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There is folk wisdom among some lawyers and judges in our state that the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ the case governing the admissibility of scientific evidence in the federal courts, are inapplicable in North Carolina. Some trial court judges with whom I have spoken are relieved not to be required to have the gatekeeping hearings with regard to scientific and technical evidence that have become endemic in the federal system. But, fortunately or unfortunately, the folklore is wrong.

Although gatekeeping hearings are unlikely to become the regular events in North Carolina that they are in the federal courts, the *Daubert* case, or something very much like it, is surely the controlling law in this state. The North Carolina Supreme Court, in *State v. Bullard*,² anticipated the *Daubert* holding by nine years in adopting an approach based upon principles remarkably similar to those expressed by the United States Supreme Court in *Daubert*. Since the United States Supreme Court holding, both the North Carolina Supreme Court and the Court of Appeals have acknowledged *Daubert* and applied it in numerous opinions. The essence of the rule in this state—that admissibility of scientific or technical evidence depends upon the establishment of the reliability of that evidence—is identical. Whether the test will be applied in the same fashion as in the federal system in either our trial or appellate courts is another matter.

The Law in the Federal Courts

Before turning to the North Carolina law and its beginnings in the very strange case of *State v. Bullard*, it is useful to describe the law in the federal courts, starting with *Daubert* itself. The Court in *Daubert* considered whether the trial court had erred in rejecting expert testimony concluding that the drug Bendectin can cause birth defects. Plaintiffs had offered expert

testimony supporting causation that was based in substantial part upon “reanalysis” of existing data. The Court of Appeals for the Ninth Circuit upheld the rejection of the testimony relying upon the then controlling case of *Frye v. United States*,³ which required that scientific evidence must have gained “general acceptance in the particular field in which it belongs” in order to be admissible. The “reanalysis” used by the experts had not achieved the required level of acceptance.

The Supreme Court rejected the *Frye* test as the sole basis for determining the admissibility of scientific evidence. The holding was based on the Court’s determination that the Federal Rules of Evidence—adopted in substantial measure in North Carolina—require a different approach. The Court found no reference to the *Frye* principles anywhere in the Federal Rules. The two controlling rules are Rule 702, dealing with expert testimony, and Rule 403, dealing with the exclusion of relevant evidence based upon, among other things, unfair prejudice. Rule 702 provided simply that if “scientific . . . knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue” an expert “may testify thereto.” The Court reasoned that scientific knowledge would only assist the trier of fact if it was scientifically reliable. Furthermore, evidence that was not scientifically reliable as applied to the facts of the case at bar would be unfairly prejudicial under Rule 403.

Perhaps the most significant aspect of *Daubert* is the onus that it puts on the trial court judge to engage in a gatekeeping function to determine whether the offered evidence is reliable. The Court suggested a nonexclusive test as a guide for determining the validity of scientific evidence, including: (1) whether the technique or theory can be or has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the degree to which the theory or technique has been generally accepted in the scientific community.⁴ Thus, the *Frye* test is still with us in a sense, but only as part of the general determination of scientific reliability.

Initially, one might look at the *Daubert* opinion and view it as a liberalization of an ultra-conservative *Frye* doctrine. After all, *Frye* most certainly would have excluded even evidence of Galileo’s astronomical theories at the time his opinions were first expressed. In fact, *Daubert* has proven to be tougher than *Frye*. As a practical matter, *Frye* was so strict that it was often ignored⁵ unless the evidence was of a general category, such as polygraph results, that seemed to invade time honored judicial functions such as assessing credibility.⁶ On the other hand, *Daubert* and its progeny have invited scrutiny of all expert testimony, even evidence such as fingerprint⁷ and handwriting analysis⁸ that was received by the courts long before the age of technology. The *Daubert* case seemed to require trial judges to assess or reassess all scientific evidence and consequentially invited lawyers to attack expert testimony on a regular and systematic basis. Federal district judges have taken their gatekeeping role seriously indeed. A “*Daubert* hearing” on the reliability of scientific testimony is now a frequently encountered part of the federal court landscape. The federal reporters are replete with dozens, and soon to be hundreds, of cases reviewing those trial court decisions.⁹

The *Daubert* principles were given even greater breadth by two subsequent United States Supreme Court cases. In *Kumho Tire Co. v. Carmichael*,¹⁰ the court extended the *Daubert* principles beyond novel scientific evidence, which was the subject matter of *Frye*, to reach all categories of evidence under Federal Rule of Evidence 702—evidence based on scientific, technical, and specialized knowledge. The *Kumho Tire* case involved evidence from an engineer with regard to the nature of a defect in a tire—technical but hardly scientific evidence. The Court held that the trial judge had properly excluded the evidence as not meeting the *Daubert* reliability standard.

The other important Supreme Court case is *General Electric Co. v. Joiner*,¹¹ where the court

made two significant points. First, a trial judge's decision to admit or to exclude expert testimony under Daubert was to be reviewed under an "abuse of discretion" standard. Thus, a district court judge's gatekeeping decision was not only to be a common occurrence, it was likely to be decisive as well. Secondly, the Joiner case negated language in Daubert that the reliability test focused on "principles and methodology," not on conclusions. The court held that the trial judge had correctly concluded that there was "too great an analytical gap between the data and the opinion proffered" and that the expert's conclusion was properly held not to meet the reliability test.¹²

In 2000, Federal Rule 702 was amended in an attempt to codify Daubert, Kumho Tire, and Joiner. A witness qualified as an expert may testify only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliability to the facts of the case." The intention of the drafters of the rule as reflected in the Advisory Committee Note¹³ was to stay within the parameters of the Supreme Court cases. The non-exclusive factors set forth in Daubert are referred to in the note as are other factors used in cases decided after Daubert. For example, the note refers to the Ninth Circuit decision on remand of Daubert where the court again rejected the expert testimony, in part because the experts were testifying based upon opinions developed expressly for the purposes of that litigation.¹⁴ Another factor mentioned in the note is whether the expert has adequately accounted for obvious alternative explanations.¹⁵

As a member of the Advisory Committee on the Federal Rules of Evidence at the time of the adoption of the amendment to Rule 702 and one of the drafters of that amendment, I can testify that a primary rationale for putting forth the amendment was a concern that Congress would get into the act and attempt to codify Daubert in an unacceptable manner before the courts had had an adequate opportunity to work through the various issues involved. There was no intention to go beyond what the Supreme Court had said in its opinion. One can argue that the state of the law involving reliability of scientific, technical, or other evidence requiring specialized knowledge is the same as it would have been had no amendment to Rule 702 occurred. Furthermore, the Advisory Committee note reflects its view that Daubert did not work a "seachange over federal evidence law."¹⁶ Despite the proliferation of Daubert hearings, most expert testimony is expected to be admissible. Most questions of reliability will be left to cross-examination. Whether the committee was right in its assessment of the impact of both the Daubert case and its own amendments to Rule 702 will have to be seen. The impact of both may well be greater than anticipated.

North Carolina Law

The same sorts of things said concerning the impact of Daubert can be said about the state of the law involving scientific or technical evidence in North Carolina. North Carolina Rule of Evidence 702, based upon original Federal Rule of Evidence 702, has not been amended to reflect the changes in the Federal Rule. But North Carolina has adopted the principles very much like those in Daubert and the absence of a rule amendment should make no more difference here than it would have in the federal courts in the absence of the amendment.

In 1984, the North Carolina Supreme Court, decided *State v. Bullard*,¹⁷ authored by Justice Henry Frye. In that case, the Court determined that the trial court judge had appropriately admitted the expert testimony of Dr. Louise Robbins that a bloody footprint found in an incriminating location was made by the defendant. The evidence was admitted despite the fact that expert testimony clearly did not meet even a liberal interpretation of the Frye test.

Dr. Robbins' credentials were impressive. She had a Ph. D. in anthropology and was a professor in the Physical Anthropology Department at UNC-Greensboro. She had begun the study of

footprints at prehistoric digs and testified that she had studied “thousands” of prints. She had written articles about her work in the forensic science journals. She also testified that she was the only person in the world now doing footprint comparisons based upon shape and similar considerations.¹⁸ Dr. Robbins based her conclusions on photographs of prints found at the crime scene, enhanced to illuminate the bloody areas, and ink and latex print impressions of defendant’s feet.

The Court, citing an early edition of the Brandis text, stated that the emphasis in North Carolina was on “the reliability of the scientific method and not its popularity within a scientific community” [emphasis added].¹⁹ The Court found Robbins’ technique to be reliable based upon three factors: (1) she used scientifically established measurement techniques relied upon in the “established field of physical anthropology;” (2) her professional background and involvement as an expert; and (3) her use of photographs, models, slides, and overlays that were before the court and verifiable by the jury.²⁰

The Court’s analysis, although not based on the Federal Rules, which were not in effect at the time of the Bullard trial, was remarkably similar to that adopted by the United States Supreme Court nine years later. The common thread of the two opinions is their emphasis on scientific reliability as opposed to general scientific acceptance or some other criterion. Furthermore, like the Court in Daubert, the North Carolina Supreme Court assumed that the trial judge was the appropriate person to make an initial determination of reliability—the gatekeeping function that is the essence of Daubert.

The common sense, flexible approach that the Court took in Bullard was welcomed by at least this evidence teacher.²¹ North Carolina was clearly and finally freed from the narrow confines of Frye and could take a modern approach to the admissibility of expert testimony. Reliable scientific evidence would no longer be rejected if offered for either side of either a criminal or civil case.

There was one problem. Dr. Robbins was almost certainly a fraud. Her theories had in fact been seriously questioned at the time she gave her testimony in Bullard. Other experts testified in that case and others in which she had given evidence questioning her findings.²² But the criticisms of Dr. Robbins’ work went far beyond those generated in the ordinary case involving a battle of experts. In 1993, in an article in the American Bar Association Journal, Mark Hansen refers to her work as “thoroughly debunked by the rest of the scientific community.”²³ One student of expert testimony referred to her work as “hogwash” and as barely rising to the “dignity of nonsense.” An FBI expert in footprints referred to her theories as “totally unfounded.” He added, “nobody else ever dreamed of saying the kind of things she said.” Many of her colleagues in the field of anthropology echoed these remarks, noting that at an archeological dig in Tanzania she had misidentified one set of human prints as belonging to an antelope and had made the totally unfounded claim that another print was made by a prehistoric woman who was 5½ months pregnant. Her conclusions were dismissed as all “in her mind.”

Thus, the modern, forward looking opinion in *State v. Bullard*—anticipating a seminal decision of the United States Supreme Court—was almost certainly wrong on its facts. Nevertheless, the North Carolina courts have moved beyond that minor detail to entrench Bullard and the federal precedent that followed as the law of the state. To be fair, perhaps a different result would now be reached with the embellishments on the law that can be gleaned from Daubert. For example, the Hansen article notes that Dr. Robbins’ work had never been subject to “peer review” nor had there been any blind test of her abilities.²⁴ Such factors would have been significant to the United States Supreme Court in Daubert and presumably would now be taken into account in North Carolina.

Some further notion of how the issues in Bullard would now be treated can be gleaned from the

Court of Appeals 2001 decision in *State v. Berry*.²⁵ In *Berry*, the police found high top Spaulding athletic shoes near the victim's body. Robert Kennedy, who was employed by the Royal Canadian Mounted Police, testified as an expert in barefoot comparisons and stated that it was "likely" that the shoes found at the crime scene and the defendant's other shoes were regularly worn by the same person. However, Kennedy was nowhere near as self-assured as Dr. Robbins in his opinions. He admitted that his research was ongoing and that he could not testify with certainty until that research was complete. His work was going in a "positive direction," but was not yet finished. The Court of Appeals, based upon Kennedy's own testimony and citing both *Daubert* and *Bullard*, found that there was an insufficient showing of reliability for the evidence to have been admitted. However, in light of other evidence linking the defendant to the shoes, as well as DNA evidence linking him to the crime, the error was found to be harmless. The expert's own honesty concerning the reliability of his findings is the best explanation for the court's decision in *Berry*. Arguably, had the expert testified that his research was complete, subjected to peer review, and free of substantial error, the Court of Appeals would have approved its admission. However, the real significance of the case and others from both of North Carolina higher courts is that there needs to be an enquiry at trial with regard to the reliability of the basis for expert testimony and that the appellate courts will review that decision at least for abuse of discretion.

