001), but the North Carolina Supreme Court granted review.
29. N.C. Gen. Stat. § 14-360 (c)(2). What "lawful" means in the exemption clause remains to be decided. Perhaps it negates the exemption where the defendant, in the process of training or raising livestock, has been cruel to an animal not owned by him and without authorization of the owner so that a trespass to chattels has been committed.
30. State v. Fowler, 22 N.C. App. 144, 205 S.E. 2d 749 (1974).
31. Herald-Sun, May 18, 2000, p. C7 ("Two hog farm workers sentenced for beating injured animals").
32. Similar issues are raised by exemptions for cruelty inflicted on animals during "activities conducted for purposes of biomedical research," during "[l]awful activities conducted for the primary purpose of providing food for human or animal consumption," and during "[a]ctivities conducted for lawful veterinary purposes." N.C. Gen. Stat. § 14-360(c)(2), (2a) and (3).
33. N.C. Gen. Stat. § 14-360(c)(4).
34. Fayetteville Observer. Nov. 21, 2001, pp. A1, A4 ("Strays find new home").
35. In re Denial of Request for Full Administrative Hearing, 552 S.E.2d 230 (N.C. App. 2001)(parrot owner who complained to North Carolina Veterinary Medical Board after pet died due to alleged improper treatment by veterinarian lacked standing to appeal board's refusal to conduct full evidentiary hearing); Malloy v. Easley, 551 S.E.2d 911 (N.C. App. 2001), petn for rev. granted (operator of pigeon shoot lacked standing to enjoin, before being arrested, application of

anti-cruelty statute as applied to him on theory statute was void for vagueness).
36. N.C. Gen. Stat. § 19A-1(3).
37. N.C. Gen Stat. § 19A-2.
38. N.C. Gen Stat. § 19A-1(1).
39. N.C. Gen Stat. § 19A-3.
40. Justice for Animals et al v. Robeson County, et al, Superior Court, Robeson County, No. 01 CVS 4254.
41. www.aldf.org; 707-789-7771 (in Petaluma, Ca.).
42. 42 W. 44th St., New York, NY 10036, www.abcny.org. The Animal Law Committee of the Environment, Energy, and Natural Resources Section of the District of Columbia Bar also offers useful programs. See www.dcbar.org.
43. www.lclark.edu/~alj.

The Soldiers' and Sailors' Relief Act

By Mark E. Sullivan

The current recall of Reserve and National Guard personnel, and the deployment overseas of active duty military personnel, will undoubtedly affect many litigants. The Soldiers' and Sailors' Civil Relief Act of 19401 (hereinafter referred to as the SSCRA) provides legal protections for those who are called to active duty in the U.S. Armed Forces or who are deployed overseas. Reservists and members of the National Guard may also be protected under the SSCRA. The protection begins on the date of entry on active duty and generally ends within 30 to 90 days after release from active duty. The United States Supreme Court has said that the SSCRA should be read "with an eye friendly to those who dropped their affairs to answer their country's call."2 This article highlights some of the issues related to the impact of military service on civil litigation, financial obligations, mortgages, family support, leases, and other matters.

OVERVIEW

Stay of Proceedings

The SSCRA allows for the stay of certain cases when a party is in the military. 50 U.S.C.App. 521 provides that a servicemember (hereinafter sometimes referred to as an SM) who is a party in civil judicial proceedings may obtain a stay if the court finds that the member's ability to prosecute or defend is "materially affected" by reason of his or her active duty service. A "material effect" exists when military duties prevent the member from appearing in court at the designated time and place, or from assisting in the preparation or presentation of the case. The stay remains in force until the "material effect" is removed. An adverse material effect might also be found when military service substantially impairs the member's ability to pay financial obligations.

Those moving for a stay under the SSCRA should file an affidavit, executed by the SM or the SM's commander, setting out all the facts and circumstances detailing the SM's efforts to appear in court and the next court date when he or she would be available. It is important to remember that, while servicemembers get 30 days' leave annually, accruing at the rate of 2.5 days per month, military necessity may limit when the leave may be taken. For instance, servicemembers who are going through basic or advanced training may be unable to appear in court due to the training schedule. Keep in mind that the judge might request a copy of the servicemember's Leave and Earnings Statement (the military equivalent of a pay stub) to show his or her Base Pay, Basic Allowance for Housing, Basic Allowance for Subsistence, tax withholdings, voluntary allotments to pay bills or support, and accrued leave.

Default Decrees

When a plaintiff applies for a default judgment against an SM, the SSCRA applies. It requires the movant to file an affidavit with the court stating that the other party is in the military, is not in the military, or the movant does not know, before a decree or judgment can be obtained by default. If the affidavit indicates the other party is in the military or the movant does not know, the SSCRA indicates the court should appoint an attorney to represent the other party; however, if the SM has counsel of record, or has filed pleadings in the case, this provision does not apply.3 When the affidavit shows that the party to be defaulted is in the armed forces, no default can be taken until the court has appointed an attorney to represent the servicemember. If the court fails to appoint an attorney, then the judgment or decree is voidable.

Although the SSCRA does not say, the probable role of the appointed attorney is to protect the interests of the absent member by contacting the servicemember to advise that a default is about

to be entered and to ask whether that party wants to request a stay of proceedings. No provision of the SSCRA says who pays the appointed attorney.

When a default has already been entered, a servicemember has the right to have it reopened upon certain conditions. If the default is granted during the period of military service or within 30 days thereafter, the SM can apply to have it set aside, provided that the member requests reopening the decree within 90 days after the end of military service, and that no appearance has been entered, either pro se or through an attorney. The SM's application to set the decree aside should be granted if the SM can show that he or she has a good and legal defense to the claim and can show prejudice resulting from not being able to appear in person to defend or prosecute.

Stay of Execution, Statutes of Limitation

The SSCRA also provides for staying the execution of a judgment.4 The court may grant a stay of the execution of a judgment or order entered against the SM, and vacate or stay an attachment or garnishment when the court determines that the SM's ability to comply with the judgment or order is materially affected by reason of military service.

Regarding statutes of limitation, the SSCRA provides5 that the period of military service shall not be included in computing any limitation period for filing suit, either by or against any person in military service. This also includes suit by or against the heirs, executors, administrators, or assigns of the servicemember, when the claim accrues before or during the period of service. Thus this SSCRA section "tolls" statutes of limitation during the military service of any military plaintiff or defendant. Once military service is shown, the period of limitation is automatically tolled for the duration of the service.

Leases and Landlords

The SSCRA also addresses rental agreements and lease terminations, and these sections are found at 50 U.S.C. App. 530. A lease covering property used for dwelling, professional, business, agricultural, or similar purposes may be terminated by a servicemember if: (a) the lease/rental agreement was signed before the SM entered active duty; and (b) the leased premises have been occupied for the above purposes by the SM or his or her dependents.

To terminate the lease, the SM must deliver written notice to the landlord after entry on active duty or receipt of orders for active duty. The effective date of termination for month-to-month rentals is 30 days after the first date on which the next rental payment is due after the termination notice is delivered.6 For all other leases, termination becomes effective on the last day of the month after the month in which proper notice is delivered.7

If rent was paid in advance, the landlord must refund the unearned portion. If a security deposit was required, it must be refunded to the servicemember upon termination of the lease. The SM is required to pay rent only for those months before the lease is terminated. Even eviction actions can be stayed. If the property is rented for $1,200 per month or less, the court may delay the eviction action for up to three months. The court must grant the stay if the SM requests it and can prove that his or her ability to pay was materially affected by military service.

Financial Obligations

The SSCRA also applies to time payments and installment contracts. Under 50 U.S.C. App. 531, servicemembers who signed an installment contract for the purchase of real or personal property before active duty will be protected if their ability to make the payments is "materially affected" because of active duty service. If the SM has paid, before entry into active duty, a deposit or

installment payment under the contract, and the SM is not able to make payments because of his or her military duty, then the SSCRA will apply and the vendor will be prohibited from exercising any right or option under the contract, such as the right to rescind or terminate the contract or to repossess the property, unless authorized by a court order. The court may determine whether an SM's financial condition is "materially affected" by comparing the servicemember's financial condition before entry on active duty with his financial condition while on active duty.

The interest rate on debts and mortgage payments can be reduced when there is material effect shown and a member is going on active duty. When an obligation was incurred before entry on active duty, the interest rate goes down to 6% unless the creditor (bank, finance company, credit card issuer, etc.) can prove in court that the member's ability to pay was not materially affected by military service. The term "interest" includes service charges.

Foreclosure

The SSCRA also protects servicemembers against foreclosures of mortgages, deeds of trust, and similar security devices, provided the following conditions are met: (a) the relief is sought on an obligation secured by a mortgage, deed of trust, or similar security on either real or personal property; (b) the obligation originated prior to entry upon active duty; (c) the property was owned by the servicemember or dependent before entry on active duty status; (d) the property is still owned by the servicemember or dependent at the time relief is sought; and (e) the ability to meet the financial obligation is "materially affected" by the servicemember's active duty obligation.

Courts can stay proceedings until the servicemember is available to answer. The court can also extend the mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by a servicemember, and extend the period of redemption by a period equal to the servicemember's military service.

THE NORTH CAROLINA CASE LAW

Several North Carolina cases have ruled on SSCRA issues.

Motion for Stay Properly Denied

In the Matter of the Paper Writing of Sue H. Vestal 8 involved a caveat proceeding to challenge the probate of a will. The trial court dismissed the caveat after finding that the caveators had willfully and blatantly ignored the court's orders for discovery compliance without reasonable excuse. One caveator, Colonel Weaver, contended that he was prevented from responding due to his involvement in the Gulf War.

On appeal, Colonel Weaver alleged that he was not required to respond because of protections afforded him by the SSCRA.9 The Court of Appeals found that Weaver had neither filed a motion to stay under the SSCRA nor an affidavit with supporting facts. Without a request for a stay by the caveator, the only remaining issue was whether the court should have granted a stay on its own motion. The court noted that the only information about Weaver's military service was found in two unverified papers signed by his attorney and that no evidence showed that Weaver had ever requested military leave to answer the interrogatories.