Other Supreme Court cases have followed *Bullard* in cementing the North Carolina approach to the reliability of scientific evidence. In *State v. Pennington*,²⁶—decided in 1990, still before *Daubert*—the Court approved the admission of DNA analysis. In reaching its decision, it relied upon *Bullard* and the citation from *Brandis* opining that general scientific acceptance is not the exclusive index of reliability. The Court used factors similar to those articulated in *Bullard* to assess the trial court's determination of reliability. The Court considered: (1) the expert's use of established techniques; (2) the expert's professional background in the field; (3) the expert's use of visual aids in his testimony; and (4) the independent research conducted by the expert. The court concluded that "DNA profile testing is generally admissible."²⁷ However, despite its approval of such testing in general—a clear invitation to the trial courts to take judicial notice of the general scientific reliability of DNA profiling—the Court stated that its ruling "should not be interpreted to mean that DNA test results should always be admitted into evidence." Expert testimony may be presented to impeach the particular procedures used in a specific test or the reliability of the results obtained. There may also be challenges such as the possibility of contamination of the sample and gaps in its chain of custody.²⁸

Thus, the general concept of DNA testing passes *Bullard* scrutiny, but the particular methodology must still be analyzed for reliability as must the applicability of those methods to the data involved in the case. The result in *Pennington* is entirely consistent with later decisions in *Daubert* and other federal cases. Subsequent decisions in North Carolina have consistently confirmed the admissibility of DNA testing.²⁹

The first significant North Carolina Supreme Court case on the question decided after *Daubert* was *State v. Goode*.³⁰ In *Goode*, the Court found that "bloodstain pattern interpretation" to be an appropriate area for expert testimony. The Court relied on *Bullard* and *Pennington* and said the following about *Daubert*:

As recognized by the United States Supreme Court in its most recent opinion addressing the admissibility of expert scientific testimony, [the admissibility of such testimony] requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* . . .³¹

The Court distinguished certain scientific evidence excluded in the past from the bloodstain pattern interpretation involved in *Goode*. Evidence enhanced by hypnosis was excluded in *State v. Peoples*,³² and evidence of the results of polygraph tests has consistently been rejected by the North Carolina courts.³³ Neither was shown to have the same reliability as the evidence admitted in *Goode*. From *Goode*, one can glean that the evidentiary doors will still be open to scientific advances that have demonstrated their reliability. Methodology rejected in the past seems just as

likely to be rejected in the future.

An example of a new technique rejected by the Supreme Court is “horizontal gaze nystagmus” or HGN—a field test for intoxication. In *State v. Helms*,³⁴ the court, relying on *Bullard*, found no indication that the trial court took judicial notice of the test’s reliability. The Court added that expert testimony is needed where “no scientific precedent exists.”

Several Court of Appeals decisions are also worthy of note. In *State v. Spencer*,³⁵ the Court affirmed the trial judge’s exclusion of testimony from a clinical psychologist specializing in sexual dysfunction. The psychologist’s testimony was based in substantial part upon the results of a “penile plethysmograph test” administered to the defendant. The test measures changes in the circumference of the penis in response to particular stimulus material. The expert was prepared to testify that, based upon interviews, standard psychological testing, and the plethysmograph test, there was no evidence of the defendant being aroused by prepubescent children. Further, she would testify that the test was 95% accurate in discriminating between persons who had committed sexual offenses against children and a control group. In contrast, the state’s expert stated that the test does not give evidence that is useful in determining whether an individual committed a specific act and had limited forensic value. The Court of Appeals held that the evidence did not establish the reliability of the test. It based its approval of the trial judge’s decision on evidence of the differences of opinion within the scientific community and cases from other jurisdictions.

Also of importance is *Davis v. City of Mebane*,³⁶ where the court clearly applied an abuse of discretion standard to review the trial judge’s exclusion of expert evidence with regard to the cause of flooding, where the experts whose testimony was excluded provided “no support” for their opinions.

The most recent and perhaps most significant Court of Appeals case is *Taylor v. Abernethy*.³⁷ In *Taylor*, the Court reaffirmed its adherence to the principles of both the *Daubert* and *Bullard* cases and set some reasonably clear parameters for their application. *Taylor* involved a contract to make a will. Plaintiff called a handwriting expert, Charles Perrotta, to testify to the validity of the deceased’s signature on the contract. The trial court found Perrotta to be an expert but refused to let him give an opinion to whether the signature was valid. The trial judge did not consider “the methodology underlying handwriting analysis in general to be sufficiently reliable for Perrotta to give his opinion because it was not ‘scientific.’”

In reversing the trial court’s decision, the Court stated:

While it is certainly true that the trial court must act as gatekeeper in determining the reliability of expert testimony being offered, there is simply no requirement that a party offering the testimony must produce evidence that the testimony is based in science or has been proven through scientific study.³⁸

The Court stated that both *Daubert* and *Kumho Tire* governed the issue and that the tests of reliability applied to all expert testimony including “technical or other specialized knowledge.” However, the pertinent question for the trial court is not whether the matters to which the expert will testify are scientifically proven, but simply whether the testimony is sufficiently reliable. In making that determination the court must assess whether the testimony will “assist” the trier of fact, within the meaning of Rule 702. In making that determination the court must determine whether it is sufficiently “valid” and can be properly applied to the facts in issue.

The Court’s language is significant in that it sends a message to trial court judges as to the extent

of inquiry with regard to scientific evidence:

[N]othing in Daubert or Goode requires that the trial court redetermine in every case the reliability of a particular field of specialized knowledge consistently accepted as reliable by our courts, absent some new evidence calling that reliability into question. . .39

Conclusion

The test for the admissibility of evidence requiring scientific, technical, or other specialized testimony, under both federal and North Carolina law, is the reliability of that evidence. The factors considered significant in Daubert and later federal cases and by the North Carolina courts in Bullard and later cases may differ, but reliability is the essence of the law in both jurisdictions. The matter is largely in the hands of the trial court judge, whose decision will be reviewed only for abuse of discretion.

The extent to which there will be extensive hearings on questions of reliability is likewise in the hands of the trial court judge. The appellate courts will require some extensive trial court analysis in the cases involving clearly novel techniques. Although there is no clear holding from the Supreme Court, the Court of Appeals decision in Taylor v. Abernethy strongly supports the conclusion that reliability will be an issue whether the evidence is scientific or merely technical. Other methods that have now gained general scientific acceptance, most notably DNA testing, will face less scrutiny, although challenges may be made to new techniques for such testing as well as to the mechanics of preservation of the sample and conduct of the testing procedures.

Testing reliability after Daubert is not confined to "novel" methods or techniques but, as illustrated by Taylor and the various cases approving DNA comparison testimony, the courts of this state will, in effect, take judicial notice of techniques previously approved in the courts. Lawyers may challenge historically approved methods, such as handwriting and fingerprint comparisons, but, if the Taylor case is any guide, such attacks face an uphill climb.⁴⁰ If challenges are to be successful, some new evidence calling the techniques into question must be produced. Methods excluded in the past, such as polygraph examinations, may have a chance for new acceptability under the Daubert-Bullard analysis, but thus far there has been little indication that the courts are open to a serious reassessment of former views.⁴¹

The approach of the courts to scientific or technical evidence is surely different after Daubert and after Bullard. How much difference that new approach will make to the trial of cases on a day-to-day basis will depend more on the inclinations of trial court judges than on academic analysis. North Carolina judges may be far less inclined to hear lengthy scientific debates than their federal counterparts. Unless the methodology involved is novel, there is little likelihood that the appellate courts will second guess the trial judge's decision, whether or not a hearing was held.

Kenneth S. Braun is the Henry Brandis Professor of Law, University of North Carolina School of Law.

Endnotes

1. 509 U.S. 579 (1993).
2. 312 N.C. 129, 322 S.E.2d 370 (1984).
3. 293 Fed. 1013, 1014 (D.C. Cir. 1923).

4. Daubert supra note 1. See also Saltzburg, Martin & Capra, Federal Rules of Evidence Manual § 702.02[5] (8th ed. 2002).
5. See, e.g., Coppolino v. State, 223 So.2d 68 (Fla.Ct.App. 1968) (novel and untried test for poison approved in jurisdiction adhering to Frye).
6. Frye itself involved an early lie detector test.
7. See United States v. Sherwood, 98 F.3d 402 (9th Cir. 1996) (fingerprint evidence properly admitted).
8. See United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995).
9. See cases cited in Saltzburg, Martin & Capra, Federal Rules of Evidence Manual supra note 4, § 702.3.
10. 526 U.S. 137 (1999).
11. 522 U.S. 136 (1997).
12. Id. at 146.
13. Fed.R.Evid. 702, advisory committee's note.
14. Daubert v. Merrell Dow Pharmaceuticals, Inc. 43 F.3d 1311, 1317 (9th Cir. 1995)
15. Fed.R.Evid. 702, advisory committee's note, citing Claar v. Burlington N. R.R.Co., 29 F.3d 499 (9th Cir. 1994).
16. Fed.R.Evid. 702, advisory committee's note, citing United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996).
17. Bullard, supra note 2.
18. An earlier case in North Carolina had admitted footprint identification based on ridge – an approach similar to fingerprint comparison. State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951).
19. 1 Brandis, North Carolina Evidence, §86 (2d rev. ed. 1982).
20. Bullard, supra note 2. 312 N.C. at 150-51, 322 S.E.2d at 382-83.
21. See Brandis & Broun, North Carolina Evidence §113 at 351 (5th ed. 1998).
22. In Bullard, two professors from Duke, Dr. Matthew Cartmill and Dr. James Robertson testified for the defense, but the Supreme Court dismissed their testimony with the remark that neither “had conducted any independent research in the area of footprint comparison as had Dr. Robbins.” 312 N.C. at 154, n.16, 322 S.E.2d at 385, n.16).
23. 79 A.B.A.J. 64 (June, 1993). Dr. Robbins died an untimely death in 1987.

24. *Id.* at 66.

25. 143 N.C. App. 187, 546 S.E.2d 145, disc. rev. denied, 353 N.C. 729, 551 S.E.2d 439 (2001).

26. 327 N.C. 89, 393 S.E.2d 847 (1990).

27. *Id.* at 101, 393 S.E.2d at 854.

28. *Id.*

29. See *State v. Bowers*, 135 N.C.App. 682, 522 S.E.2d 332 (1999); *State v. Best*, 342 N.C. 502, 467 S.E.2d 45 (1996); *State v. McKenzie*, 122 N.C. App. 37, 468 S.E.2d 817 (1996). See also Morgan, DNA Profiling in North Carolina, 21 N.C. Cent. L.J. 300 (1995).

30. 341 N.C. 513, 461 S.E.2d 631 (1995).

31. *Id.* at 527, 461 S.E.2d at 639.

32. 311 N.C. 515, 319 S.E.2d 177 (1984).

33. The Court cites *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961).

34. 348 N.C. 578, 504 S.E.2d 293 (1998).

35. 119 N.C. App. 662, 459 S.E.2d 812, disc. rev. denied, 341 N.C. 655, 462 S.E.2d 524 (1995).

36. 132 N.C. App. 500, 512 S.E.2d 450 (1999), rev. dismissed, 351 N.C. 329, 524 S.E.2d 569 (2000).

37. 560 S.E.2d 233 (N.C. App. 2002).

38. *Id.* at 239.

39. *Id.* at 240.

40. In addition to *Taylor*, see also *State v. Parks*, 147 N.C. App. 485, 556 S.E.2d 20 (2001) (fingerprint comparison properly permitted as scientifically reliable method of identification).

41. See *State v. Lytch*, 142 N.C. App. 576, 544 S.E.2d 570 (2001), affirmed per curiam, 355 N.C. 270, 559 S.E.2d 547 (2002) (no error to refuse to admit results of polygraph test offered by defendant); *Lindsey v. Boddie-Noell Enterprises, Inc.*, 147 N.C. App. 166, 555 S.E.2d 369 (2001), reversed on other grounds, 562 S.E.2d 420 (N.C. 2002) (evidence from polygraph test properly excluded).

Hearsay Hearsay? The Expansion and Contraction of Hearsay Exceptions in North Carolina

By Robert C. Montgomery

"Hearsay evidence is inadmissible because the person quoted was unsworn and is not before the court for examination; yet most momentous actions, military, political, commercial, and of every other kind, are daily undertaken on hearsay evidence."¹

In 1603, a man named Cobham made out-of-court statements that served as a basis for Sir Walter Raleigh's trial for treason.² Although Cobham retracted his statements in writing and Raleigh believed Cobham would be called to testify at trial, Cobham did not testify and Raleigh was convicted.³ Concerns about the reliability of out-of-court statements like the ones used to convict Raleigh spurred development of the first rules excluding hearsay.⁴

Almost 400 years after Raleigh's conviction and ultimate beheading, another notorious trial illustrated that the hearsay pendulum had swung very much in the other direction. In *People v. O.J. Simpson*, the trial court excluded evidence that Nicole Brown Simpson said "that she was deathly afraid of O.J. Simpson, that he had threatened her, and that he had said if he couldn't have her, no one could."⁵

Finding the proper balance between the admission of necessary evidence and the exclusion of unreliable hearsay has been elusive. Nowhere is this more true than in North Carolina where the judiciary and the bar have sometimes struggled to understand what out-of-court statements are admissible under exceptions to the hearsay rule.

The Hearsay Rule in North Carolina

North Carolina's common law excluded hearsay,⁶ but a long-standing exception permitted the admission of out-of-court statements showing conditions "such as pain, comfort, emotion, or other mental state[.]"⁷ The rationale for admission of these statements, made at the time the declarant was experiencing a subjective condition, was that they were "more trustworthy than . . . testimony given after a lapse of time and under the influence of self-interest."⁸

The North Carolina Rules of Evidence, made effective in 1984, provide that "[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁹ The Rules further provide that "[h]earsay is not admissible except as provided by statute or by these rules."¹⁰

The common law hearsay exception for statements of mental or physical condition has been codified into two exceptions commonly known as the "state-of-mind" and "medical" exceptions. Many practitioners, judges, and commentators are now asking whether recent decisions of the Supreme Court of North Carolina have unjustifiably extended or limited the statutory language of those exceptions.