The court quoted with approval an Indiana case which noted that "the man in service must himself exhibit some degree of good faith and his counsel some degree of diligence."10 Vestal suggests the following guidelines: (a) always file a motion and an affidavit when seeking a stay; (b) lack of good faith and due diligence on the part of the servicemember are grounds for denial of the motion; and (c) a stay may not be necessary simply to answer interrogatories-phone calls

and correspondence can be used to prepare answers most of the time.

Material Effect Demonstrated

The "flip side" of Vestal is found in Cromer v. Cromer.11 The SM was the defendant in a motion to increase child support with the hearing set for November 1979. Prior to the hearing, the SM sought a stay under the SSCRA. His commander wrote a letter to the presiding judge stating that operational requirements prevented the SM from taking leave until January 1980. The commander subsequently signed an affidavit on the SM's behalf and sent it to the district court, stating that Jack Cromer, the defendant, was "Chief of the Boat," the sole interface between enlisted men and officers on the nuclear submarine USS Skate, that operations at sea were scheduled for the last two weeks in November 1979, and that he had advised Mr. Cromer that he would not be permitted to take leave. The district court denied the stay and ordered Mr. Cromer to pay increased child support. Defendant appealed.

The Court of Appeals upheld the trial court's increase in child support but the Supreme Court granted defendant's petition for discretionary review. The letter and affidavit showed up as part of the petition for discretionary review in the Supreme Court, but were not part of the record on appeal and had not appeared in any lower court file. Regardless of this irregularity-or perhaps because of it-the Supreme Court reversed, stating that "the trial court might have proceeded in another manner had it been aware of these documents."12 Cromer suggests that it's never too late, that the motion and affidavit can still help the SM in the appellate process to show the "material effect" of military service. It also shows the value of a detailed and specific affidavit and motion requesting only a limited-and not an indefinite-stay, about two months in this case.13

Requirement of a Meritorious Defense

When considering a request to reopen a default judgment, in addition to finding that his military service had a material effect on his ability to defend himself, the court must decide whether the defendant has a meritorious defense. This was the issue in Smith v. Davis,14 in which the SM was served with a complaint in May 1985 alleging that he had been paying $100 a month for the support of his child and requesting an increase to at least $150 a month.

In response the SM sent a letter in June 1985 to plaintiff's attorney admitting receipt of the summons and complaint but asking that plaintiff's attorney recognize his rights under the SSCRA. The defendant did not appear at the hearing, nor did an attorney on his behalf, and no attorney was appointed to represent him as is required under 50 U.S.C. App. 520. An order was entered that he pay $225 a month in child support.

The defendant filed a motion to reopen the judgment and submitted an affidavit in support of the motion. The affidavit stated that at the time of the support hearing he was on active duty in the Marine Corps, he was stationed in California, his unit was subject to deployment to the western Pacific at any time, and that his military duties made him unavailable to defend at that hearing. He also stated that, upon arrival at the base, he experienced "pay problems" that left him without a paycheck for four months. The trial court denied his motion.

The Court of Appeals, however, reversed that decision after conducting a clear and concise analysis of the "default provisions" of the SSCRA.15 The court found that the motion of defendant was timely (made no later than 90 days after termination of military service); the trial court had not appointed an attorney for him (as is required by the SSCRA); the defendant showed prejudice stemming from his military service; and the defendant showed that he had a meritorious defense (that is, he lacked the ability to pay support). The defendant in this case based his affidavit on the four D's-Distance, Deployment, Defense, and Deficit (that is, inability to pay). Smith v. Davis

demonstrates the importance of setting up the groundwork early for a later motion to reopen, and following through with detailed factual statements in an affidavit that is filed on a timely basis with the trial court.

Failure to Demonstrate Diligence and Good Faith

Judkins v. Judkins16 started in August 1988 when the wife filed a lawsuit for divorce from bed and board, custody, child support, alimony, and equitable distribution. The defendant, an Army Lieutenant Colonel stationed at Ft. Bragg, filed an answer that contained counterclaims for custody, child support, and equitable distribution. Discovery was initiated before April 1989 and continued through August 1990, when the invasion of Kuwait started the deployment that led to the Gulf War. At that time "the court continued the matter over because of defendant's service with the United States Military in that action."17

But that didn't end the dispute. Although combat in the Gulf War was finished in February 1991, the plaintiff continued to attempt to obtain information from defendant through discovery and the defendant continued to resist. The plaintiff filed motions to compel discovery responses in July 1991, December 1991, and February 1992. In February 1992, a year after the Gulf War ended, the judge entered an order requiring the defendant to produce documents to the plaintiff. The defendant failed to comply with the discovery order.

The trial, set for April of 1992, was continued at defendant's request. The trial judge contacted the Army and was told that defendant was "on a mission" and that he would be available in July 1992. The court ordered a continuance until July 1992. When that date rolled around, defendant's attorney again requested a continuance, stating that defendant would be available to complete discovery and the pretrial order on or before August 3, 1992, and would be available for trial on August 31, 1992. The court once again granted a continuance, setting the case peremptorily for hearing on August 31, 1992.

Is it hard to guess what happened next? The defendant failed to respond to discovery, failed to complete the pretrial order, and moved for a continuance on August 31, adding (apparently for the first time) a motion for a stay under the SSCRA. The trial court found that the defendant had failed to exercise good faith and proper diligence in appearing and resolving his case and then denied the motions of defendant.

The Court of Appeals framed the issue as whether the trial judge had erred in denying the defendant's motion for a stay. The court noted that the only evidence of the SM's unavailability was a letter from the Army stating that the defendant was to depart for Southeast Asia on August 30, 1992, for about 46 days, that there was no evidence in the record as to whether the SM had at any time requested leave to defend the action or whether leave was likely to be granted upon request, and that the defendant made no showing as to how his defense would be prejudiced or his rights materially affected by his absence. The Court of Appeals accepted the trial court's determination that the SM had failed to exercise good faith and due diligence.18

The Judkins case teaches that a stay will not be granted without a showing of good faith and proper diligence, and that the courts will usually need to see a statement from the SM as to whether leave was available and had been requested. A stay is not forever. Contrary to the popular notion of many soldiers and some civilian practitioners, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. Military members accrue leave at the rate of 30 days per year, and courts can take judicial notice of this fact.19 Current overseas postings usually last around three years for an "accompanied tour" (with family members), and much less for unaccompanied tours in such host countries as Turkey, Korea, and Iceland. This showing regarding leave is important in most cases where the SM is

proclaiming nonavailability.

The stay is, in fact, intended to last only as long as the material effect lasts. Once this effect is lifted, the opposing party should immediately request the lifting of the stay. In the event of further resistance by the SM, the court should require submissions upon affidavit.

Finding of No Prejudice

The last case is Booker v. Everhart.20 The case arose from "a complex series of proceedings and circumstances involving the divorce of defendant." In March 1974 the plaintiff, an attorney who had represented the plaintiff-wife, sued for his fees on a note from defendant-husband (guaranteed by his parents). In May 1975 the defendant joined the Navy and was sent to the Philippines, where he remained through trial. In January 1976 the defendants (the husband and his parents) moved that the case be "entirely removed from the trial calendar" pursuant to the SSCRA on the ground that the husband would be absent from trial. The judge denied the motion and set the trial for April 1976. A month after that order and a month before the trial date, the defendants noticed plaintiff for the taking of the deposition of the defendant-husband in the Philippines two weeks before the trial. The judge granted a protective order to plaintiff, and the deposition was not taken. At the trial the court granted a directed verdict for plaintiff and the defendants appealed.

The Court of Appeals, in ruling on defendants' claim that the trial court erred in denying a stay under 50 U.S.C.App. 521, noted that the Act mandates a continuance where military service would cause a party to be absent, but it also allows the judge to deny a continuance if, in his opinion, the SM's ability to conduct his defense is not materially affected by reason of his military service. The court then noted the following facts: (a) the defendant-husband, who volunteered for naval service, was sent to the Philippines 14 months after the lawsuit was filed; (b) there was no showing in his affidavit that he requested leave or would not be able to obtain leave to be present at trial; (c) there was no showing in his affidavit, beyond a mere conclusory statement, that his defense would be prejudiced or his rights impaired materially by his absence; (d) his deposition had already been taken in May 1974 by plaintiff in the presence of counsel for the defendants; and (e) defendant-husband, an attorney licensed in North Carolina, took no steps to seek a speedy determination of the case prior to going on active duty. Based on the above, the court upheld the trial judge's order, which found that the SM's absence would not materially prejudice his defense. The court noted that the SM's use of the SSCRA was likely based on policy and strategy, rather than on the necessities of military service.

The lessons of the Booker case are that, once again, there must be more than a vague and conclusory affidavit-there must be a clear and detailed showing that the SM will be prejudiced by his inability to appear and defend. There should, ordinarily, also be a statement as to whether leave was requested and the results of such a request.

SSCRA Resources on the Internet

There are useful resources on the internet for SSCRA research. Visit the home page of the Army JAG School, www.jagcnet. army.mil/TJAGSA. When you get there, click on "Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Soldiers' and Sailors' Civil Relief Act Guide," a thorough examination of every section of the SSCRA by the faculty of the Army JAG School (updated in July 2000). You can also find useful material at these URL's:

"Soldiers' and Sailors' Civil Relief Act Provides Umbrella of Protection" - Department of Defense article, Armed Forces Information Service: www.defenselink.mil/specials/Relief_Act/

US Coast Guard article on SSCRA: www.uscg.mil/mlclant/LDiv/soldiers1.htm

Air Force Academy article on SSCRA: www.usafa.af.mil/10ja/ssra.htm

Coast Guard Fact Sheet on SSCRA: www.uscg.mil/legal/la/topics/sscra/SSCRA_Factsheet.htm

Article by Carreon and Associates, Cypress, CA, on SSCRA: www.carreonandassociates.com/soldiersact.html

Office of Child Support Enforcement's "A Caseworker's Guide to Child Support Enforcement and Military Personnel" - section on SSCRA: www.acf.dhhs.gov/programs/cse/fct/military guide2000.htm#relief

Legal Services, www.jagcnet.army.mil/ legal, the Army Judge Advocate General's Corps public preventive legal information site (Soldiers' & Sailors' Civil Relief Act information center).