The State-of-Mind Exception

The state-of-mind exception permits the admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."¹¹ Courts interpreting this exception have faced two

interrelated issues: (1) whether a statement of the declarant's then-existing state of mind must include an express indication of emotion; and (2) whether a statement of memory or belief is ever admissible.

The language of the exception provides only for admission of the particular state of mind and does not refer to the cause for the state of mind. Some courts interpreting nearly identical versions of the exception have held that a witness may not testify to statements relating the reasons for a declarant's state of mind.¹² Such an interpretation is reasonable in light of the language of the statutory exception, but North Carolina has historically allowed admission of a declarant's statements showing a state of mind even if those statements contain no express indication of emotion.¹³

The Supreme Court of North Carolina continued permitting the admission of statements showing a state of mind without an express indication of emotion under the codified exception in *State v. Cummings*,¹⁴ a case in which the trial court allowed a witness to testify that the victim, who appeared terrified, said the defendant had beaten her on several occasions and had threatened to kill her if she tried to take back her children from him. The Court held that the testimony was admissible although it contained no express indication of emotion because it "related directly to [the victim's] existing state of mind and emotional condition."¹⁵ The decision was not without a dissent, however, as Justice John Webb voted to "limit this exception to testimony as to statements of the declarant which say what is his or her mental or emotional state."¹⁶

As to the second issue, some commentators have called North Carolina's interpretation of the state-of-mind exception "[a]lmost unique in the nation" in "ignoring both directly and indirectly the limitation in excluding 'a statement of memory or belief to prove the fact remembered or believed.'"¹⁷ This unwarranted expansion of the exception by ignoring its plain language, it has been argued, could destroy the hearsay rule by permitting the admission of almost any statement of past factual occurrence.¹⁸

In *State v. Walker*,¹⁹ witnesses were permitted to testify that the victim said the defendant had physically harmed her in the past. The Supreme Court held that the statements were admissible under the state-of-mind exception, noting that "[i]n recent years this Court has defined the state of mind exception to include statements made by the victim which may indicate the victim's mental condition by showing the victim's fears, feelings, impressions, or experiences."²⁰ Justice Webb again dissented, stating that "I do not believe we can say what inference can be drawn as to the deceased's state of mind at the time of each assault."²¹

In *State v. Hardy*,²² the majority of the Supreme Court reached a decision hailed by many as an about-face on the Court's interpretation of the exception in line with Justice Webb's earlier dissents. Stating that it was receding from some of its prior holdings, the Court seemed to limit the content of statements admissible under the exception to express indications of emotion that did not include statements of past factual occurrences.

In *Hardy*, the defendant was convicted for the first degree murder of his wife. The trial court had admitted portions of the victim's diary that read as follows:

Charlie went off this morning. He wanted to take his break and I said, "Please, let's catch up the dishes first," and he got mad. When we finished the dishes, he wouldn't leave. I said, "Act immature, why don't you? Why don't you try acting like an adult male?" He hit me in the side of the head and slapped me across the face, then took off. He came back a little later, didn't apologize, wanted to use the vacuum. David changed the lock on my break. Late that night, he went off berserk, threw water, dishes, ashtrays, paper at me. Screamed he was going to kill me. Alan came to help mop and tried to hold him back. He jumped in the car and broke the steering

wheel adjuster. We filed a harassment charge. Waiting twenty-four hours.²³

The Court held that the diary entry was not admissible pursuant to the state-of-mind exception because “[t]he statements in the diary are not statements of [the victim’s] state of mind but are merely a recitation of facts which describe various events.”²⁴ Noting that “[s]tatements of a declarant’s state of mind, are, for example, ‘I’m frightened,’ or, ‘I’m angry,’” the Court stated that the victim’s diary “contains no statements like these which assert her state of mind.”²⁵

The Court’s apparent decision to rein in the state-of-mind exception, however, was short-lived. In *State v. Gary*,²⁶ the Court made it clear that even statements not containing express indications of emotion may be admissible despite its holding in *Hardy*. In ruling that a victim’s statement that the defendant threatened to kill her was properly admitted even though the victim did not express any particular emotion in the statement, the Court stated that the exception “allows the admission of hearsay testimony if it tends to demonstrate the victim’s then-existing state of mind.”²⁷

The Court further distanced itself from the holding in *Hardy* when it held in *State v. Brown*²⁸ that various statements of a victim relating threats made by the defendant and concerning the status of their relationship were properly admitted although they contained no express indications of emotion and were backward-looking. The Court held the statements were admissible because “they indicated [the victim’s] then-existing state of mind and were not merely a recitation of facts.”²⁹

While the Court’s decisions in *Gary* and *Brown* seemed to signal a retreat from *Hardy*, they were not entirely inconsistent with *Hardy*. Those decisions picked up on and magnified a portion of *Hardy* in which the Court noted that in addition to failing to express an emotion, the diary entry in that case was also “written in a calm and detached manner” which made the entry “at best speculative as to [the victim’s] state of mind.”³⁰ Unlike the diary entry in *Hardy*, the statements in *Gary* and *Brown*, according to the Court, were not a mere recitation of facts and did tend to demonstrate the victim’s then-existing state of mind.

Despite the Court appearing to step back from its decision in *Hardy* and its clarifications in *Gary*, *Brown*, and other cases, confusion still exists as to the application of the state-of-mind exception. In at least two cases, the North Carolina Court of Appeals has continued to require express indications of emotion in hearsay statements in order for them to be admissible.³¹ In other cases, however, the Court of Appeals has permitted the admission of hearsay statements not containing express indications of emotion.³²

The question remains as to whether the Supreme Court’s interpretation and application of the state-of-mind exception unjustifiably expands the codified version of the exception. While the unfettered admission of mere statements of memory or belief certainly could vitiate the hearsay rule, the admission of statements demonstrating a then-existing mental state or emotion and made to communicate that mental state or emotion does not necessarily spell the demise of the rule. Although concerns about fabrication may persist, the issue is really whether these statements are inherently any less trustworthy than express indications of emotion.³³

The Medical Exception

Prior to the enactment of the Rules of Evidence, out-of-court statements to treating physicians relevant to diagnosis or treatment were admissible in North Carolina not as substantive evidence but as a basis for an expert opinion.³⁴ The rationale for admission of these statements was that “[w]hen a patient seeks treatment, ‘it is reasonable to assume that the information which [he] gives the doctor will be the truth, for self-interest requires it.’”³⁵

The medical exception to the hearsay rule, as now codified in the Rules of Evidence, permits the admission of “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”³⁶ Courts interpreting this exception have wrestled with the following issues: (1) how to determine whether the declarant’s statements were made for purposes of medical diagnosis or treatment; and (2) how to determine whether the statements were reasonably pertinent to diagnosis or treatment.

The Supreme Court of North Carolina has long held that statements made to physicians solely for purposes of trial preparation are not admissible under the medical exception despite the rule expressly applying to statements made for the purpose of diagnosis.³⁷ However, the Court had not ruled until recently that the declarant was required to have a “treatment motive” when making the statements, instead generally focusing only on whether the physician had the intention to treat the declarant.³⁸

In *State v. Hinnant*,³⁹ a child sexual abuse case, the Court held that the proponent of the evidence “must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment.” Although the Court recited the “diagnosis or treatment” language of the statutory exception, it nevertheless chose language which arguably seems to limit application of the exception to instances in which the declarant “had a treatment motive when speaking to” the physician.⁴⁰

The holding in *Hinnant* essentially requires proof that the declarant understood the purpose for his or her statements by way of an “objective circumstances” test that considers the setting for the interview, the nature of the questioning, and the person to whom the statements are made. The Court in *Hinnant* took umbrage at the use of child-friendly interview rooms on the ground that these rooms would not reinforce the child’s need to speak truthfully and at the use of leading questions by the interviewer on the ground that this undermined the reliability of the hearsay statements.⁴¹

The “treatment motive” requirement is in keeping with the pre-rule exception permitting the admission of statements to a “treating” physician and comports with the rationale for admission of such statements. However, the requirement appears to be a judicial narrowing of the codification of the exception which by its plain language permits admission of statements made for “diagnosis or treatment.”⁴² It also begs the question of whether statements made to a medical professional by a child not capable of appreciating the need for treatment or made to a family member by a child incapable of seeking treatment himself or herself may be deemed reliable enough for admission under the medical exception.

The Court in *Hinnant* further limited application of the exception by essentially holding that statements—at least those made to non-physicians—are not reasonably pertinent to medical diagnosis or treatment after the declarant has received initial treatment.⁴³ The ruling seems to mean that statements made to physician’s assistants or nurses during follow-up visits may not be admissible. It also leaves open the question of the applicability of the exception to statements made to a psychologist over a series of interviews, statements made to the same physician on subsequent visits, and statements made to referral specialists or their staff.

The Court’s rationale for the immediacy requirement is that “[i]f the declarant is no longer in need of immediate medical attention, the motivation to speak truthfully is no longer present.”⁴⁴ This is similar to the common law belief that the spontaneity of statements regarding subjective conditions of pain or mental state is the key to their reliability. However, it would seem immediacy

would not be necessary so long as a “treatment motive” was shown inasmuch as the desire for proper treatment would exist even some time after occurrence of the precipitating incident.

The question remains then whether the Supreme Court has unjustifiably limited the medical exception to statements made only for the purpose of treatment and to statements made when immediate medical attention is being sought. The first limitation, while conflicting with the express language of the rule and its interpretation in other jurisdictions, is faithful to the literal “treatment motive” rationale underlying the rule. The second limitation, however, seems to make “treatment motive” irrelevant because of the fear that fabrication, especially in children susceptible to manipulation, may be more likely over time.

Ramifications for Civil Practitioners

The ramifications of the Supreme Court’s holdings with regard to the state-of-mind and medical exceptions are most likely to be seen in criminal cases, particularly homicide and child sexual abuse cases. But because the rules themselves do not differentiate between types of cases to which they do or do not apply, the possible effect on civil cases cannot be ignored.

In *Griffin v. Griffin*,⁴⁵ the Court of Appeals held that statements made by children as to how they were treated by their father and as to their desire to live with their mother were admissible to show the children’s state of mind. In *In re Hayden*,⁴⁶ a case in which a child was alleged to have been physically abused by her father, the Court held that an out-of-court statement by the child that she had burned herself on the previous day was not admissible because it “pertained to a memory of the previous day’s events and was offered solely for the purpose of proving such events[.]”

The holdings in *Griffin* and *Hayden* are consistent with the Supreme Court’s interpretation of the exception to permit statements demonstrating a state-of-mind and to exclude statements of past occurrences if used only to show what occurred. Regardless of whether the exception has been given an interpretation that is too expansive, civil practitioners should be aware of these parameters.

A few appellate cases have also addressed the medical exception in the context of civil matters even though, unlike child sexual abuse cases, fault is generally not pertinent to treatment in those cases.⁴⁷ The recent decision of the Supreme Court in *Hinnant*, however, may call into question the continuing authority of these cases.

In *Williams v. Williams*,⁴⁸ a child custody case, the Court of Appeals held that statements made by the child to a psychiatrist were admissible under the medical exception where the mother’s purposes in taking the child to the psychiatrist were evaluation, diagnosis, and treatment if necessary. In light of *Hinnant*, a court would now look to whether the child rather than the mother understood that the visits to the psychiatrist were for treatment.

In *Reed v. Abrahamson*,⁴⁹ an automobile negligence case, the defendants argued the trial court should not have admitted the plaintiff’s “pain diary” because it constituted inadmissible hearsay. The Court of Appeals held that the statements contained in the diary were properly admitted under the medical exception because the plaintiff kept the daily log as part of her treatment program with a psychologist. The *Hinnant* decision raises the question of whether statements like these made after initial treatment by a psychologist would qualify under the exception.

The Court of Appeals may have reached different results in *Williams* and *Reed* after the Supreme Court decided *Hinnant*. Regardless of whether *Hinnant* has been construed more narrowly than the language of the exception would ordinarily permit, civil practitioners must be aware of the

potential for exclusion of statements previously thought to be admissible.

Conclusion

With the exception of possibly one case, *State v. Hardy*, the North Carolina Supreme Court has consistently applied an expansive interpretation of the state-of-mind exception to the hearsay rule, at least in homicide cases. This interpretation has sometimes been criticized, misapplied, and confused. Even so, it appears to remain the law in North Carolina that statements demonstrating a declarant's state-of-mind are admissible under the exception even if they contain statements of past occurrences.

The medical exception, on the other hand, has recently been clarified by the Court in *Hinnant*. In the Court's limited interpretation, it is questionable as to whether statements made for the purpose of diagnosis or made after the immediate need for treatment has passed—at least to non-physicians—would now qualify for admission under the exception.

Whether the expansion and limitation of the state-of-mind and medical exceptions to the hearsay rule will stand the test of time is open to debate. Because there will continue to be cases like those of *Raleigh* and *Simpson* that may hinge on the admission or exclusion of hearsay, the struggle between the admission of necessary evidence, and the exclusion of unreliable hearsay is unlikely to abate any time soon. Therefore, both criminal and civil practitioners should be diligent in understanding the often-changing parameters of the exceptions.

Robert Montgomery is an assistant attorney general with the North Carolina Department of Justice. He earned his BA in Journalism and Political Science from the University of North Carolina at Chapel Hill and his JD from the University of North Carolina School of Law. The opinions expressed in this article are solely those of the author.

Endnotes

1. Ambrose Bierce, *The Devil's Dictionary* (1911), available at www.online-literature.com/bierce/devilsdictionary. In his satirical and often cynical interpretation of American language and culture, Bierce included his thoughts about hearsay in his definition of "inadmissible." Interestingly, he also defined "lawyer" as "[o]ne skilled in the circumvention of the law."
2. *California v. Green*, 399 U.S. 149, 157 n.10, 90 S. Ct. 1930, 1934 n.10, 26 L. Ed. 2d 489, 496 n.10 (1970).
3. *Id.* at 157 n.10, 90 S. Ct. at 1934 n.10, 26 L. Ed. 2d at 496 n.10.
4. Commentators suggest that the right of a criminal defendant to confront his accusers was an outgrowth of *Raleigh's* trial. *Id.* at 157 n.10, 90 S. Ct. at 1934 n.10, 26 L. Ed. 2d at 496 n.10. Although the right to confront witnesses and rules excluding hearsay should not be equated, they nevertheless "stem from the same roots." *Dutton v. Evans*, 400 U.S. 74, 86, 91 S. Ct. 210, 218, 27 L. Ed. 2d 213, 226 (1970).
5. Donna Meredith Matthews, Article, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 *Golden Gate U.L. Rev.* 117, 118 (1997). The hearsay statements apparently were barred on the grounds that they contained statements of belief and because they were not deemed relevant to the issues before the jury. See *People v. Arcega*, 32 Cal. 3d 504,

526-29, 651 P.2d 338, 349-51 (1982).

6. See, e.g., *Sutton v. Blount*, 3 N.C. 343, 343 (1805) (excluding survey as evidence against plaintiff “made behind his back”).

7. 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 217, p. 85 (5th ed.1998).

8. *Id.* at 85.

9. N.C.G.S. § 8C-1, Rule 801(c) (2001).

10. N.C.G.S. § 8C-1, Rule 802 (2001).

11. N.C.G.S. § 8C-1, Rule 803(3) (2001).

12. See, e.g., *United States v. Liu*, 960 F.2d 449, 452 (5th Cir.), cert. denied, 506 U.S. 957, 113 S. Ct. 418, 121 L. Ed. 2d 431 (1992); *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980). At least one commentator is not troubled that the statements often do not include express indications of emotion, stating that a homicide victim’s statements showing a relationship with the defendant ordinarily do reflect the victim’s state of mind. 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 217, pp. 87-88 (5th ed. 1998). However, the commentator is concerned about the relevance of such statements. *Id.* at 88.

13. See, e.g., *McRae v. Malloy*, 93 N.C. 154 (1885) (holding that a witness was properly allowed to testify to various statements made by the defendant shortly after he signed a contract that he regretted signing the contract, that he was forced to sign it, and that he did not believe he owed any money as a basis for the opinion of the witness as to the defendant’s state of mind); *State v. Walden*, 311 N.C. 667, 671-72, 319 S.E.2d 577, 580 (1984) (holding that witnesses were properly permitted to testify that the decedent said she did not want to see the defendant, told the defendant “go ahead on,” said “[p]lease don’t let him in,” and “asked who was at the door?” because “the statements were admissible to show the victim’s state of mind since they tended to show that the victim did not want to see the defendant and did not want him in her home”).

14. 326 N.C. 298, 389 S.E.2d 66 (1990).

15. *Id.* at 313, 389 S.E.2d at 74.

16. *Id.* at 326, 389 S.E.2d at 82 (Webb, J., dissenting).

17. *Mosteller et al.*, *North Carolina Evidentiary Foundations* § 11.I. North Carolina’s interpretation, while perhaps “almost unique,” is not entirely unique. See, e.g., *Brenk v. State*, 311 Ark. 579, 599-600, 847 S.W.2d 1, 12 (1993) (finding proper the admission of hearsay statement by victim that the defendant is “going to kill me”); *Duvall v. State*, 825 P.2d 621, 626 (Okla. Crim. App. 1991) (finding proper the admission of hearsay statement by victim that the defendant “told her if she left him, that he would kill her”), cert. denied, 506 U.S. 878, 113 S. Ct. 224, 121 L. Ed. 2d 161 (1992).

The origin of the exclusion from the rule of statements of memory or belief is traced to the decision of the Supreme Court of the United States in *Shepard v. United States*, 290 U.S. 96, 104, 54 S. Ct. 22, 25, 78 L. Ed. 196, 201 (1933), in which the Court held that backward-looking statements were not admissible under the common law state-of-mind exception because they did not prove the declarant’s “present thoughts and feelings” but instead were introduced as “proof of

an act committed by someone else[.]”

18. Reagan F. McClellan, Note, *State v. Alston: North Carolina Continues to Broaden Its Mind to Admissibility of a Victim’s Out-of-Court Statements Under the Rule 803(3) Hearsay Exception in Criminal Cases*, 32 Wake Forest L. Rev. 1327, 1358 (1997).

19. 332 N.C. 520, 422 S.E.2d 716 (1992), cert. denied, 508 U.S. 919, 113 S. Ct. 2364, 124 L. Ed. 2d 271 (1993).

20. *Id.* at 535, 422 S.E.2d at 725.

21. *Id.* at 542, 422 S.E.2d at 729 (Webb, J., dissenting).

22. 339 N.C. 207, 451 S.E.2d 600 (1994).

23. *Id.* at 227, 451 S.E.2d at 611.

24. *Id.* at 228, 451 S.E.2d at 612.

25. *Id.* at 229, 451 S.E.2d at 612.

26. 348 N.C. 510, 501 S.E.2d 57 (1998).

27. *Id.* at 522, 501 S.E.2d at 65 (emphasis added).

28. 350 N.C. 193, 513 S.E.2d 57 (1999).

29. *Id.* at 201, 513 S.E.2d at 62 (emphasis added).

30. 339 N.C. at 229-30, 451 S.E.2d at 612-13.

31. *State v. Lesane*, 137 N.C. App. 234, 240, 528 S.E.2d 37, 42, appeal dismissed and disc. rev. denied, 352 N.C. 154, 544 S.E.2d 236 (2000) (“Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.”); *State v. Marecek*, 130 N.C. App. 303, 502 S.E.2d 634 (holding that statements were inadmissible because they were a mere recitation of fact and totally without statement of emotion), disc. rev. denied, 349 N.C. 532, 526 S.E.2d 473 (1998).

32. See, e.g., *State v. Patterson*, 146 N.C. App. 113, 127-29, 552 S.E.2d 246, 257-58 (holding that although the victim’s statements that the defendant wanted to move in with him, that the victim did not want the defendant to move in with him, and that the defendant did not like it were recitations of fact, they nevertheless were admissible because they tended to show the victim’s state of mind), disc. rev. denied, 354 N.C. 578, 559 S.E.2d 549 (2001); *State v. Kimble*, 140 N.C. App. 153, 164, 535 S.E.2d 882, 890 (2000) (distinguishing *Hardy* on the ground that although the victim’s statements contained no explicit indication of emotion as in *Hardy*, they nevertheless revealed her state of mind); *State v. Lathan*, 138 N.C. App. 234, 239, 530 S.E.2d 615, 620 (holding statements of fact admissible where the witness described the victim’s demeanor or attitude when making them), disc. rev. denied, 352 N.C. 680, 545 S.E.2d 723 (2000); *State v. Wilds*, 133 N.C. App. 195, 206, 515 S.E.2d 466, 475 (1999) (holding “it was not necessary for [the victim] to state explicitly to each witness that she was afraid, as long as the scope of the

conversation . . . related directly to [her] existing state of mind and emotional condition”).

33. Some commentators believe there is no difference. In addressing the federal version of the state-of-mind exception, they have stated:

In the first place, it is in the nature of things that statements shedding light on the speaker’s state of mind usually allude to acts, events, or conditions in the world, in the sense of making some kind of direct or indirect claim about them. . . . In the second place, fact-laden statements are usually deliberate expressions of some state of mind. . . . It does not take a rocket scientist . . . to understand that fact-laden statements are usually purposeful expressions of some state of mind, or to figure out that ordinary statements in ordinary settings usually carry ordinary meaning. In the end, most fact-laden statements intentionally convey something about state of mind, and if a statement conveys the mental state that the proponent seeks to prove, it fits the [federal rule 803(e)] exception.

4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 438, pp. 417-18 (2d ed. 1994), quoted in *State v. Exum*, 128 N.C. App. 647, 655, 497 S.E.2d 98 (1998).

34. 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 217, p. 89 (5th ed. 1998).

35. *State v. Wade*, 296 N.C. 454, 460, 251 S.E.2d 407, 411 (1979) (quoting *State v. Bock*, 288 N.C. 145, 163, 217 S.E.2d 513, 524 (1975), vacated in part on other grounds, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976)).

36. N.C.G.S. § 8C-1, Rule 803(4) (2001).

37. See, e.g., *State v. Stafford*, 317 N.C. 568, 573-74, 346 S.E.2d 463, 466-67 (1986).

38. See, e.g., *State v. Aguillo*, 318 N.C. 590, 596-97, 350 S.E.2d 76, 80 (1986).

39. 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000).

40. *Id.* at 289, 523 S.E.2d at 671 (emphasis added).

41. The questions used by the interviewer in *Hinnant* do not suggest a desired answer and therefore do not actually appear to be leading questions. See *State v. Young*, 312 N.C. 669, 678, 325 S.E.2d 181, 187 (1985). Even if leading questions were utilized, the consideration of this as a factor in determining whether hearsay statements were properly admitted under the medical exception is questionable.

42. Under the federal rule, the distinction between a treating and a diagnosing physician has been abolished. The holding in *Hinnant* seems to retain the distinction. It has been suggested that this may be most significant in the context of statements made to a psychologist for purposes of diagnosis. See Andrea D. Blohm, *Recent Developments, State v. Hinnant: Limiting the Medical Treatment Hearsay Exception in Child Sexual Abuse Cases*, 79 N.C. L. Rev. 1089, 1105-06 (2001).

43. In considering what statements are reasonably pertinent to medical diagnosis or treatment it is important to note the general rule that the cause of a physical symptom or ailment is not admissible. See N.C.G.S. § 8C-1, Rule 803(4) official commentary (2001). The exception is in child sexual abuse cases when the cause—that is, the identity of the perpetrator—may be reasonably pertinent to medical diagnosis or treatment because the relationship of the abuser may have some impact on the course of psychological treatment, because of the possibility of

sexually transmitted diseases, or because a course of treatment might include the removal of the victim from the home. See *Aguallo*, 318 N.C. at 596-97, 350 S.E.2d at 80-81.

44. 351 N.C. at 289, 523 S.E.2d at 670.

45. 81 N.C. App. 665, 668-69, 344 S.E.2d 828, 830-31 (1986).

46. 96 N.C. App. 77, 82, 384 S.E.2d 558, 561 (1989) (emphasis added).

47. Statements other than those attributing fault may certainly be relevant in cases such as those involving workers' compensation,

negligence, wrongful death, or infliction of emotional distress.

48. 91 N.C. App. 469, 473-74, 372 S.E.2d 310, 312 (1988).

49. 108 N.C. App. 301, 308-09, 423 S.E.2d 491, 495 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 624 (1993).

The Law Between the Lines: Sub Silentio Holdings

By Thomas L. Fowler

Appellate judges do not always say everything they mean. Appellate opinions can contain unstated but implicit holdings. Such implicit or sub silentio¹ holdings can make law and sometimes even overturn express precedent.² Appellate courts can implicitly overrule prior decisional law “simply by establishing a later contrary precedent without taking note of its impact on earlier decisions. ... Normally, the later decision is considered authoritative and as having implicitly rejected the earlier one.”³ But discerning these implied holdings—and evaluating the effect and significance of this law between the lines—is no easy task.

In some cases appellate courts never actually considered the matter that, although unstated, is a logical necessity to what was explicitly resolved.⁴ And sometimes the highest courts simply seem offended by the notion that lower courts can decide for themselves what the supreme court really meant.⁵ But there is law to be found between the lines of appellate opinions—several North Carolina cases admit to sub silentio overrulings.⁶ And the lower courts should not ignore or avoid these sub silentio holdings. As one federal judge noted: “There are persuasive authorities cited in support of the right (arguably, the duty) of a lower court to decline to apply Supreme Court precedent when the Court in later decisions has itself de facto overruled that precedent, although not expressly.”⁷ But these are still tough calls. Consider the following cases.