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Endnotes

1. 50 U.S.C. App. 501-548, 560-593.

2. Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

3. 50 U.S.C. App. 520 governs default entries and reopening defaults.

4. 50 U.S.C. App. 523.

5. 50 U.S.C. App. 525.

6. For example, if rent is due on the first of the month and notice is mailed on 1 August, then the next rent payment is due on 1 September. Thirty days after that date would be 1 October, the effective date of termination.

7. For example, if the lease calls for a yearly rental, and notice of termination is given on 20 July, the effective date of termination would be 31 August.

8. 104 N.C. App. 739, 411 S.E.2d 167 (1991).

9. Vestal, 104 N.C. App. at 743, 411 S.E.2d at 169.

10. Vestal, 104 N.C. App. at 744, 411 S.E.2d at 170, quoting from Sharp v. Grip Nut Co., 116 Ind. App. 106, 111, 62 N.E.2d 774, 776 (1945).

11. 303 N.C. 307, 278 S.E. 2d 518 (1981).

12. Cromer, 303 N.C. at 311, 278 S.E. 2d at 520.

13. It should also be noted that there is no clear formulation of who has the burden of proof to

show a "material effect." As stated by the U.S. Supreme Court in Boone v. Lightner. supra: "The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come." Although it is logical to place the burden of proof on the movant (i.e., the SM who is requesting a stay of proceedings), some courts have stated that both parties may be required to produce evidence on the issues. Gates v. Gates, 197 Ga. 11, 25 S.E. 2d 108 (1943).

14. 88 N.C. App. 557, 364 S.E. 2d 156 (1988).

15. 50 U.S.C. App. 520.

16. 113 N.C. App. 734, 441 S.E. 2d 139 (1994).

17. Judkins, 113 N.C. App. at 738, 441 S.E. 2d at 141.

18. The court also dealt with the issue of personal jurisdiction. Under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408(c)(4), a court can exercise jurisdiction over the division of military retired pay if a SM consents to the jurisdiction of the court, among other things. The court found that the answer and counterclaims of the defendant constituted a general appearance, and that he had thus consented to the court's jurisdiction. Thus the SM in a military pension division case is well-advised to object immediately at the start of the case as to jurisdiction over his military pension (as an aspect of equitable distribution). If he fails to do this, he may up the claim of lack of jurisdiction by the trial court.

19. Underhill v. Barnes, 161 Ga. App. 776, 288 S.E. 2d 905 (1982).

20. 33 N.C. App. 1, 234 S.E. 2d 46 (1977).

Employees Called to Military Duty Protected by Law

By John Mann

As thousands of Americans are called to active military service as part of our nation's response to the tragic events of September 11, employers should review the laws that offer job protection for these employees. While the vast majority of employers view supporting their employees in uniform as a patriotic duty, others may see these statutory requirements as a financial stress on the business. Still others may violate the law through ignorance of its provisions. Employers should know, however, that willful violations of the law can result in courts awarding double damages to the wronged employee.

The rights of individuals called to active military service, including the mechanisms for employees to file complaints against their employers for violations of the law, are found in the Uniformed Services Employment and Reemployment Rights Act (USERRA). The USERRA covers employees who temporarily leave employment to serve in the uniformed services, including the Armed Forces, National Guard, Reserves, and other groups designated by the President. All employers must comply with the USERRA.

The USERRA generally requires that returning service-members be reemployed in the job that they would have attained had they not been away from their jobs due to their military service. This "escalator principle" of the USERRA requires that the employee be credited with the same seniority, status and pay, as well as other seniority-based rights and benefits. The USERRA also requires that employers offer their returning employees the training needed for them to refresh or upgrade their skills for their positions. The law, however, does allow the employer to assign an employee to an alternative position if the employee is unable to qualify for a higher one. In addition, the USERRA protects disabled veterans, requiring employers to make reasonable efforts to accommodate disabilities. Employees convalescing from injuries received during service or training may have up to two years to return to their jobs.

The following summarizes the USERRA's key provisions.

Employer Obligations

· Reemployment-An employer must reinstate an employee who has been absent for up to five years (and possibly longer) because of uniformed service, whether voluntary or involuntary. There are specific limited exceptions to this requirement.

· Promotion and Seniority-The USERRA contains a detailed scheme for determining the position in which a returning service member must be placed, which is designed to return an employee to a job at the seniority level that he/she would have obtained but for the absence, where possible.

· Retention-Upon returning from leave, a service member may not be discharged except for cause for a specified period of time, which varies based on the length of uniformed service.

· Healthcare and Pension Benefits-The USERRA contains detailed provisions governing pension and health benefits. For example, an employee may elect to continue health plan coverage for up to 18 months when absent due to military service.

Employee Obligations

· Notice of Service-Employees must provide their employer with advance notice of service, unless

providing such notice is unreasonable, impossible, or prevented by "military necessity."

· Notice of Return to Work-Employees absent less than 30 days must return to work on their first regularly scheduled workday after the end of service. Employees absent for longer periods must apply for reinstatement within varying time limits contained in the law.

· Documentation of Eligibility-Upon request, an employee must provide documentation establishing eligibility for reemployment. If documentation is unavailable, the employer must reemploy the individual until documentation becomes available.

The Department of Labor, through the Veterans' Employment and Training Service (VETS), provides assistance to anyone who has claims under the USERRA. If VETS cannot resolve the claim, a service member may request the Department of Justice to file suit or may elect to bring a private cause of action in federal district court at no cost to the claimant. Through the review process by VETS or the court action, an employer may be required to return the employee back to work while also providing back pay, lost benefits, corrected personnel files, lost promotional opportunities, retroactive seniority, pension adjustments, and restored vacation. If the employee can prove that her employer willfully violated the law, the court can double any amounts due as liquidated damages. In addition, an employee who prevails in a private action is entitled to attorneys' fees and costs, including expert witness fees.

The USERRA was intended to enable employees to serve their country without sacrificing their careers. Employers are well advised to brush up on the USERRA's requirements as the military call-up escalates.

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Interpreting in the Courts: The AOC's Guidelines

In response to the growing number of non-English speakers in North Carolina, the Administrative Office of the Courts secured grant funds in 2000, 2001, and 2002 to enhance access to the courts for non-English speakers, with an emphasis on the Spanish speaking population.1 As a part of this effort, guidelines for the use of foreign language interpreting and translating services were adopted by the director of the Administrative Office of the Courts (AOC) in the fall of 2000.2 The guidelines are intended to facilitate the use of foreign language interpreters and translators3 in court proceedings, and to provide guidance to districts in fashioning local rules. The guidelines address the appointment, compensation, and removal of interpreters, interpreter responsibilities and practices, ethical limitations on interpreter conduct, and interpreter certification. This article presents edited excerpts4 from these guidelines. The complete AOC Guidelines can be found on the internet at the North Carolina Court System home page.5

I. Appointment

General Principles

The court has inherent authority to appoint a foreign language interpreter when, in the discretion of the court, an interpreter is "necessary."6 An interpreter is necessary when a person's "normal method of communication is unintelligible to those in the courtroom."7 In determining whether an interpreter is necessary, the court should ask the non-English-speaking (NES) person open-ended questions requiring elaboration rather than questions requiring a simple "yes" or "no" answer. Such questions could be about the person's work, education, family, or other similar matters.

Locating and Selecting

Any person who, in the discretion of the court, "is competent to perform the duty assumed may be appointed as an interpreter."8 To assist the court in making this competency determination, the AOC maintains a list of certified interpreters.9 It is recommended that the court appoint a certified interpreter from this list. If a certified interpreter is not reasonably available, or where the NES person would prefer to use an interpreter of his or her own who is not certified, the court may appoint an interpreter who is not certified. In determining whether to appoint a non-certified interpreter, factors the court should consider include the nature of the proceeding, the hardship that would be caused by delaying the proceeding until a certified interpreter could be located, and the level of competence of the non-certified interpreter.

In determining whether a non-certified interpreter is competent, court officials should note that being bilingual is not, by itself, a guarantee of a person's ability to serve as an interpreter. Interpreting requires specialized knowledge of grammar, vocabulary, legal and other specialized terminology, slang, idioms, and dialectal variations. It also requires specialized skills in the areas of memory, comprehension, attentiveness, listening, and multi-tasking.

In any event, the court should avoid acting as an interpreter itself or allowing an attorney or law enforcement officer participating in the case to serve as an interpreter. First, the judge or attorney may not be able to perform his or her duties at the optimum level if he or she is attempting to serve dual roles during the proceeding. Second, serious conflict of interest concerns arise when a judge serves as both fact finder and interpreter, or when an attorney serves as both advocate and interpreter. Similar conflict of interest concerns arise for law enforcement officers serving as court interpreters.

If the language spoken by the person is uncommon, the court might contact one of the following

resources to locate a translator: (a) the language department of a local college or university; (b) a local military base; (c) the American Translators Association headquartered in Alexandria, Virginia (703/683-6100, or www.atanet.org); or (d) the AOC, which has a directory of interpreting companies and individual interpreters published by the Carolina Association of Translators and Interpreters.

Use of Form AOC-G-107

When appointing and compensating interpreters, the court should use form AOC-G-107 ("Motion, Appointment and Order Authorizing Payment of Interpreter"). The form has four sections:

Motion section: The attorney, party, or court official requesting the interpreter should complete the "Motion" section at the top of the form. This section requires the requesting party to explain the reasons an interpreter is needed.

Appointment section: The judge, clerk, or magistrate should complete the "Appointment" section of the form. This section requires the court official to (1) identify the interpreter who will be providing services and (2) make a finding that the interpreter is competent to serve.

Certification section: The interpreter should complete and sign the "Certification" section of the form. In this section the interpreter (1) certifies that he or she actually provided the services requested and (2) provides a total cost for these services.

Order section: The court official should approve a total payment amount by completing the "Order" section near the bottom of the form. Once the court official has approved the payment amount, the court should forward the completed form to the AOC Controller's Office for payment.

Removal

If the court subsequently determines that an interpreter is not competent, has engaged in misconduct, or is otherwise unable to perform the necessary interpreting services, or that the person does not in fact need an interpreter, the court may in its discretion remove the interpreter.10 Similarly, an interpreter who becomes concerned about his or her ability to interpret in a particular proceeding or for a particular person should inform the court immediately.

Oath

Rule of Evidence 604 contemplates that a court interpreter will swear or affirm that he or she "will make a true translation."11 Districts may want to adopt a more expansive oath by local rule. For example, a guidebook on interpreting issues published by the National Center for State Courts suggests the following oath:

Do you solemnly swear or affirm that you will interpret accurately, completely, and impartially, using your best skill and judgment in accordance with the standards prescribed by law and [the Code of Ethical Conduct for Court Interpreters adopted by the Administrative Office of the Courts], follow all official guidelines established by this court for legal interpreting or translating, and discharge all of the solemn duties and obligations of legal interpretation and translation?12

Need for More than One Interpreter

The demands of courtroom interpreting,13 particularly simultaneous interpreting, can be grueling. For lengthy or complex matters, the court may, therefore, choose to appoint more than one

interpreter. The two interpreters then may spell each other as they become fatigued. As a general rule, the court should consider securing more than one interpreter for any proceeding likely to last for two or more hours.

Appointment By Session Rather Than By Case

Some districts appoint a single interpreter for an entire session of court rather than appointing a different interpreter for each case heard during the session that requires an interpreter. For example, some districts now appoint one interpreter to remain available in the courtroom for an entire day or half-day of Criminal District Court. This interpreter assists any indigent defendants or witnesses during the course of the day who need interpreting services. Several districts that regularly experience a high volume of NES persons use this approach.14

II. The Role of the Interpreter

Pre-Hearing Activities

If possible, the interpreter should meet with the non-English-speaking (NES) person and his or her attorney prior to the proceeding to allow the interpreter to become familiar with the NES person's dialect and manner of speaking. It will also allow the interpreter to clarify the nature of his or her role, i.e., that the interpreter will interpret the proceedings for the party, but is not permitted to advise the party in any way.

Courtroom Protocol

The interpreter should abide by the instructions and rules of the local district and the presiding judicial official at all times. The following policies are recommended:

Arrival: The interpreter should arrive at least 15 minutes prior to the start of the proceeding and should introduce himself or herself to the courtroom clerk. If the interpreter arrives while a proceeding is in progress, the interpreter should ask the bailiff to notify the clerk of his or her arrival.

Courtroom location: Generally, the interpreter should sit by the NES party at the counsel table when simultaneously interpreting for a party. When consecutively interpreting15 the testimony of a NES witness, the interpreter should stand by the witness positioned in such a manner that the judge, the parties, the attorneys, and the jury are able to view the witness.

Equal access: The interpreter's purpose is, to the extent possible, to place the NES party in a situation equivalent to that of an English-speaking party. Accordingly, the interpreter should interpret for the NES party everything that the party would hear were he or she English-speaking.

Completeness and accuracy: The interpreter should interpret completely and accurately. The interpreter should not alter the meaning of the original statements in any way. For example, the interpreter should not elaborate on, explain, or clarify the statements, and should not correct obvious errors.

Verbatim vs. complete interpretation: A verbatim interpretation is not necessarily a complete and accurate interpretation. Specifically, an interpreter should not interpret a statement verbatim if a verbatim interpretation would rob the statement of its meaning. This is particularly true for idiomatic expressions. For example, a verbatim translation of the phrase "we kept tabs on him"

may fail to convey the meaning of the phrase to the NES person.

Preservation of tone and register: In addition to preserving meaning, the interpreter should also preserve the tone and register of the original statements. In other words, the interpreter should convey the intensity and emotion of the original statements.

Use of first and third person: If it becomes necessary for the interpreter to address the court during the proceeding, the interpreter should speak in the third person. For example, the interpreter should say, "Your Honor, the interpreter was unable to hear counsel's question." The interpreter should always render a witness' testimony, however, in the first person. For example, if a witness responds, "I saw the defendant around 10:00," the interpreter should not state: "The witness says she saw the defendant around 10:00." Observing these rules will allow the official court record to reflect clearly when the interpreter is speaking on his or her own behalf and when the interpreter is rendering the testimony of a witness.

Departure: When the proceeding concludes, the interpreter should not leave the courtroom until the court formally excuses the interpreter.

Code of Ethical Conduct: At all times, the interpreter should act in a manner consistent with the Code of Ethical Conduct.16

Suggestions for Court Officials

The court should encourage the interpreter to meet with the NES person prior to the hearing, if possible, in order to familiarize himself or herself with the person's dialect and manner of speech. The court should also encourage counsel to share with the interpreter any documents that they will be asking the interpreter to sight translate during the proceeding. The court may want to introduce the interpreter and provide instructions to the parties, the attorneys, and the jury on the proper role of the interpreter. Specifically, the court may want to address the following: (a) The interpreter's role and purpose is limited to facilitating communication. The interpreter may not provide legal or other advice or assistance to any party; (b) The participants in the proceeding should speak directly to one another, not to the interpreter. For example, an attorney should ask a NES witness a question directly. The attorney should not say to the interpreter, "Ask the witness when she saw the defendant." Similarly, the witness should respond directly to the attorney, not to the interpreter; (c) The interpreter will render everything that is said in the courtroom completely and accurately. The interpreter will not elaborate on, explain, clarify, add to, or omit information from the original statements; (d) The jury should not give any weight to the fact that a party or witness requires the assistance of an interpreter; and (e) The court reporter should record only the English spoken during the proceeding. In the verbatim transcript of the proceeding, the reporter should indicate when a witness or party is speaking through an interpreter.

The court should ensure that the courtroom is as quiet as possible, that all participants speak audibly and clearly, that all participants speak at a reasonable rate of speed, and that the participants speak only one at a time. Interpreters regularly use notepads to assist them in recalling lengthy statements that they must interpret. The court should permit the interpreter to use a notepad in this fashion and may want to explain to the jury and the other participants why the interpreter is using it. Many interpreters use wireless interpreting equipment for simultaneous interpretation. The interpreter speaks into a transmitter and the signal is sent to a receiver used by the NES person. This equipment allows the interpreter to move about the courtroom in order to better hear the person who is speaking. By using multiple receivers, the interpreter can also serve multiple NES persons at the same time. The court should permit the interpreter to use this equipment and may want to explain to the jury the nature of the equipment and why the

interpreter is using it. In the most serious cases (for example, capitally tried cases), the court may want to order that the proceedings be recorded on audio tape, particularly if the court is using a non-certified interpreter. This will provide a record of the original statements made in the foreign language should a question arise regarding the adequacy of the interpretation.

Court officials may want to utilize several AOC forms recently translated into Spanish. These include criminal forms17 and domestic violence forms.18 These forms are available in the Judicial Branch Forms Manual19 and are also available on the AOC web page at http://www.nccourts.org.

III. Compensation

When the State May Bear the Cost of a Foreign Language Interpreter

The court system is authorized to provide foreign language interpreters at state expense only in those instances when the state is bearing the costs of representation. G.S. § 7A-314(f), for example, authorizes the court to appoint a foreign language interpreter at Judicial Branch expense in indigent criminal cases where the defendant, or a witness for the defendant, cannot speak or understand English. This statute also authorizes the court to appoint an interpreter for a witness for the prosecution who cannot speak or understand English. The AOC has interpreted this statute in conjunction with various other statutes (for example, G.S. § 7A-450, G.S. § 7B-602, G.S. § 7B-1101, G.S. § 7B-2000, and G.S. § 122C-268), to authorize an interpreter at Judicial Branch expense for any party for whom the Judicial Branch is bearing the costs of representation (for example, indigent criminal defendants, witnesses for indigent criminal defendants, witnesses for the state, parties to juvenile proceedings, or indigent respondents in involuntary commitment proceedings).

There may be a situation where a person has retained his or her own attorney but is still entitled to other services, such as the assistance of an interpreter, at state expense.20

There may also be situations where a party appears before a judicial official before any determination of indigency or right to counsel at state expense has been made. For example, at an initial appearance before a magistrate pursuant to G.S. § 15A-511, the magistrate may not yet know whether the defendant is indigent. The usual practice in this situation is for the magistrate to appoint an interpreter even though a determination of indigency (and entitlement to counsel at state expense) has not been made. If the defendant is subsequently convicted, the court can assign the interpreter's fee to the defendant as costs.21

When the State May Not Bear the Cost of a Foreign Language Interpreter

The Judicial Branch is not authorized to provide interpreters to parties who are required to bear the costs of their own representation (for example, civil and domestic litigants, non-indigent criminal defendants). Because the legislature has not authorized or appropriated funds for these other contexts, it would not be appropriate for the court system to begin paying for these services on its own authority. The Judicial Branch also is not authorized to provide interpreters for law enforcement matters such as interrogations or bookings. Similarly, the Judicial Branch is not authorized to provide interpreters for use by juvenile court counselors. In these instances, the law enforcement agency or the Department of Juvenile Justice and Delinquency Prevention must bear the cost of the interpreter.

Finally, some persons may waive the services of the interpreter that the court intends to appoint. Some districts require these persons to bear the cost of their own interpreters. This approach is consistent with the rules governing the waiver of a court-appointed sign language interpreter.22

(Note: The foregoing policies apply to foreign language interpreters only. As a general rule, Chapter 8B of the General Statues and the Americans with Disabilities Act requires the court system to provide sign language interpreters at state expense regardless of the financial status of the person needing the interpreter and regardless of the type of case.)

Rate of Payment

When the Judicial Branch is authorized to bear the interpreting costs, the interpreter is entitled to "a reasonable fee . . . as set by the court."23 Relying by analogy on G.S. § 8B-8(a), which governs the compensation of sign language interpreters, reasonable compensation for foreign language interpreters may include, in the court's discretion, (1) a reasonable hourly fee for services provided and for time spent in court waiting for the case to be called and (2) reimbursement for necessary travel and subsistence expenses pursuant to the reimbursement policies that apply to state employees.