In the late 19th century, the North Carolina legislature created new courts called “circuit” courts and specified that such courts had concurrent and equal jurisdiction and authority with the existing superior courts. Over the years, appeals from judgments of these circuit courts were taken directly to the North Carolina Supreme Court and the Court regularly resolved the matters so appealed. Because subject matter jurisdiction is always a proper consideration of the courts—even if the parties themselves have not raised the matter⁸—the Supreme Court’s resolving these cases could have been viewed as a de facto confirmation that these circuit courts properly functioned as the equals of superior courts. But in 1898, in *Rhyne v. Lipscombe*,⁹ the Supreme Court held that the legislature’s attempt to create circuit courts with the same jurisdiction as superior courts was unconstitutional and void. Thus, there could be no direct appeal from these circuit courts to the Supreme Court. Justice Walter Clark, for the Court, noted: “While appeals have been often brought to this Court direct from criminal inferior courts [i.e., the circuit courts], the right to do so has never been adjudged by this Court.”¹⁰ Thus despite the logical inference from the earlier cases that the Court approved of the equivalence of the legislatively created circuit courts and the constitutionally created superior courts, the Court denied that this was a de facto holding because the precise issue had never been properly raised or appealed in any of the previous cases.

In 1984, in *Cannon v. Miller*,¹¹ after an extensive review of the historical and theoretical bases of the torts of alienation of affection and criminal conversation, the Court of Appeals abolished both torts because “the very theory of recovery underlying both actions is without basis in contemporary society.”¹² The Court appeared to conclude, not that the North Carolina Supreme Court would probably abolish these torts itself at some point in the future, but that the Supreme Court already had done so, by implication in other cases: “[T]here is no continuing legal basis for the retention of these tort actions today.”¹³ The Supreme Court, however, rejected this application of the sub silentio doctrine. In a sharp rebuke to the Court of Appeals, the Supreme Court reversed, stating that the panel of judges of the Court of Appeals to which this case was assigned had acted “under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court.”¹⁴

Lower courts must, then, proceed cautiously in deciding that a higher court has made a sub

silentio determination—and extra cautiously if that determination involves overruling an express precedent. This does not mean, however, that a clear and applicable precedent must always be followed until explicitly overruled by the Supreme Court.¹⁵ In *Riley v. DeBaer*,¹⁶ Superior Court Judge Howard E. Manning Jr. granted defendants' motion for summary judgment basing his ruling solely on the negligent infliction of emotional distress [NIED] standard announced in a 1997 Court of Appeals case, *Lorbacher v. Housing Authority of City of Raleigh*.¹⁷ *Lorbacher* was clear and applicable precedent that compelled Judge Manning's decision so long as it had not been overruled—and, without a doubt, the Supreme Court had never explicitly overruled *Lorbacher*. The Court of Appeals, however, held that the North Carolina Supreme Court had, in a 1998 case,¹⁸ overruled *Lorbacher* sub silentio and therefore reversed Judge Manning's grant of summary judgment for the defendants. The Court of Appeals stated the test as follows:

"By mere implication, a subsequent decision cannot be held to overrule a prior case, unless the principle is directly involved and the inference is clear and compelling."¹⁹ *Lorbacher* had announced the standard for an NIED claim as requiring the plaintiff to show, inter alia, that the defendant negligently engaged in conduct that was extreme and outrageous. In the later Supreme Court case, *McAllister v. Ha*, that court stated that when a plaintiff asserts a claim of NIED, "[a]lthough an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice."²⁰ In *Riley v. DeBaer* the Court of Appeals stated that: "Although the *McAllister* Court did not directly state that its decision overruled the holding in *Lorbacher*, the same principle is directly involved in both cases and the inference in *McAllister* is clear and compelling—an allegation of ordinary negligence will suffice as the first prong in a claim of NIED." Thus, the trial court erred by failing to recognize and follow the Supreme Court's implicit, sub silentio overruling of the explicit precedent established by *Lorbacher*.

A final example presents the opportunity to apply the test set out in *Riley v. DeBaer*. In October of 2001, in *Anderson v. Assimos*,²¹ the Court of Appeals held that Civil Rule 9(j)—which provides for special rules of pleading in medical malpractice cases—was unconstitutional and was "therefore void." In a subsequent case, *Best v. Wayne Memorial Hospital*,²² the Court of Appeals stated that this holding in *Anderson* "is binding and controlling" regarding the status of Rule 9(j). In December 2001, in *Sharpe v. Worland*,²³ the court also stated that, pursuant to *Anderson*, Rule 9(j) was void and so required reversal of the trial court's dismissal "on the basis of Rule 9(j)."²⁴ *Sharpe* acknowledged that *Anderson* was on appeal to the NC Supreme Court. *Best* and *Sharpe* appear to establish that at present, the status of the law is that, pursuant to *Anderson*, Rule 9(j) is void and therefore can not serve as the legal basis for dismissal of a lawsuit. However, the NC Supreme Court appears to disagree. In a case filed in February of 2002, *Thigpen v. Ngo*,²⁵ the NC Supreme Court upheld the dismissal of case based on a violation of Rule 9(j)—a result seemingly inconsistent with the Court of Appeals' cases and their insistence that Rule 9(j) is void. The *Thigpen* opinion reasoned: "The trial court dismissed plaintiff's complaint with prejudice because it did not comply with Rule 9(j) and was therefore filed outside the statute of limitations. ... Rule 9(j) clearly provides that '[a]ny complaint alleging medical malpractice ... shall be dismissed' if it does not comply with the certification mandate. ... Failure to include the certification necessarily leads to dismissal. ... In light of the specific, unambiguous, and plain language of Rule 9(j); the legislative intent of the statute; and the record and facts in this particular case, we hold the trial court correctly dismissed plaintiff's complaint."

As of the writing of this article, the Supreme Court has not rendered an opinion in the *Anderson v. Assimos* case. As the law now stands, then, is Rule 9(j) void and thus not a proper basis for dismissing a medical malpractice action—as the Court of Appeals' cases clearly hold? Or has the Supreme Court, in *Thigpen* implicitly reversed *Sharpe* and *Anderson* in a sub silentio overruling? *Thigpen* does not mention the Court of Appeals cases nor does it discuss the constitutionality of Rule 9(j), the status of the *Anderson* decision pending appeal to the Supreme Court, and the

effect on other cases resolved after Anderson but prior to the Supreme Court's decision. Yet in light of the trio of Court of Appeals cases, are these arguably primary issues in the case? The Supreme Court justices can not have been unaware of the holding in *Anderson v. Assimos*. Thigpen's upholding the dismissal on Rule 9(j) grounds seems a "clear and compelling" rejection of Sharpe's conclusion that Rule 9(j) was void and therefore not a proper basis for dismissal. But Thigpen does not take this position explicitly and it can be argued that Thigpen does no more than suggest the likelihood that the Supreme Court is disposed to overrule Anderson. Or it is possible that this aspect of Thigpen was simply an inadvertence.²⁶ Maybe it carries no significance at all.

There is law to be found between the lines of appellate opinions—but it is also clear that reasonable legal scholars, attorneys, and judges may well disagree as to exactly what that law is. Although Justice Holmes claimed the law is simply a prediction of how judges would rule,²⁷ when express, applicable precedent exists, lower courts should not engage in predicting how the supreme court will rule on the matter in the future²⁸ and the lower courts should proceed cautiously in deciding that a later inconsistent supreme court opinion has overruled express precedent sub silentio.²⁹

Tom Fowler is associate counsel with the North Carolina Administrative Office of the Courts. He earned his BA in 1975 from the University of North Carolina at Chapel Hill, and his JD in 1980 from the University of North Carolina School of Law. The opinions expressed in this article are solely those of the author and do not represent any position or policy of the Administrative Office of the Courts.

Endnotes

1. "Sub Silentio: Under silence; without any notice being taken. Passing a thing sub silentio may be evidence of consent." Black's Law Dictionary (West 1968) at 1593.
2. "The notion of sub silentio reversal ... is commonplace in the law." James Bopp, Jr., Richard E. Coleson, Barry A. Bostrom, Does the United States Supreme Court Have a Constitutional Duty To Expressly Reconsider And Overrule *Roe v. Wade*?, 1 Seton Hall Const. L. J. 55, 75 (1990). In its review of 190 cases which constituted Supreme Court reversals of prior decisions, the Congressional Research Service noted that "[w]hile the Supreme Court sometimes expressly overrules a prior decision, in a great many instances the overruling must be deduced from the principles of related cases." Id. Raoul Berger, A Study of Youthful Omniscience: Gerald Lynch on Judicial Review, 36 Ark.L.Rev. 215 (1982) ("In the history of the Court many a decision has been overruled sub silentio..."). "Although sub silentio overruling is a common practice in our system of jurisprudence, it often clouds the law and undermines the legitimacy of both the new decision and the precedent. Stability is better achieved when the Court directly reviews the weaknesses of the prior case law and completely, rather than partially, overrules it." Lisa J. Allegrucci & Paul E. Kunz, The Future of *Roe v. Wade* in the Supreme Court: Devolution of the Right of Abortion and Resurgence of State Control, 7 Saint John's Journal of Legal Commentary 295, 327 (1991).
3. Richard B. Cappalli, What Is Authority? Creation And Use Of Case Law By Pennsylvania's Appellate Courts, 72 Temple Law Review 303, 366 (1999).
4. See *Barnes v. Teer*, 219 N.C. 823, 824, 15 S.E.2d 379 (1941) ("In originally upholding the judgment, this question was inadvertently answered sub silentio in the affirmative. The authorities are to the contrary."); *Scott v. Battle*, 85 N.C. 184, 189, 2 S.E. 70 (1881) ("On looking to the case, the fact that the plaintiff was a married woman seems not to have been observed by the court, at least there is no mention made of that circumstance in the opinion. So far as we can see, the point passed sub

silentio, as if it had been the case of an ordinary vendor, resting under no disability, seeking to avoid his parole agreement; and regarding the decision to be inconsistent alike with precedent and principle, we do not feel at liberty to follow it.”); Anonymous, 2 N.C. 171, 120-21, 2 S.E. 70 (1795)(“Whatever may have been the practice, I cannot say, not having attended to it in this particular. Sometimes a practice may prevail for a length of time, upon the strength of a precedent passing sub silentio, which, when it comes to be examined, may be found very erroneous.”).

5. “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

6. *State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349 (1993)(“Here, however, we are forced to acknowledge that in *Gibson* we overruled, sub silentio, our recent precedent established in *Garner*.”); *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 8, 418 S.E.2d 648 (1992)(“Our review of the case law persuades us that the second line of cases overrules, sub silentio, the earlier line.”); *White v. White*, 312 N.C. 770, 778, 324 S.E.2d 829 (1985)(“Once the trial court orders a distribution, it has held sub silentio that such distribution is fair and equitable. A specific statement that the distribution ordered is equitable is not required.”); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182 (1982)(“This decision was based on the conclusion that the denial of a motion to dismiss under Rule 12 (b)(1) for lack of subject matter jurisdiction is not immediately appealable and the sub silentio determination that sovereign immunity is a matter of subject matter jurisdiction.”); *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 346, 451 S.E.2d 358 (1994)(“Thus, the Court decided, sub silentio, that holding property for anticipated development is a present use.”); *Reidy v. Macauley*, 57 N.C. App. 184, 187, 290 S.E.2d 746 (1982)(“We believe *Chiple* has been overruled sub silentio by *Vogel* and its progeny.”). But see *State v. McGill*, 73 N.C. App. 206, 213, 326 S.E.2d 245 (1985)(“We are aware of cases apparently supporting, sub silentio, a contrary rule.”).

7. *Sojourner v. Roemer*, 772 F.Supp. 930, 931-32 (E.D. La. 1991); see also *Planned Parenthood v. Casey*, 947 F.2d 682 (3rd Cir. 1991), rev'd in part, 505 U.S. 833 (1992): “[A] legal standard endorsed by the [Supreme]Court ceases to be the law of the land when a majority of the Court in a subsequent case declines to apply it;” but see *Hohn v. United States*, 524 U.S. 236, 252-53 (1998): “Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.” One commentator has criticized this position of the Supreme Court, noting that “[t]he net result of the Court’s approach ... is that in deciding if it is bound by a precedent of the Court, lower courts must ignore the reasoning of that decision and subsequent doctrinal developments which might bring the validity of that reasoning into question, focusing instead on the narrow holding of the case, and whether it has been expressly overruled. ... What does it mean for a court of law to announce that the reasons it gives for its decisions do not matter; all that matters is the decision itself, the raw exercise of power? After all, one can argue that deciding in a reasoned manner and explaining the reasons for one’s decision is the essence of judging, as distinguished from other forms of state power.” Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, The Lower Federal Courts, And The Nature Of The “Judicial Power”*, 80 *Boston University Law Review* 967, 973 (October, 2000).

8. “It is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves.” *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431 (1980).