The court in its discretion determines the specific rate of payment for interpreters. Rates for Spanish court interpreters in North Carolina generally range from $25.00 per hour to $35.00 per hour.24 The court may consider increased rates of payment in certain circumstances, for example, if: (a) the interpreter appeared on extremely short notice; (b) the interpreter appeared after normal working hours; (c) the case was particularly complex or taxing; or (d) the case involved an esoteric language for which interpreters are difficult to locate.

Once the court has determined the interpreter's compensation, the interpreter and the court should use form AOC-G-107 ("Motion, Appointment and Order Authorizing Payment of Interpreter") to compensate the interpreter. Once the appropriate court official has signed the form, the court should forward it to the AOC Controller's Office for payment.25

Prohibition on Double Billing

An interpreter may not (1) bill twice for the same period of time or (2) bill both the state and the indigent NES person.

Example 1: The court appoints an interpreter for Defendant A and Defendant B in separate cases. The interpreter waits in court from 9:30 AM until 10:30 AM until the two cases are heard. The interpreter may not bill twice for the one hour spent waiting for the cases to be called. The interpreter should apportion the hour between the two cases. Example 2: The court appoints an interpreter for Defendant A, who is indigent. Since the state will compensate the interpreter for his or her services, the interpreter should neither seek nor accept payment directly from Defendant A. Similarly, the interpreter should not accept a tip or gratuity from Defendant A.

Assigning the Interpreter's Fee as Costs

The court may assess the costs of a foreign language interpreter against an indigent criminal defendant if the defendant is found guilty.26 Some districts employ a bipartite approach, requiring the defendant to pay (1) $20.00 toward the cost of the interpreter if the defendant pleads guilty or (2) the entire cost of the interpreter if the defendant pleads not guilty and is subsequently convicted. (Note: The court should never tax the cost of a sign language interpreter (or other accommodation) to a person who is deaf or hard of hearing. Even where the services were provided for a criminal defendant who was convicted, the state must bear the cost.)

Interpreter Fees in Cases where the State Is Not Authorized to Pay

In civil and domestic cases where an interpreter is necessary, the court may appoint an interpreter on its own motion and require the parties to bear the cost of the interpreter. Rules of Evidence 604 and 706 provide the court with this authority. Rule of Evidence 604 provides that interpreters are "subject to the provisions of [the Rules of Evidence] relating to qualification as an expert."27 Rule 706(a) provides that the court may appoint an expert "on its own motion" and "of its own selection."28 Reading Rules 604 and 706 together, a court may, on its own motion, appoint an interpreter of its own selection.

Pursuant to Rule 706(b), an interpreter appointed by the court in this fashion is "entitled to reasonable compensation in whatever sum the court may allow."29 Where there are no "funds which may be provided by law" to pay for the services of the interpreter, "the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs."30 Thus, in civil actions, domestic actions, and other proceedings where the person must bear the cost of his or her own representation, the court may order the person to bear the cost of the interpreter.

The court could also rely on these rules to remove an interpreter retained by a party. Specifically, if the court determines that the interpreter provided is not adequate, the court could refuse to qualify the interpreter under Rule 604. The court then could appoint an interpreter of its own choosing pursuant to Rule of Evidence 706.

Special Rule for Chapter 50B Domestic Violence Proceedings

Domestic violence proceedings under Chapter 50B of the General Statutes are civil matters for which the parties bear their own costs of representation. Thus, absent special direction from the General Assembly, the court system is not authorized to pay for foreign language interpreters in these proceedings. During the 2000 short legislative session, however, the General Assembly authorized the Judicial Branch to provide foreign language interpreters at state expense to indigent NES parties in domestic violence actions. The AOC has established a separate account for the payment of interpreters in these matters. Accordingly, the court should write "CHAPTER 50B" in large letters at the top of form AOC-G-107 before forwarding it to the AOC Controller's Office for payment.

In addition to the AOC Guidelines, information on interpreter training and testing, copies of bilingual materials, and the directory of AOC certified court interpreters are posted on the AOC web site at http://www.aoc.state.nc.us/www/public/aoc/f_lang_services.htm. For questions regarding the AOC Guidelines or foreign language issues generally, contact Stephanie S. Scarce, the AOC Foreign Language Project Coordinator. Ms. Scarce may be reached at the AOC, Post Office Box 2448, Raleigh, NC 27602; E-mail: Stephanie.S.Scarce@ aoc.state.nc.us.

The Journal wishes to thank Thomas Fowler, Matt Osborne, and Stephanie Scarce for their work editing this piece.

Endnotes

1. Grant sources include the Z. Smith Reynolds Foundation, the North Carolina State Bar, and the Governor's Crime Commission.

2. In preparing these guidelines the Administrative Office of the Courts relied upon interpreting materials developed by the National Center for State Courts, the Minnesota Supreme Court Interpreter Advisory Committee, the BERKANA Center for Translation and Interpretation Studies, and several judicial districts in North Carolina. The AOC also received valuable input and assistance from the members of the Judicial Branch Foreign Language Advisory Committee:

Hon. Melzer A. Morgan Jr., Senior Resident Superior Court Judge; Hon. Alonzo B. Coleman Jr., District Court Judge; Hon. Sheila S. Pridgen, Clerk of Superior Court; Hon. Kellum Morris, Public Defender; Hon. Sandra J. Jordan, Magistrate; Elizabeth J. Carico, Certified Interpreter; Ilana Dubester, Director, El Vínculo Hispano; Pat Fields, Superior Court Trial Court Coordinator; James E. Gates, Attorney at Law; Michelle Luhr, Director, Choice Translating and Interpreting, LLC; Dr. H. Nolo Martinez, Director of Hispanic/Latino Affairs, Office of the Governor; Todd Nuccio, Trial Court Administrator; Matt Osborne, AOC Associate Counsel; Lillian Salcines, Assistant District Attorney; Stephanie S. Scarce, AOC Foreign Language Project Coordinator; Jane Worthen Eaton, former AOC Court Reporting Coordinator; Patricia G. Smith, Interpreter.

3. Interpreting is rendering statements spoken in one language into statements spoken in another language, while translating is converting a written text from one language into the written text of another language. The principles that apply to interpreting also apply to translating. See Wise v. Short, 181 N.C. 320, 322-23, 107 S.E. 134, 136 (1921).

4. This article was edited by Thomas L. Fowler, Associate Counsel, AOC; Matt E. Osborne, Associate Counsel, AOC; and Stephanie S. Scarce, Foreign Language Services Project Coordinator, AOC.

5. www.nccourts.org This article does not address the Guidelines' coverage of the Code of Ethical Conduct for Court Interpreters and Interpreter Certification information and procedures. These matters are covered in Chapters 4 and 5 of the Guidelines.

6. State v. Torres, 322 N.C. 440, 443-44, 368 S.E.2d 609, 611 (1988).

7. State v. McLellan, 56 N.C. App. 101, 102, 286 S.E.2d 873, 874-75 (1982).

8. Torres, 322 N.C. at 443-44, 368 S.E.2d at 611.

9. At present there are 23 AOC certified Spanish language interpreters and five federally certified Spanish language interpreters in North Carolina. A list of these certified interpreters is found at http://www.aoc.state.nc.us/www/public/language/nc_interpreters_sp.pdf

10. See G.S. § 8C-1, Rule 604 (1999) ("An interpreter is subject to the provisions of these rules [i.e., the Rules of Evidence] relating to qualification as an expert . . . ."); see also State v. Overton, 60 N.C. App. 1, 36-37, 298 S.E.2d 695, 716 (1982) (explaining that an order appointing an interpreter may "be altered upon a showing of changed circumstances"), disc. rev. denied and appeal dismissed sub nom., State v. Ruviwat, 307 N.C. 581, 299 S.E.2d 652 (1983).

11. G.S. § 8C-1, Rule 604 (1999).

12. William E. Hewitt, Court Interpretation: Model Guides for Policy and Practice in State Courts, at 149 (1995).

13. Simultaneous interpreting is interpreting continuously at the same time a person is speaking rather than waiting for the person to finish.

14. These districts include Districts 4 (Duplin, Jones, Onslow, and Sampson), 14 (Durham), 20 (Anson, Richmond, Stanly, and Union), 21 (Forysth), 26 (Mecklenburg), and 28 (Buncombe).

15. Consecutive interpreting is interpreting a person's statement after that person has finished

speaking.

16. The Code of Ethical Conduct for Court Interpreters is found in Chapter 4 of the Guidelines and can be viewed at http://www.aoc.state.nc.us/www/forlang/guidelines.html#Chapter 4:

17. E.g., "Affidavit of Indigency" (AOC-CR-226); "Waiver of Counsel" (AOC-CR-227); and "Transcript of Plea" (AOC-CR-300).

18. E.g., "Complaint and Motion for Domestic Violence Protective Order" (AOC-CV-303); Instructions (AOC-CV-303); "Ex Parte Domestic Violence Protective Order" (AOC-CV-304); "Notice of Hearing on Domestic Violence Protective Order" (AOC-CV-305); "Domestic Violence Protective Order" (AOC-CV-306); "Identifying Information about Defendant" (AOC-CV-312); "Civil Summons Domestic Violence" (AOC-CV-317); "Application and Order to Appoint Guardian Ad Litem in Action for Domestic Violence Protective Order" (AOC-CV-318); and "Affidavit as to Status of Minor Child" (AOC-CV-609).

19. These forms are printed on lavender paper in order to distinguish them from other AOC forms.

20. See State v. Boyd, 332 N.C. 101, 107-09, 418 S.E.2d 471, 474-76 (1992) (explaining that "whenever a defendant's personal resources are depleted and he can demonstrate indigency, he is eligible for state funding of the remaining necessary expenses of representation"; accordingly, the fact that a defendant has "sufficient resources to hire counsel does not in itself foreclose [the] defendant's access to state funds for other necessary expenses of representation").

21. See G.S. § 7A-455 (1999).

22. See G.S. § 8B-3(b) (1999) ("A deaf person who has waived an interpreter under this section may provide his own interpreter at his own expense . . . .").

23. G.S. § 7A-314(f) (1999).

24. In a memorandum to all superior and district court judges, dated 26 April 2001, the director of the AOC, Robert H. Hobgood, requested that the judges "limit Spanish interpreter fees to $25.00 an hour for non-state certified interpreters and $35.00 an hour for state certified interpreters," noting that certified interpreters "should be paid more because they have passed a rigorous exam and have met the criteria as set out in our state guidelines."

25. The AOC recommends that each county or district centralize the processing of interpreter invoices with a particular employee or a particular office. This will allow the court to ensure that (1) no changes are made to the form after the court signs it and (2) interpreter compensation is generally uniform in the county or district.

26. See G.S. § 7A-455 (1999).

27. G.S. § 8C-1, Rule 604 (1999).

28. 5G.S. § 8C-1, Rule 706(a) (1999).

29. G.S. § 8C-1, Rule 706(b) (1999).

30. Id.

An Interview with Judge Anthony M. Brannon

By Thomas P. Davis and Thomas L. Fowler

In the fall of 2001, Tom Fowler and Tom Davis talked with Emergency Superior Court Judge Tony Brannon at his home in Durham. The discussion was spirited and wide-ranging. The following are excerpts from this conversation.

Fowler/Davis: Judge Brannon, you served as Durham's District Attorney from 1971 to 1977, as a Superior Court Judge from 1977 to 1995, and in the early '90s you ran for a seat on the Court of Appeals. Will you tell us about your motivation in deciding to seek that office?

Judge Brannon: When I was district attorney, I'd get up every Monday morning and jump out of bed and run down to the courthouse to leap upon the barricades and swing the sword. But after a period of years, I got to thinking, well, I'd experienced most of what there was to the job. I had tried every kind of case there is, I had reached about the limits of what I was going to learn. So I thought I'd try something new. I became a judge, and there were new horizons, and new experiences, and new challenges. After I'd been judge for umpteen years, I thought to myself, well, I've been reading all these appellate decisions all these years-and privately praising some and not praising others-and so I thought, well, I can do that, too. So I embarked upon that campaign.

Fowler/Davis: You do seem to have a scholarly bent. You have written several law review articles and you regularly make presentations at CLE's and judges conferences. Do you see any problems with a judge laying out his or her legal opinions outside the context of a specific case? Is it inappropriate for a sitting trial judge to write an article criticizing an appellate opinion?

Judge Brannon: I have never even remotely thought it was. Appellate courts are right because they are final-they are not final because they are right. In the law review articles I have written, I think I have been pretty careful not to say anything that would shock the conscience. I think it's appropriate to point out that a line of decisions may have been a little beyond what the legislature intended when they wrote the statute. To me, that's properly respectful and good for the development of the law.

Fowler/Davis: Were you ever worried that a lawyer appearing before you would hand up one of your law review articles and say, "Hey, Judge, look at this authority! You'd better follow it!"

Judge Brannon: I have actually had that happen. And being Irish, I was tickled! I wrote a law review article in which I espoused the use of Rule of Evidence 806 to impeach the declarant of hearsay that had been properly admitted. My lament was the common practice, in criminal cases once hearsay was admitted, for the opponent to just sit back in the chair and concede defeat. I frequently thought to myself, "I wonder if this lawyer has bothered to think of available impeachment-such as whether the hearsay declarant is hiding out, has a criminal record that could be introduced in evidence, or has given a slew of inconsistent statements about it, all of which could be admissible for purposes of impeaching the hearsay." But I rarely saw lawyers do this. So I wrote this law review article to increase the awareness of this approach. I secretly applauded when this lawyer told me in open court that his use of Rule 806 to impeach the hearsay declarant was based on the law review article I wrote.

Fowler/Davis: You have also suggested that our appellate courts have taken a different approach to evidence questions than that taken by the federal courts.

Judge Brannon: Yes. The federal appellate courts basically treat evidence questions on appeal,

as discretionary rulings by the trial judge, and hence, they only reverse for what they call an abuse of that discretion. We all know that appellate courts are generally loathe to find an abuse of discretion-but it's my observation that the North Carolina appellate courts may jump in a little quicker in their willingness to evaluate evidence questions. If they want to reverse the trial court's evidentiary ruling, they label it as question of law, not a discretionary ruling. And they simply say, "Well the judge is wrong in the application of law." So I have suggested that the value of a trial judge's discretionary authority over evidentiary questions is, at the state level, more honored in the breach than in the observance.

Fowler/Davis: Do you have an opinion on the value of electing rather than appointing judges?

Judge Brannon: I'm in favor of elections for appellate judges, and while I'm also in favor of electing trial judges, if you're going to change either to an appointed system, it should be the trial judges. The reason is, we wouldn't dream of making the legislature an appointed body, because they make the laws. Well, I defy you to pick up an appellate advance sheet in which you will not find several opinions which state at the beginning, that this is a case of first impression in North Carolina. Appellate judges also make law. Sometimes more than the legislature. If they are going to make laws, then under our democratic system, it seems to me they ought to be elected, and not appointed. I realize that is not a popular view-particularly with appellate judges.

Fowler/Davis: Is there argument for the appointment of trial judges?

Judge Brannon: They don't make law.

Fowler/Davis: No, I mean even acknowledging that appointment of trial judges may be less objectionable than appointment of appellate judges, is there a positive argument for appointing rather than electing trial judges?

Judge Brannon: Oh, there is a logical argument. Namely, the general public neither knows nor cares anything about the folks running for trial benches. They are often elected on party tickets. I have heard of elections in which there were good district court judges who'd served for years, and were highly regarded. Yet they were swept out of office in an election by the candidate of the other party who may have just started his or her legal practice or who were picked simply because they needed a name to put on the ballot-all because it was a big year for that particular political party. Clearly that's a concern.

Fowler/Davis: What are your feelings about the system of rotation of superior court judges, which has long been in place in North Carolina, but is generally not followed in the rest of the states?

Judge Brannon: I am a true believer in the rotation system. I think the phraseology in the State Constitution is exactly correct. The language refers to it as salutary, as I recall. The best reason for it, although not often articulated, is to avoid "home cooking." Local judges, locally elected, can become beholden to local, politically powerful lawyers. I have had lawyers tell me that they wished they had rotation for the district court. The example they used was a district court judge who had been made a district court judge by a powerful law firm, and the perception-perhaps the reality-that his or her rulings went down the line for that law firm. This could become a crucial issue in certain cases in which the powerful law firm was involved, for instance big equitable distribution cases-because such cases are, to some extent, discretionary as to outcome. ED cases can involve huge amounts of money. Frequently. You might say such cases involve the most powerful decision-making amongst any trial judge in North Carolina.

Fowler/Davis: So you might even consider expansion of rotation-even with the cost and

inefficiencies of judicial travel, etc.?

Judge Brannon: Well, there is a price to be paid. I remember vividly getting up in Durham and driving to Lumberton every Monday for six months. And staying there the entire week. Some of your trial judges have paid a real price for rotation. But I think it is worth it. A judge from another district or division is unlikely to live in fear of what a locally powerful lawyer can do to his re-election bid. I'd see that in some of the counties where I'd be assigned to hold court. That locally powerful attorney would come before me with his case. And I would nod and smile at him-because no matter what, he knew and I knew, that he couldn't begin to affect me politically in Durham. There was no way. Now he may not have been prone to…or have been tempted to…or anything else. But local judges may have lived in fear of what he could do, if he ever threatened. I didn't have that concern, all because of rotation.

Fowler/Davis: Are the differences between the various individual judges who are assigned to a given session of superior court of significance or are the judges essentially fungible?

Judge Brannon: It is always interesting. When I was district attorney, a given judge might come in for six months, and he and I could not agree upon the time of day if the good Lord held a watch. But for six months, I could put up with any of them. Work around them, whatever. But if I had them all the time, … [unintelligible]. Of course, they had to put up with me for six months too. As district attorney, I had local lawyers come to me every once in awhile to say, "Judge X is coming in this district for the next six months. I would appreciate it, as a personal favor, if you wouldn't put any of my serious cases on the calendar while he is here. I'll try 'em before, I'll try 'em after, another judge comes in for a week, I'll try anything, it's just that I don't think he gives my clients a fair trial, or I think he's laying for me personally." I tended to respect that.

Fowler/Davis: During your service as a district attorney and Superior Court Judge, you have had to apply some contrasting sentencing philosophies, including Fair Sentencing and Structured Sentencing. It seems as if it's gone from placing a tremendous amount of discretion in the sentencing judge, to narrowing it under Fair Sentencing, to narrowing it still further under Structured Sentencing, which some argue is just looking up the sentence in a table. Is this development a good thing or bad thing?

Judge Brannon: I have seen sentencing philosophy and statutes change drastically over the years, and, sentencing, to some extent, has become like fashions. Hemlines go up and down and new sentencing philosophies come and go. However, I have always worked on the basis that whatever the legislature says the law is, them's the rules, and I will play by whatever rules they make. There is still a great deal of discretion in the system, but it's the district attorney that exercises it.

Fowler/Davis: How does that work?

Judge Brannon: There was a time when plea-bargaining was not recognized on the record. Everybody kind of fibbed about it. But then it shifted and became constitutionally recognized, and all the conditions were put on the public record, which I think is exactly right. But the district attorney's recommendation of the plea bargain was then not legally binding. So in fact, if the district attorney recommended the defendant get say, a ten-year sentence for some kind of robbery or something, the judge could give him 20 if the statute so allowed. Then the statute was rewritten-by the Fair Sentencing law, so that the district attorney's recommendation wasn't binding but if the judge didn't follow it, the defendant was allowed to withdraw his plea. So, that's basically the way it is today. But there's a difference between charge bargaining and sentencing bargaining. The defendant can be charged with first-degree murder, and the district attorney can say, "Judge, we're gonna accept a plea to involuntary manslaughter." As judge, I have no

discretion. I have got to accept that, no matter how outrageous I think it may be. That's charge bargaining. That's totally in the discretion, the unreviewable discretion, of the district attorney. Sentence bargaining means that I either accept the sentence or the defendant withdraws his plea. So I do have discretion not to accept that. And I have occasionally. But the presiding judge usually has rotated in from another district, he or she probably doesn't live there, doesn't know the case, doesn't know all the facts, and doesn't know things that the district attorney does-like how good the state's case is. The district attorney may agree to reduce the charges for all sorts of reasons that are not within the judge's purview. And so when you, as the judge, go somewhere to hold court, you have to work on the assumption that the district attorney knows and cares what he or she is doing-and usually these assumptions are valid. And then, you just have to kind of cross your fingers and rely on good faith and basically accept what the district attorney recommends. Every once in awhile, you kind of swallow real hard.