9. 122 N.C. 650, 29 S.E. 57 (1898).
10. *Id.*, at 656.
11. 71 N.C. App. 460, 322 S.E.2d 780 (1984).
12. The Court also noted: "The above actions have never fully shaken free from their property-based origins, as evidenced by fact that the consent of the participating spouse to the offending conduct, or even his or her initiation of it, will not bar the suit. Yet, unarguably, spousal love and all its incidents do not constitute property that is subject to 'theft' or 'alienation.'" *Id.*, at 492.
13. *Id.*, at 497.
14. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).
15. See footnotes 6, 7 and 8, *supra*, and accompanying text.
16. 144 N.C. App. 357, 547 S.E.2d 831 (2001).
17. 127 N.C. App. 663, 493 S.E.2d 74 (1997).
18. *McAllister v. Ha*, 347 N.C. 638, 496 S.E.2d 577 (1998).
19. Citing *Cole v. Cole*, 229 N.C. 757, 762, 51 S.E.2d 491, 494-95 (1949).
20. *McAllister*, 347 N.C. at 645, 456 S.E.2d at 583 quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990).
21. 146 N.C.App. 339, 553 S.E.2d 63 (2001).
22. 147 N.C.App. 628, 556 S.E.2d 629 (2001).
23. 147 N.C.App. 782, 557 S.E.2d 110 (2001).
24. "Recently in *Anderson v. Assimos*, 146 N.C.App. 339, 553 S.E.2d 63 (2001), a different panel of this Court held that the pre-filing certification of Rule 9(j) of the North Carolina Rules of Civil Procedure was unconstitutional and void. Thus, we must reverse the trial court's dismissal of this matter on the basis of Rule 9(j)." *Id.* at 783.
25. 355 N.C. 198, 558 S.E.2d 162 (2002).
26. Compare *Barnes v. Teer*, 219 N.C. 823, 824, 15 S.E.2d 379 (1941) ("In originally upholding the judgment, this question was inadvertently answered sub silentio in the affirmative. The authorities are to the contrary."); *Scott v. Battle*, 85 N.C. 184, 189, 2 S.E. 70 (1881).
27. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897), reprinted in 78 B.U. L. Rev. 699, 702 (1998).
28. For a brief discussion of lower courts predicting what higher courts will do see Thomas L.

Fowler, Of Moons, Thongs, Holdings And Dicta: State v. Fly And The Rule of Law, 22 Campbell Law Review 253, 258-61 (2000).

29. Compare State v. Ring, 25 P.3d 1139 (2001), where the Supreme Court of Arizona observed that the U.S. Supreme Court in Jones v. United States, 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000), appeared to have overruled sub silentio the otherwise on point and binding decision of Walton v. Arizona, 497 U.S. 639 (1990)(involving Arizona's judge-sentencing procedure for capital cases). Nevertheless, the Arizona Supreme Court stated that because the U.S. Supreme Court "has explicitly refrained from overruling Walton ..., we are bound by the Supremacy Clause in such matters. Thus, we must conclude that Walton is still the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either Apprendi or Jones." In Ring v. Arizona, ___ U.S. ___ (2002), the U.S. Supreme Court acknowledged that Walton could not stand after Apprendi

Mental Illness and Bankruptcy

By A. Thomas Small

One out of every five Americans will suffer from a mental illness, and many will suffer from severely disabling mental disorders such as schizophrenia, major depression, and bipolar disorder. The percentage of individuals in bankruptcy who suffer from mental illness may be even higher. "Poverty is depressing, and depression, leading as it does to dysfunction and isolation, is impoverishing."¹

This article discusses various aspects of mental illness that arise in bankruptcy cases —the kind of evidence bankruptcy courts have relied on in evaluating a debtor's mental condition, problems that counsel face in presenting a mental illness defense, ways in which bankruptcy courts have dealt with debtors or litigants who because of mental illness are abusive and disruptive, and the ethical considerations that counsel must address when opposing counsel's mental illness affects opposing counsel's representation in the case.

Mental Illness as an Issue in Bankruptcy Court

Major depression,² bipolar disorder,³ and substance abuse are the mental illnesses that most often are issues in bankruptcy cases. Not infrequently, the issue is how a debtor's depression or bipolar disorder affects the debtor's ability to pay debts. In *In re Smith*,⁴ a creditor objected to the debtor's fourth chapter 13 case, arguing that the case had been filed in bad faith. The debtor's prior cases had been dismissed for failure to make plan payments. The debtor contended that his failure to make payments was caused by his inability to hold a job due to post-traumatic stress syndrome related to his military service in Vietnam. The debtor was receiving therapy, and he convinced the bankruptcy court for the Eastern District of North Carolina that he had a good prospect of retaining his new employment with the US Postal Service.⁵

In *Smith*, the debtor was trying to show that he had the ability to make payments, but in many cases debtors are attempting to discharge student loans by showing an inability to make payments because they are unemployable due to depression, bipolar disorder, or some other mental illness. Student loans are not discharged in chapter 7, chapter 11, chapter 12, or chapter 13 cases unless excepting the debt from discharge "will impose an undue hardship on the debtor and the debtor's dependents."⁶ Health Education Assistance Loans are not dischargeable unless the bankruptcy court finds that nondischargeability is "unconscionable."⁷

There have been many cases in which bankruptcy courts have found that a debtor's depression or bipolar disorder has prevented the debtor from being fully employed and the debtor's student loans and HEAL loans were discharged.⁸ But there are also cases where a debtor's mental illness defense was not successful and the student loans and HEAL loans were not discharged.⁹ Most bankruptcy judges are skeptical when a debtor claims an inability to pay debts due to depression. Major depression is chronic, but modern treatment methods make it possible to reduce its symptoms for most who suffer from this disorder. Depression can be treated through psychotherapy and medication, hospitalization, and electroconvulsive therapy for those who do not respond to other treatments. As a general rule, debtors trying to discharge student loans must show that they have made an effort to repay and that their inability to pay will continue.¹⁰ Some courts may require debtors claiming inability to pay debts because of mental illness to show that they sought treatment and that the treatment was not successful.

The case of *In re Binder* presented a difficult issue for a bankruptcy judge in North Dakota.¹¹ Mr. Binder was a chapter 7 debtor with bipolar disorder who, according to his psychiatrists, was severely depressed, restless, impulsive, upset and insecure, anxious, hyperactive, and suicidal.

Fortunately, the debtor could control his illness through medication, but, unfortunately, he would not take his medicine. The court found that the debtor's mental illness "rendered him unable to obtain and maintain suitable employment," and Mr. Binder's student loans were discharged.¹² The types of treatment for manic-depression are similar to those for depression, although the particular medications used differ. The prognosis for people with bipolar disorder is worse than for those with major depression, and treatment compliance is a significant problem because people who are manic frequently do not choose to medicate away an exhilarating state, nor are they likely to be realistic in seeing their behavior as abnormal.

Mental illness is also raised in bankruptcy cases by debtors and litigants to excuse their behavior or their failure to act. For example, a debtor may claim that depression or anxiety prevented attendance at a meeting of creditors. In *In re Keefe*, the bankruptcy court for the Eastern District of Virginia held that the debtor's mental breakdown excused his attendance at his discharge hearing.¹³ In *Golden & Mandel v. Angeli (In re Angeli)*, the bankruptcy court for the Eastern District of New York set aside a default judgment finding that a debtor's chronic depression constituted excusable neglect for not answering a complaint.¹⁴ In *Kemba Roanoke Fed. Credit Union v. St. Clair (In re St. Clair)*, the bankruptcy court in the Western District of Virginia found that a debtor's depression explained the debtor's failure to list assets on his schedules.¹⁵ In *Dutreix v. Fontenot (In re Fontenot)*, the bankruptcy court for the Western District of Louisiana found that the debtor's bipolar disorder explained his irrational belief that he could pay obligations he incurred and the court determined that those debts were not nondischargeable under § 523(a)(2)(A).¹⁶ Debtors have not infrequently asserted that their behavior should be excused by their substance addiction, but that defense rarely is successful.¹⁷

There have been a number of cases recently in the bankruptcy court for the Eastern District of North Carolina involving mental illness issues. Judge Leonard considered a debtor's mental illness in *Warren v. O'Neil (In re O'Neil)*.¹⁸ In that case, the debtors filed a joint chapter 7 petition in January 2000. Two months after the § 341 meeting of creditors, the female debtor sold a 2.7-acre tract of land that she owned to relatives for \$15,000. The property was not listed in the bankruptcy schedules and was not disclosed at the § 341 meeting. After learning of the transfer, the chapter 7 trustee filed a complaint to revoke her discharge pursuant to 11 U.S.C. § 727(d). At trial, the debtor testified to a host of problems that had impaired her ability to attend to the bankruptcy: she had suffered a broken back several months before, was under the care of a psychologist, and was taking medications for pain, depression, and anxiety. In addition, she had recently separated from her husband and was homeless when the petition was filed. The debtors' attorney testified that the female debtor was not part of the initial consultation, and that her estranged husband had initiated the filing to close down his business. Only the male debtor had assisted with preparation of the petition and schedules. The attorney later attempted to go through the petition with the female debtor, but reported that she was distraught and only interested in signing it as quickly as possible. On these extreme facts, the court found that the debtor did not have the intent to defraud and did not act "knowingly and fraudulently" in failing to disclose the property and its transfer to the trustee.

In another Eastern District of North Carolina bankruptcy case, a non-debtor challenged a property conveyance to a debtor, contending that she suffered from bipolar disorder and at the time of the conveyance was incompetent.¹⁹ The court found that although the plaintiff was incompetent for a period of time shortly before the conveyance, she was taking medication and the illness was under control at the time of conveyance. Consequently, the plaintiff was competent to convey her property.

Issues of Proof

If a debtor raises a defense of mental illness, the debtor has the burden of proof. Some courts

require that a debtor's mental illness be established by expert medical evidence,²⁰ while others have found mental disorders based on the court's observation of the debtor and the debtor's testimony.²¹ In *In re Brightful*, the bankruptcy judge in the Eastern District of Pennsylvania found, based on his observation of the debtor, that the debtor was emotionally unstable and had "glaring" psychiatric problems and determined that her student loans should be discharged.²² On appeal to the United States Court of Appeals for the Third Circuit, the creditor argued that the bankruptcy judge's findings should be set aside because they were not based on expert testimony. The Third Circuit held that expert testimony was not necessary to find mental illness, but the appellate court nevertheless reversed because the bankruptcy judge did not specify the nature of the debtor's emotional and psychiatric problems or how those problems would prevent her from being gainfully employed.²³

Testimony from a mental health professional may not be technically required to establish mental illness, but as a practical matter, expert testimony may be essential. Unfortunately, most debtors in bankruptcy cannot afford a medical expert. As a bankruptcy judge in the Western District of New York observed, "all dischargeability litigation involves real persons who are debtors under the Bankruptcy Code, and cannot afford to hire medical experts to testify to the effect of their disease on their earning capacity."²⁴

One possible solution being considered in the Eastern District of North Carolina is a relationship between the court and the North Carolina Society of Clinical Social Workers that will offer debtors an evaluation by a mental health professional at a discounted or pro bono rate.²⁵ The professional will prepare a written report that may be submitted to the court, and there will be a case-by-case determination as to whether the professional will give testimony in court. The written evaluation would target the particular issues in the case, such as whether the debtor can understand contractual obligations, whether the debtor can maintain a job, whether the condition is treatable, and the likelihood that the debtor will comply with treatment recommendations. Those who are interested in helping to establish the project should contact Pam McAfee, Staff Attorney to Judge Small, at PO Drawer 2747, Raleigh, North Carolina 27602; 919-856-4603.

In addition to the problem of the cost of employing a mental health professional, there are also other difficulties that arise when a mental health professional testifies. Mental health experts are often reluctant to get involved with legal proceedings; they are intimidated by courts, reluctant to disrupt their schedules, and are often unwilling to compromise the confidential relationship they have established with their patients. Therapists are also concerned that their relationship with their patients will be compromised if they testify in court. This is particularly true in situations where the therapist has worked hard to establish a relationship of trust with a patient who does not trust easily.²⁶ Lawyers and judges in cases involving mental illness defenses should be sensitive to these problems.

When the Debtor's Behavior Affects the Proceedings

There are any number of ways that a debtor's mental state may affect proceedings in a bankruptcy case. A debtor may be too anxious to attend a meeting of creditors or a hearing. The court may allow the debtor to have a trusted friend sit with the debtor during the hearing. The court might also allow the debtor's testimony to be given by deposition, by proffer subject to cross examination, or by telephone.

In a case in the Western District of Missouri, a bankruptcy judge determined that a pro se debtor was too incompetent to proceed with her defense and appointed a guardian ad litem.²⁷

Sometimes a party's mental illness affects or disrupts the court proceedings. In cases involving disruptive litigants, courts have used their contempt powers to bar parties from the courthouse,²⁸

have sanctioned litigants for frivolous pleadings and appeals,²⁹ and have enjoined further filings.³⁰

Paranoid pro se debtors also present problems, especially for the clerk's office. These individuals are best dealt with by one designated person to eliminate conflicting stories and to reduce accusations of conspiracy. It is also a form of damage control, as those with severe paranoia are often abusive and tend to accuse those they come in contact with of improper conduct. Courts may be tempted to allow paranoid pro se litigants to appear by telephone, but that is not a good idea because these individuals are so suspicious of everyone that if they cannot see what is happening, they will assume that their rights are being violated.