Fowler/Davis: And the judge's role under Structured Sentencing-is it cookbook sentencing?

Judge Brannon: Oh yes, there's no question. All week now [while presiding in criminal court], I've been sitting with charts, and that's mostly what I do…run my finger across the grid, line it up and down, and read off the numbers.

Fowler/Davis: Does that make your job easier, I mean, do you prefer it that way-because there's less agonizing over what's the right sentence?

Judge Brannon: I'm not so sure. The district attorney looks at the defendant and says, "I've got you cold. I think I've got more evidence than the law allows. And so, the best I'll do for you is I'll agree to recommend the consolidation of this armed robbery with conspiracy (because there are two defendants). That's the best you're gonna get. Either that, or we're gonna put 12 in the box and try the case." And it kind of forces the defendant's lawyer to say, "You're gonna get convicted of both counts by a jury, and Lord knows what'll happen to you. So you're stuck. I recommend you take it." With those facts, all I can do is go by the grid. I might be able to find mitigation in a given case where I might not find it in another one-so that gives me some discretion. But basically I am locked in. I guess I look at it this way. That is our present system. This is democracy. That's what the legislature has chosen to do and I'm in no position to change it, so I sometimes just shrug my shoulders. Now there are federal judges who have resigned their lifetime appointments because of their objections to the strict federal sentencing guidelines that can require them to give long sentences to undeserving defendants who might be a small fish under state law-but they have gone federal, as the phrase goes. So some federal judges have resigned rather than impose those sentences. Not many though.

Fowler/Davis: Since retiring from the bench you have become a mediator for Superior Court civil actions. As a judge, you were basically in control of the proceedings. You told people what they got to do and what they didn't get to do. You made binding decisions. But in mediation, the mediator is in a very different role. The mediator is not the decision maker but rather the facilitator. Has this transition been a difficult one?

Judge Brannon: No. I have heard that there is at least one retired Superior Court Judge in North Carolina who has a very successful mediation practice but who basically runs his mediations as arbitrations. The rules for mediators in North Carolina say that ethically a mediator can only facilitate and cannot evaluate-those are the two competing concepts. But the national literature finds these to be artificial distinctions, that one leads to the other, and there is no such rigid, watertight division between the two. I've had lawyers call me up on the phone, and hire me for mediation, and talk about the mediation process. And then they'll say, "Now do you know why we want you to be the mediator of this case?" I'll say, "No, why?" And they'll say, "Our client got many letters from lawyers wanting to represent him in this case. So when he came to us, we had to be positive with him. We had to stress how good a case he had. Well, now that we're getting

down to trial or disposition of it, we find it difficult to shift gears and now tell him seriously about the problems in his case, such as the fact that the highway patrolman said that while he didn't charge him with being under the influence, he'd had the odor of alcohol about him, and there was a six-pack of empty cans in the back…little things like that." And, of course, this is a state that recognizes contributory negligence as a complete bar. And what's more, by that time the plaintiff may have visions of great riches floating in his mind. He wants $100,000 for a twisted ankle. These lawyers say, "Look, we can't really tell him about the problems and he'll leave us if we can't shift gears. We want you to tell him that he doesn't want to take the chance of losing everything by holding out for the big bucks." And I have to laugh. But, of course, I still do my best for both sides.

Fowler/Davis: But don't the parties to a mediation really want to hear your evaluation of their case, or their chances if it goes to a jury? Isn't that one of the reasons they chose you-because of your experience with civil verdicts by North Carolina juries?

Judge Brannon: When I started to do mediation, I had lawyers who'd seen me in court, and they'd say, "Tony, don't see how you're gonna do it, because judges tell folks what to do and the mediator doesn't," as you phrased it. But I have never found this to be a problem, and there's a reason why. In the first place, I tended to probably have a little different attitude towards criminal cases than civil cases. Criminal cases I probably had a little more concern about the general public and this, that, and the other. But in civil cases, I just sit back and whatever happens, happens. If you want a jury trial, fine, just don't complain to me afterwards about the results. Very few state judges set anything aside, no matter what the jury does. That's just the tradition. So, in civil cases, I just let the good times roll. When it's over, I might shake my head and say, "Good Lord, how could that crowd do that," referring to the 12 jurors. But I didn't get upset about it, I just go on home. So in mediation, I have never ever even had an inclination to tell somebody, this is the best you're going to get, and you're going to take it. I see nothing wrong with telling someone, "Look, the insurance company lawyer just said that this $10,000 offer was a 'drop dead offer.' You either take it, or you're going to trial. Those are the choices at this point. So it's a question of what you want to do." I never tell them they ought to take it. I have sometimes smiled and if a jury gives you what it is you are asking for, it would really be quite a verdict. But juries in North Carolina tend to be very conservative. They're not giving away money. Contrary to popular opinion.

Fowler/Davis: Do you think mediations work?

Judge Brannon: I do. When I first started practicing law, in Durham in 1964, I would talk to all the lawyers and I'd ask them things like what percentage of jury verdicts do you think are predictable? And what percent do you think are just off the wall? And their estimates were, somewhere between five percent and ten percent unpredictable. And you do want predictability. It's supposedly one of the things the law is all about. But today, most judges and lawyers will tell you that anywhere from one-third to one-half are unpredictable. Now, at that point, it's like playing roulette. With lots of money. Whichever way it goes, you could get hurt very badly. And so that's the reason a lot of people are pushing mediation, and indeed arbitration, because you may still lose, but you don't have runaway juries. In mediation, the plaintiff may not score a home run, but he may well get full and adequate compensation. I have seen cases in mediation where I'm satisfied that while the insurance company offer wasn't, shall we say, generous, it wasn't unreasonable either. And the plaintiff would turn it down, they'd want some huge amount of money that I have never seen a jury return a verdict for. And so I think to myself, as we have an impasse, that these folks are rolling the dice, whether they know it or not.

Fowler/Davis: Can't the judge presiding over the civil action explore settlement possibilities with the parties?

Judge Brannon: As a judge, I attempted to settle the civil cases. In civil cases, I'd get them

together Monday morning and ask a number of questions. I'd say, "Folks, where's the pretrial order?" "Well, we ain't got it ready yet." "Well, what are the issues of this case?" "Well, we're not exactly sure." And so on and so forth. You laugh, but it's not that unusual. And then I'd say, "Folks, have you talked about this case?" Sometimes they'd say no. I'd say, "Is there any chance of settling this case? Because I really don't want to spend an entire week trying this case (which means I don't try anything else), only to have you settle the matter on Friday morning. Don't just play four corners and bluff each other and then settle for what's already on the table." I'd ask them sometimes, "What is the disagreement between you?" I had one case which I'll never forget, ever. It's burned in my mind. I was presiding over a wrongful death case in which a man had been run over by a tractor-trailer in an intersection…terrible wreck…and I was told Monday morning by a defense counsel, "Judge, we have conveyed to them our offer of $325,000. They turned it down, so we're going to try the case." Plaintiff's counsel, a very successful plaintiff's lawyer, told me, "Well, we're going to get a huge verdict. We're all going to get rich, etc." So he started to try the case and I started getting chills. I got chills because the plaintiff's evidence was very weak on negligence. And the evidence appeared to be overwhelming on contributory negligence. I was looking at the plaintiff's table, and I was looking at $325,000 sitting on the table, and I was looking at a widow woman and a couple of small children thinking to myself, that amount of money, properly invested, would give them some steady money every year to support them forevermore. During the trial, I would look at plaintiff's counsel and think, "Baby doll, you ought to take that money and run! This isn't going the way you think it's going! You're gonna get burned." But the case wasn't settled, and I instructed the jury with a sickened heart. The conscientious jury went out and they came back in a couple of hours with a question. "What was that stuff you were telling us about proximate cause and contributory negligence?" I thought, "School's out, baby, It's almost over now." I reinstructed them and they went out and deliberated about another 30 minutes. They came back in, they found negligence-which surprised me-and they found contributory negligence. I saw the $325,000 fly off the table and out the window. And I looked at that widow woman and those little children that were sitting there, and I felt worse than anybody in the courtroom. I was shaken. But everybody had been told what the options were, and everybody marched…it was like Pickett's charge, marching right up to the Union cannon.

Fowler/Davis: If judges regularly asked the parties about the status of settlement negotiations in civil cases, would we need the whole mediation process?

Judge Brannon: I think so. The in-chambers discussion about settlement generally does not go into painstaking details and facts. Additionally, you'd be surprised how few lawyers ever sat down and talked about the case amongst themselves prior to the pre-trial conference. Their contact with each other is within the context of a deposition here, a contested motion in court there, and is not really conducive to friendly discussions. And most lawyers, believe it or not, in our legal culture, treat talk of settlement as a matter of weakness-that is, if you are the first to raise the question of settlement possibilities then the other side's going to think that I got you, I got you, I got you. So frequently lawyers talk on the courthouse steps for the very first time about a settlement. But with mediation, there is a point sometime between the filing of the lawsuit and the trial of it, where the parties, under court auspices, must talk about settling their case, neither one of them had to be the first to initiate the discussion, and there's a neutral party to help facilitate, there's that word again, the discussion. So there is reason to think that it works. And it can save the uncertainty of a trial.

Fowler/Davis: Are there secondary benefits of mediation to the judicial system as a whole?

Judge Brannon: I think it makes the running of the civil court system more certain by making the trial calendar more accurate. For instance, I recall a civil session in Wake County before mediation was adopted. Usually a civil calendar would have 20 cases on it. There was one poor fella who had checked with the trial court administrator, and all the lawyers, and on Friday afternoon he had the 18 case set for trial. And of course, all the lawyers on the cases ahead of

him on the calendar said, "We're never going to settle our case, we're going to try it." So the lawyer with the 18 case walked in to court Monday morning and all the cases ahead of him had settled and he had the first case to be tried. He's sitting there sweating. His out-of-state client wasn't there as he hadn't notified him to come down, and he had no witnesses ready. Malpractice was in the air. So I'm sitting there, and a resident judge of Wake County was calling the calendar for our two civil courts. The Wake County judge simply said, "Well, we're getting ready to call this case in about five minutes. Your choices are to try it or take a voluntary dismissal. Them's the choices." I'm listening, thinking, "Wow, this is for real." Today, you wouldn't have that many uncertain cases because every one of these cases would have gone to mediation and either settled or gone to impasse. So therefore, today's trial calendar should be more representative of the cases that are truly expected to go to trial.