A Lawyer's Obligation when Opposing Counsel Suffers from Mental Illness

An interesting, and not easily answered question, is what should an attorney do when opposing counsel is mentally ill and that illness adversely affects the representation provided by that lawyer? Should the attorney report counsel's mental illness to the opposing party? to the State Bar? to the court? May the attorney report opposing counsel's mental illness to the PALS or FRIENDS programs? These are troubling questions for which the Revised Rules of Professional Conduct for the North Carolina State Bar (1997) do not provide ready answers.

The Preamble to the Revised Rules of Professional Conduct states that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the same time, assume that justice is being done."³¹ According to the Preamble it is a lawyer's duty "to uphold legal process[.]"³² and a lawyer "should also aid in securing their [observance of the Revised Rules, including the Rule 1.1(a) competency requirement] by other lawyers."³³ The Preamble also instructs that "[n]eglect of these responsibilities compromises the independence of the profession and the public interest which it serves."³⁴ A lawyer reading the Preamble might conclude that justice is not being done when opposing counsel is mentally ill and that there is an obligation to do something to correct the situation. However, what the attorney should or could do is not clear.

Rule 1.1 requires that a lawyer be competent to handle a client's representation. If a lawyer's mental illness renders the lawyer incompetent, the lawyer is in violation of Rule 1.1, and opposing counsel may have an obligation under Rule 8.3(a) to report the violation to the North Carolina State Bar or to the court.³⁵ However, Rule 8.3(c) provides that disclosure is not required if the information is "otherwise protected by Rule 1.6."³⁶ Rule 1.6(c) provides that "confidential information" may not knowingly be revealed to the disadvantage of the client. "Confidential information" is broadly defined in Rule 1.6(a) and, according to the comment to that Rule, "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."³⁷ A staff attorney at the State Bar has observed that the duty of confidentiality under Rule 1.6 "trumps" the obligation to report under Rule 8.3(c) and that "[s]ince the information about the impaired lawyer arose during the representation of a client, it is confidential information that the lawyer may only disclose with the consent of the client."³⁸

Rule 3.4, titled "Fairness to Opposing Party and Counsel," includes a list of prohibitions, but does not include a prohibition against representing a client when opposing counsel is incompetent due to mental illness.³⁹ Furthermore, an attorney would be prohibited by Rule 4.2(a) from communicating with an opposing party who is represented.

This is a difficult question that is not limited to bankruptcy cases and is one that would be a proper subject for review by the State Bar.⁴⁰

Mental illness issues are arising with more frequency as the public becomes more familiar with

the disorders and their symptoms. Attorneys and the courts need to be aware of the illnesses and their many implications.

A. Thomas Small has served as a United States Bankruptcy Judge for the Eastern District of North Carolina since 1982 and is the immediate past president of the National Conference of Bankruptcy Judges. Judge Small wishes to express his appreciation for the assistance of his staff attorney, Pam McAfee.

Endnotes

1. Andrew Solomon, Case Study: The Depressed Poor, Location: Washington D.C., A Cure for Poverty, THE NEW YORK TIMES MAGAZINE 112, May 6, 2001, at 114.

2. A major depression is a sustained period (at least two weeks) during which an individual experiences a depressed mood or a loss of interest or pleasure in most or all activities. During this period the individual may also exhibit other symptoms of depression. Twice as many women as men suffer from major depression. According to the Diagnostic and Statistical Manual of Mental Disorders: Fourth Edition ("DSM-IV"), as cited in the Federal Judicial Center's Handbook for Working with Mentally Disordered Defendants and Offenders (FJC Revised March 1999), "[f]or a diagnosis of major depression, at least five of the following symptoms must have been present every day, or almost all day, over a two-week period. These symptoms will represent a change from previous functioning. A depressed mood, loss of interest or pleasure, or both will be among the symptoms.

- Depressed mood
- Disinterest or lack of enjoyment in usual activities
- Significant weight loss or weight gain when not dieting
- Insomnia or increased need for sleep (hypersomnia)
- Psychomotor agitation or psychomotor retardation
- Fatigue or loss of energy
- Feelings of worthlessness or excessive or inappropriate guilt
- Diminished concentration or ability to think clearly
- Recurrent thoughts of death, or suicidal thoughts, attempts, or plans."

FJC Handbook at 21.

3. "Individuals with bipolar disorders suffer one or more manic episodes, usually accompanied by one or more major depressive episodes. With manic-depressive illness, mood swings are sometimes separated by periods of normal mood. Equally prevalent in men and women, bipolar disorder affects an estimated 0.4% to 1.2% of the adult population." FJC Handbook at 23. According to the DSM-IV, the diagnostic criteria are the same for the depressive episodes, while the manic episodes consist of

A distinct period of abnormally and persistently elevated, expansive, or irritable mood lasting for at least one week has occurred.

During a period of mood disturbance, at least three of the following symptoms have persisted and have been present to a significant degree:

- grandiosity, inflated self-esteem;
- decreased need for sleep;
- increased talkativeness;

- flight of ideas or racing thoughts;
 - distractibility, i.e., attention is too easily drawn to unimportant or irrelevant external stimuli;
 - increase in goal-oriented activity (either socially, at work, at school, or sexually), or psychomotor agitation; or
 - excessive involvement in pleasurable activities, with a lack of concern for the high potential for painful consequences, such as buying sprees, foolish business ventures, reckless driving, or casual sex.
- Mood disturbance is severe enough to cause marked impairment in occupational or social functioning or to necessitate hospitalization to prevent harm to others.

FJC Handbook at 23.

4. 43 B.R. 319 (Bankr. E.D.N.C. 1984).

5. The creditor's objection to confirmation was denied. The debtor in fact was able to retain his employment and is still employed by the postal service 18 years later.

6. 11 U.S.C. §§ 523(a)(8), 727(b), 1141(d)(2), 1228(a)(2), and 1328(a)(2). The test for determining "undue hardship" under § 523(a)(8) requires a three part showing: (1) that the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period for student loans; and (3) that the debtor has made good faith efforts to repay the loans. *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987).

7. 42 U.S.C. § 294(g). "Unconscionability" is a higher standard than "undue hardship" under 11 U.S.C. § 523(a)(8). *United States v. Wood*, 925 F.2d 1580, 1583 (7th Cir. 1991).

8. *Lohr v. Sallie Mae (In re Lohr)*, 252 B.R. 84 (Bankr. E.D. Va. 2000) (partial discharge of student loans granted where physical and mental health issues caused significant medical costs under § 523(a)(8)); *Anelli v. Sallie Mae Servicing Corp. (In re Anelli)*, 2000 WL 33311723 (Bankr. D. Mass. 2000) (series of illnesses, including depression, constitute undue hardship under § 523(a)(8)); *Doherty v. United Student Aid Funds, Inc. (In re Doherty)*, 219 B.R. 665 (Bankr. W.D.N.Y. 1998) (debtor's bipolar disorder was factor in determining undue hardship under § 523(a)(8)); *Binder v. United States Dep't of Educ. (In re Binder)*, 54 B.R. 736 (Bankr. D. N.D. 1985) (mental and emotional problems including bipolar disorder for which debtor refuses treatment prevent debtor from being employed and student loan discharged under § 523(a)(8)); *Meling v. United States Dep't of Education (In re Meling)*, 2001 WL 670832 (Bankr. N.D. Iowa 2001) (long history of bipolar disorder resulted in inability to maintain more than part-time, low stress employment and student loan discharged under § 523(a)(8); court also finds some of other debt incurred due to mental illness); *Kline v. United States (In re Kline)*, 155 B.R. 762 (Bankr. W.D. Mo. 1993) (debtor's chronic depression, panic and anxiety attacks were factors in determining that HEAL loan was dischargeable); *In re Dyer*, 40 B.R. 872 (Bankr. E.D. Tenn. 1984) (student loans discharged based on debtor's anxiety, agoraphobia, and panic attacks); *In re Nichols*, 15 B.R. 208 (Bankr. D. Me. 1981) (student loans discharged based on debtor's unspecified psychiatric disorders and related alcohol problems); *Williams v. Illinois Student Assistance Comm'n (In re Williams)*, 1999 WL 1134772 (Bankr. E.D. Pa. 1999) (debtor's drug addiction was factor in determining undue hardship under § 523(a)(8)); *Harris v. Unipac Serv. Corp. (In re Harris)*, 198 B.R. 190 (Bankr. W.D. Va. 1996) (debtor's cocaine dependency was factor in determining undue hardship under § 523(a)(8)).

9. *Burgess v. Bank One Cleveland, N.A. (In re Burgess)*, 204 B.R. 521 (Bankr. N.D. Ohio)

(debtor's unsubstantiated depression not grounds for undue hardship under § 523(a)(8)); *Gearhart v. Clearfield Bank & Trust Co.* (In re Gearhart), 94 B.R. 392 (Bankr. W.D. Pa. 1989) (unsubstantiated defense of "shot" nerves did not establish undue hardship under § 523(a)(8)); *Mitchell v. United States Dep't of Educ.* (In re Mitchell), 210 B.R. 105 (Bankr. N.D. Ohio) (debtor's unsubstantiated depression not grounds for undue hardship under § 523(a)(8)).

10. See endnote 6.

11. *Binder v. United States Dep't of Educ.* (In re Binder), 54 B.R. 736 (Bankr. D. N.D. 1985).

12. *Binder* at 740; see also *In re Dresser*, 33 B.R. 63 (Bankr. D. Me. 1983) (student loan discharged even though debtor's psychiatrist testified that he could possibly improve in a year).

13. *In re Keefe*, 7 B.R. 270 (Bankr. E.D. Va. 1980).

14. *Golden & Mandel v. Angeli* (In re Angeli), 216 B.R. 101 (Bankr. E.D.N.Y. 1997); but see *Massaro v. Massaro* (In re Massaro), 235 B.R. 757 (Bankr. D.N.J. 1999) (court rejected the debtor's unsubstantiated claim of depression and did not find excusable neglect).

15. *Kemba Roanoke Fed. Credit Union v. St. Clair* (In re St. Clair), 193 B.R. 783 (Bankr. W.D. Va. 1996) (depressed debtor did not have intent to hinder, delay or defraud creditor under § 723(a)(2)(A) and did not have intent to make a false oath under § 723(a)(4)(A)).

16. *Dutreix v. Fontenot* (In re Fontenot), 89 B.R. 575 (Bankr. W.D. La. 1988).

17. *Wegmans Food Mkt., Inc. v. Smith* (In re Smith), 207 B.R. 403 (Bankr. W.D.N.Y. 1997) (drug addicted debtor's debts from bad checks were nondischargeable under § 523(a)(2)(A)); *City Loan Bank v. Nechovski* (In re Nechovski), 1987 WL 109003 (Bankr. S.D. Ohio 1987) (alcoholic compulsive gambler's debts nondischargeable under § 523(a)(2)(A)); *McManus v. McManus* (In re McManus), 112 B.R. 773 (Bankr. E.D. Va. 1990) (drug addiction did not excuse failure to retain records or to explain losses under § 727(a)(3) and (a)(5) and did not excuse making a false oath under § 727(a)(4)(A)); *Dolin v. Northern PetroChemical Co.* (In re Dolin), 799 F.2d 251 (6th Cir. 1986) (drug addiction and compulsive gambling did not excuse failure to retain records or to explain losses under § 727(a)(3) and (a)(5)); *Pacific W. Bank v. Johnson* (In re Johnson), 68 B.R. 193 (Bankr. D. Or. 1986) (unsubstantiated alcoholism did not excuse failure to explain loss of assets under § 727(a)(5)); *Sicherman v. Murphy* (In re Murphy), 244 B.R. 418 (Bankr. N.D. Ohio 2000) (anger, anxiety, and depression not adequate explanation for loss of \$54,000 during drinking and gambling spree under § 523(a)(2)(A)). But see *Hutzelman v. Luhman* (In re Luhman), 146 B.R. 163 (Bankr. W.D. Pa. 1992) (drug addict debtor was not denied discharge under § 727(a)(3) and (a)(5)); *Williams v. Illinois Student Assistance Comm'n* (In re Williams), 1999 WL 1134772 (Bankr. E.D. Pa. 1999) (debtor's drug addiction was factor in determining undue hardship under § 523(a)(8)); *Harris v. Unipac Serv. Corp.* (In re Harris), 198 B.R. 190 (Bankr. W.D. Va. 1996) (debtor's cocaine dependency was factor in determining undue hardship under § 523(a)(8)).

18. Adv. Pro. No. L-01-00069-8-AP (Bankr. E.D.N.C. Jan. 15, 2002).

19. *Collier v. Hamilton* (In re Hamilton), Adv. Pro. No. S-99-00042-5-AP (Bankr. E.D.N.C. October 6, 2000).