Fowler/Davis: Thanks very much for talking with us tonight, Judge Brannon.

Judge Brannon: It has been my pleasure.

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The View from the Fifth Floor of the Justice Building (On A Clear Day)

By Thomas P. Davis and Thomas L. Fowler

The North Carolina Supreme Court Library is open for public use weekdays from 8:30 a.m. to 5:00 p.m., except on state holidays. The Library is located on the fifth floor of the Justice Building, 2 East Morgan Street, Raleigh, North Carolina. The information below was compiled by NC Supreme Court Librarian, Thomas P. Davis, with the help of Thomas L. Fowler.

I. Recently Published Articles of Interest to North Carolina Attorneys 1

Jessica Smith, Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR, ADMIN. OF JUSTICE (Oct. 2001, No. 2001/04) [IOG Bulletin; Robert Farb, ed.]

This bulletin sets out the law governing whether a motion for appropriate relief can be resolved on the filed papers or whether a hearing is required. Also discussed is the related issue of the showing the movant must make to succeed on such a motion.

Balancing Administrative Law in North Carolina: A Collection, 79 N.C. L. REV. 1569 (2001)

Includes essays by Charles E. Daye, Judge Julian Mann III, and an article by Senator Brad Miller entitled What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA.

Marie C. Moseley, North Carolina's Patients' Bill of Rights-Potential Impact on Health Care Litigation, 18 PROGNOSIS 1 (Dec. 2001) [4 pages]

Effective March 1, 2002, this law "creates rights under four separate sections encompassing: (1) patient access to medical advice and care, (2) health plan disclosures, (3) mandated benefits, and (4) external review and managed care entity liability.

Greg Willis, Conflicting Cases From the Court of Appeals: Addressing the Issue of Termination of Compensation Upon Reaching Maximum Medical Improvement, 15 COURSE & SCOPE 1 (November 2001) [NCBA Newletter] [2 pages]

Can temporary total disability continue after reaching maximum medical improvement? The author argues that Russos v. Wheaton Industries and Anderson v. Gulistan Carptet, Inc., both decided 17 July 2001 by the NC Court of Appeals, reach different conclusions.

Carlyn Poole, The Evolution of Equitable Distribution in N.C., 22 FAMILY FORUM 1 (Oct. 2001) [3 pages]

A short look at equitable distribution in North Carolina on the 20th anniversary of the statute.

Tom Davis, Legislative History in North Carolina: Three Dozen Cases of the Twentieth Century, 6 NC STATE BAR J. 20 (Fall 2001)

Tom Fowler, Sanctions For Failure to Participate in Good Faith in Court-Ordered Arbitration, 14 NC LAWYER'S WEEKLY 28 (Aug. 20, 2001)

Indigent Representation in North Carolina: An Interview with Tye Hunter, TRIAL BRIEFS 5 (Sept.

2001)

Pat DeVine, An Interview with [Chief] Judge Naomi Elizabeth Morris (1921-1986), 5 JURIDICUS 1 (Oct. 2001) (reproduced from the Southern Historical Collection, University of North Carolina)

Robinson O. Everett, Redistricting in North Carolina--A Personal Perspective, 79 N.C. L. REV. 1301 (2001)

Gene R. Nichol Jr., The Practice of Redistricting, 72 U. COLO. L. REV. 1029 (2001)

Discusses Dean Nichol's experiences as vice-chairman of the Colorado Reapportionment Commission and as special master in Colorado's federal redistricting case.

Lisa Stansky, Feeling the Knife: Budget Cuts Are Affecting Many State Courts, NAT'L LAW J., Dec. 10, 2001, v.24, no.15, A1, C3

Mentions the budget problems state courts are facing in New Hampshire, Florida, Washington, California, North Carolina, and others. "The picture may be most grim in New Hampshire. Court officials there say they will suspend civil and criminal jury trials in December and in April, July, August, and December 2002 . . ."

Michael DeBow, The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage, 31 SETON HALL L. REV. 563 (2001)

Jon A. Strongman, Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional, 50 U. KAN. L. REV. 195 (2001)

This is an interesting comment which argues that denying precedential value to unpublished opinions is a violation of the Fifth Amendment. The student argues that, contrary to Anastasoff, the notion of precedent is not bound up in Article III of the federal Constitution, but rather is anchored in the guarantees of equal protection and procedural due process.

Beverly Blair Cook, Fuzzy Logic and Judicial Decision Making, 85 JUDICATURE 70 (2001)

"Fuzzy logic can help judges do their work more intelligently." "The new theory of fuzzy logic addresses the inadequacies of language and paradoxically introduces the possibility of improving opinion writing and legal scholarship."

II. Jurisprudence Beyond Our Borders 2

United States v. Plaza, __ F.Supp.2d __ (2002 WL 27305)(United States District Court, E.D. Pennsylvania, Jan. 7, 2002): Defendants, charged with drug conspiracy offenses and murders, moved to preclude latent fingerprint identification evidence. The District Court held that although the court would take judicial notice of uniqueness of fingerprints and of the permanence of fingerprints, fingerprint identification technique did not satisfy Daubert requirements for admissibility of an expert witness's opinion that a particular latent print was that of a particular person. Nevertheless the expert would be allowed to identify and place before jury latent and rolled fingerprints, and to point out observed similarities and differences between them. The court noted that under Daubert a judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. That is, trial judges are called on to play a "gatekeeping role" with respect to scientific testimony. In applying Rule 702 to the admission of scientific testimony, for evidence to be considered "reliable," the proposed expert's opinion must actually

be based on what Rule 702 terms "scientific knowledge." The primary question was whether fingerprint identifications are scientifically reliable and thus admissible under Federal Rule of Evidence 702, as construed by the Supreme Court in Daubert and Kumho Tire. This judge held that they were not, finding that the fingerprint identification techniques presented did not adequately satisfy the "scientific" criterion of testing (the first Daubert factor) or the "scientific" criterion of peer review (the second Daubert factor). Further, the court found that the information of record is unpersuasive, one way or another, as to the "scientific" rate of error (the first aspect of Daubert 's third factor), and that, at the critical evaluation stage, the technique does not operate under uniformly accepted "scientific" standards (the second aspect of Daubert 's third factor).

Public Citizen v. Bomer, 274 F.3d 212 (United States Court of Appeals, Fifth Circuit, 2001): Plaintiffs, nonprofit consumer advocacy organizations suing on behalf of their members who have appeared, are appearing, or will appear as parties in Texas state courts, alleged that the current system of financing judicial elections "creates the appearance, if not the reality, of partiality and impropriety of Texas state judges," to the detriment of the legal profession, and their members' interests". The injury pleaded in the complaint was a systemic appearance of impropriety-no actual impropriety or a specific instance of an appearance of impropriety was alleged. Instead, plaintiffs alleged that recent surveys conducted by the Texas Supreme Court showed that 83 percent of the Texas public, 79 percent of Texas lawyers, and 48 percent of Texas state judges believe that campaign contributions have a significant influence on judicial decisions. Only one percent of lawyers and 14 percent of judges believe that campaign contributions have no influence. Plaintiffs also noted that Texas state judges may solicit and accept campaign funds, although there are limits on the amounts individuals may contribute. Texas judges are, of course, subject to disqualification and recusal rules: "No judge shall sit in any case wherein he may be interested." The Court of Appeals did not reach the substantive issue, holding instead that the organizations did not allege injury in fact and thus lacked standing to challenge constitutionality of Texas system on ground that allowing large financial contributions to and personal solicitation by judges created appearance of impropriety.

Black v. Commonwealth of Virginia, 553 S.E.2d 738 (Supreme Court of Virginia, 2001): Defendant was charged with violating a Virginia statute which prohibited the burning of a cross with the intent of intimidating any person or group of persons. The facts involved a Ku Klux Klan rally held on private property with the permission of the owner, where a cross was burned as a part of the ceremony. The Virginia Supreme Court held that, despite the laudable intentions of the General Assembly to combat bigotry and racism, the statute was facially unconstitutional under the First Amendment because it prohibited otherwise permitted speech solely on the basis of its content and not on the secondary effects of the speech. The court stated: "However pernicious the expression may be, '[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'"

Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (Supreme Judicial Court of Massachusetts, 2002): Wife who was artificially impregnated by sperm of dead husband and gave birth to twin daughters applied for mother's and children's social security survivor benefits. The Social Security Administration denied such benefits, and wife appealed. The US District Court certified to the Supreme Court of Massachusetts the question of whether children enjoyed the inheritance rights of natural children under Massachusetts law of intestate succession. The Supreme Judicial Court held that children could inherit if wife established their genetic relationship with the decedent, and that the decedent consented both to reproduce posthumously and support any resulting child. The court explained its holding, in part, as follows: "The question whether posthumously conceived genetic children may enjoy inheritance rights under the intestacy statute implicates three powerful state interests: the best interests of children, the state's interest in the orderly administration of estates, and the reproductive rights of the genetic

parent. Our task is to balance and harmonize these interests to effect the Legislature's over-all purposes. First and foremost we consider the overriding legislative concern to promote the best interests of children. 'The protection of minor children, most especially those who may be stigmatized by their 'illegitimate' status...has been a hallmark of legislative action and of the jurisprudence of this court.'... Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be 'entitled to the same rights and protections of the law' regardless of the accidents of their birth.'"

Endnotes

1. A more comprehensive list of recent articles of interest is also accessible on the world wide web from the homepage of the North Carolina Supreme Court Library, at http://www.aoc.state.nc.us/www/copyright/library/libpers.htm

2. These are recent cases from other jurisdictions that address issues of possible interest to North Carolina attorneys.