20. *Burgess v. Bank One Cleveland, N.A.* (In re Burgess), 204 B.R. 521 (Bankr. N.D. Ohio 1997) (debtor's unsubstantiated depression not grounds for undue hardship under § 523(a)(8)); *Signet*

Bank/Virginia v. Borrer (In re Borrer), 132 B.R. 194 (Bankr. M.D. Fla. 1991) (debtor's claim of depression unsubstantiated and credit card debt nondischargeable under § 523(a)(2)(A) and (B)); Mitchell v. United States Dep't of Educ. (In re Mitchell), 210 B.R. 105 (Bankr. N.D. Ohio 1996) (debtor's unsubstantiated depression not grounds for undue hardship under § 523(a)(8)).

21. In re Mayer, 198 B.R. 116 (Bankr. E.D. Pa. 1996)(debtor denied mental illness and refused to see court-appointed medical expert but court, based on its observation of debtor's conduct, found debtor to be severely mentally ill and held that student loan was dischargeable under § 523(a)(8)); Kemba Roanoke Fed. Credit Union v. St. Clair (In re St. Clair), 193 B.R. 783 (Bankr. W.D. Va. 1996) (depressed debtor did not have intent to make a false oath under § 723(a)(4)(A)).

22. In re Brightful, 1999 WL 1024516 (Bankr. E.D. Pa. 1999), aff'd, 1999 WL 812791 (E.D. Pa. 1999), rev'd, 267 F.3d 324 (3d Cir. 2001).

23. In re Brightful, 267 F.3d 324, 330 (3rd Cir. 2001).

24. Doherty v. United Student Aid Funds, Inc. (In re Doherty), 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998).

25. Dr. Jay C. Williams, a psychotherapist and clinical social worker, who practices in Chapel Hill and who teaches at the University of North Carolina at Chapel Hill, has been instrumental in establishing this program. Dr. Williams and Judge Small have made presentations on the subject of bankruptcy and mental illness for the Federal Judicial Center, the North Carolina Bar Association, and the Eastern [North Carolina] Bankruptcy Institute.

26. Comments of Dr. Jay C. Williams at the Eastern Bankruptcy Institute, Bankruptcy and Depression, North Myrtle Beach South Carolina, May 31, 2002, manuscript at p. 65.

27. In re Moss, 239 B.R. 537 (Bankr. W.D. Mo. 1999).

28. In re North Jersey Trading Corp., 177 B.R. 814 (Bankr. D. N.J. 1995), appeal denied, 66 F.3d 312 (3rd Cir. 1995) (shareholder held in contempt and barred from courthouse, but permitted to attend hearing by telephone).

29. In re KTMA Acquisition Corp., 153 B.R. 238 (Bankr. D. Minn. 1993) (sanctions of \$10,000 imposed for pro se litigant's numerous pleadings containing irrelevant, unsubstantiated, and sensational factual and legal allegations); In re Arleaux, 229 B.R. 182 (8th Cir. BAP 1999) (\$100 sanction for frivolous appeal).

30. Martin-Trigona v. Lavien and Smith (In re Martin-Trigona), 737 F.2d 1254 (2nd Cir. 1984) (affirmed injunction prohibiting filing of abusive litigation); Robinson v. Jones (In re Robinson), 152 B.R. 743 (Bankr. E.D. Ark. 1993) (clerk directed to refuse adversary complaints submitted by debtor with history of abusing system).

31. Revised Rule 0.1[12].

32. Revised Rule 0.1[4].

33. Revised Rule 0.1[15].

34. Id.

35. Revised Rule 8.3(a) provides that “[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the North Carolina State Bar or the court having jurisdiction over the matter.”

36. Revised Rule 8.3(c).

37. Comment to Revised Rule 1.6.

38. E-mail from Alice Neese Mine of the North Carolina State Bar to Pam McAfee, Staff Attorney to Judge Small (May 20, 2002). The E-mail is the opinion of Ms. Mine and is not an official opinion of the State Bar.

39. Revised Rule 3.4

40. In a criminal case the obligation of the prosecutor may be different than that of an attorney in a bankruptcy or civil case. Revised Rule 3.8(b).

Impeaching North Carolina Supreme Court Justices a Hundred Years Ago

By Robert Dick Douglas Jr.

There have been conflicts in North Carolina among different divisions of government, executive, legislative, and judicial, but none more openly aggressive than the confrontation between our General Assembly and our Supreme Court at the end of the 19th century: strong, hard politics.

Many offices had been established by democratic legislatures over the years, and new ones during the brief period of republican strength. However, the republican period had resulted in members of that party holding office by appointment or election. In 1899, when a democratic legislature was enjoying its strength, it decided to get rid of such republican office holders, with unexpired terms, and replace them with loyal members of the party in power.

The plan: enact legislative bills abolishing many departments, units, and bodies, getting rid of the incumbents; then reestablish the offices to be filled by appointed or elected democrats. Of course, any such objective was denied, and if the desired result could be accomplished, it was "the will of the people." A number of the displaced incumbents went to Court and several suits found their way to the North Carolina Supreme Court in the late 1890's.

The legal issue began with *Hoke vs. Henderson*, 15 NC 1 (1833). That case was decided by Justices Thomas Ruffin, Joseph Daniel, and William Gaston, all democrats, able men venerated by their profession in later years.

The *Hoke* case, in a unanimous decision, held that when a man was appointed or elected to public office for a term of years, he had property right to his office. The plaintiff, *Hoke*, had been elected clerk of the court of Lincoln County under an act of 1832, but the defendant, *Henderson*, had been previously appointed Clerk under an act of 1806.

The North Carolina Constitution provided for a clerk of the court in each county. In 1806, the Legislature called for the appointment to be filled by the appointing judge and held "during good behavior." In 1807, *Henderson* was so appointed and was still performing his duties in 1832, when the new act changed the office of clerk from appointive to elective. *Hoke* was elected in 1832 and demanded that *Henderson* remove himself from the office.

The Court said that the defendant had an estate (property right) in his office, and although the Legislature may destroy the office, and by consequence, the estate in it, the 1832 Act did not do away with the position. It continued the office of clerk of the court but transferred the estate to another, and therefore the Act is unconstitutional and void.

The *Hoke* case was cited as to property rights over the years in minor cases, and never questioned; not until 1897 did a legislative act challenge the *Hoke* rule.

In 1897, our Supreme Court was composed of William T. Faircloth, Chief Justice, republican; Walter A. Montgomery, democrat; Walter Clark, a very ardent democrat; David M. Furchess, republican; and Robert M. Douglas, republican.

This Court heard the case of *Wood vs. Bellamay*, 120 NC 212 (February term 1897). The facts were not in dispute. In 1858, the General Assembly had established a State Hospital for the Insane, to be administered by a superintendent, advised by a board of directors. In 1897, the democrat Legislature changed the name of the hospital, changed the office of superintendent to a resident physician, and substituted a Board of Trustees to replace the directors. Other than these

changes, everything remained the same, by an act stating that the old act was being amended.

The new superintendent and the trustees sued to take over under the 1897 Act and the Supreme Court reached a decision in February 1897. The unanimous opinion, written by Justice Montgomery, democrat, said:

Whatever the law may be in other states, it is settled beyond question in North Carolina that a public office is property, is a vested right, exists by contract between the state and the holder, and that as long as the office is continued, the holder cannot be deprived of his term against his consent, unless he has committed some acts which works a forfeiture. We have no desire to disturb the decisions of our court on this subject. They are founded on principles of justice and of safe public policy . . . It is undoubtedly the law in North Carolina that an office can be abolished, and as a result, the officer loses his office and his property in it. This is no breach of contract on the part of the state. The holder accepted the office subject to this contingency. No one could contend that, because an office was in the estimation of the Legislature useful and necessary at the time of its creation, such an office would continue to be forever a public necessity. If an office once useful should become useless and an unnecessary charge upon the people, it is not only the right of the Legislature to abolish it, but it is its duty to do so.

Apparently *Wood vs. Bellamay* blunted the political plans of the General Assembly for a while, at least until 1899, when that democratic body resolved to try again to clean out certain republican office holders. As soon as legislative acts cleared the Legislature, new suits arose, filed by a newly appointed officer as plaintiff, or by the incumbent ousted officer as plaintiff, and several cases reached the Supreme Court in record time. In the following cases, the facts were stipulated by the parties or found by a lower court and affirmed on appeal. It is interesting to observe that the Legislature, faced with *Wood vs. Bellamay* on amending a previous law, decided to try a different approach and use the word "abolish."

In *Day vs. State Prison*, 124 NC 362, the plaintiff had been appointed by the governor as superintendent of the North Carolina State Prison, a position created by earlier legislation. On January 26, 1899, the General Assembly stated that it was abolishing the position of superintendent, and the same act declared that all the functions of the Superintendent were immediately transferred to a Board of Directors. Superintendent Day brought suit.

In *Wilson vs. Jordan*, 124 NC 685, an act of 1895 had created a Criminal Circuit Court for Buncombe, Madison, Haywood, and Henderson Counties, and the plaintiff was elected clerk of such court. On February 27, 1899, the Legislature passed an act to abolish the Criminal Circuit Court in the counties. On March 3, 1899, a new Act established a Western District Criminal Court and provided that all cases then pending in the abolished court would be transferred to the new court, with a new clerk to be elected to replace the republican incumbent.

In *Greene vs. Owen*, 125 NC 212, the Court found that an act of 1897 had established a Board of Education for Davidson County, and members of the board had been elected. In 1899, the Legislature abolished the Board of Education and the next day established a Board of School Directors to be appointed by the Legislature. There were no changes made as to the duties of the board.

Abbot vs. Beddingfield, 125 NC 256, considered the following facts. In 1891, the General Assembly has created a Railroad Commission (chapter 320) and subsequently greatly enlarged its duties. The plaintiff in the *Abbot* case had been elected a commissioner in March 1897 for a six-year term.

On March 6, 1899, a new act of the Legislature "abolished" the Railroad Commission. The same

day, the Legislature established a North Carolina Corporation Commission, and said that the new commission should “perform all the duties and exercise all the power confirmed by chapter 320 of the Public Law of 1891 and the amendments thereto.”

In *White vs. Hill*, 125 NC 194, the Court examined the facts, stating that in 1897, the Legislature had passed a law to promote the oyster industry, and the governor had appointed the plaintiff as chief oyster inspector. In 1899, the Legislature set up a Shellfish Commission, and although the act repealed the statute under which the plaintiff was appointed chief inspector, the 1899 act was the same in substance as the former act.

In the *White* case, written by Chief Justice Faircloth, the court said:

The statement presents the questions so frequently presented to this Court in recent years, that is, whether the act relied upon by the new claimant is amendatory of a previous act, under which the other claimant asserts title, or whether it is an absolute repeal and substitution of a new system or scheme for the government and regulation of the same subject matter. As the argument and reasons have been so often stated by this court, we deem it unnecessary to repeat them. We may say, however, that it is well settled that an office is property, that the Legislature may abolish an office of its own creation; that it may, when not in conflict with the organic law, increase or diminish the duties of an officer; but it cannot, as long as the office remains, deprive the officer of the material part of his duties and emoluments, and that the oath and salary are the incidents of an office, but no part of its duties.

In all these 1899 cases, the political aims of the Legislature were thwarted by the politically divided Court, which refused to change its judicial position.

The *Wood vs. Bellamay* decision was written by Justice Montgomery, a democrat, with no dissent, even from Walter Clark (you will see later why this remark was made). Justice Montgomery said:

There is no change as to duties, rights, or power. There is nothing in the new Act but the same old office with changed names, with the same duties, rights, and privileges as were provided under the old law.

In *Day vs. State Prison*, Justice Montgomery, democrat, wrote the unanimous opinion of the Court.

No function or duty that was formerly performed or imposed upon the superintendent was abolished. The functions and duties of that office are still necessary to the public welfare. They have not been abolished; they have simply been transferred to others. That cannot be done according to the law of the land (citing *Wood vs. Bellamay* and *Hoke vs. Henderson*). All the reported cases from *Hoke vs. Henderson* down to and including *Wood vs. Bellamay*, hold that to have the effect of ousting the incumbent before his term expires, the office must be abolished. It is not sufficient to declare that it is abolished when it is not abolished. The discussion comes down to this: Are the duties of the office of the defendant held abolished or are they transferred to others?

In *Wilson vs. Jordan* (changing the name of the criminal court), Justice Furchess, republican, gave the opinion of the Court, holding that the criminal court of the western counties had not been changed, simply renamed, and the previous Clerk still held his job. Justice Furchess had one very interesting comment to make.

It has been suggested by a member of this Court, that the Legislature has the power to impeach a judge, and there is no appeal from its judgment. Such a suggestion as this has never occurred in the history of this court until now. This suggestion added nothing to the strength of the

argument advanced for the defendant. Why it should have been made, we do not know. But remembering our position as members of this court, we will not express our sentiments as to such suggestions, and we only say that, in our opinion, any member of any court who would allow himself to be influenced by such suggestions, is unfit to be a judge. Justice Clark dissented in a lengthy opinion.

In *Wilson*, Justice Douglas, concurring, said:

Again we are now told, but not by counsel, that we are liable to impeachment. Of course we are. No man in this country is above the law. And as, holding the supreme judicial power, we cannot try ourselves nor try each other for our judicial acts, there must be some tribunal to which we are amenable. I am sure there is no member of this court who would have it otherwise; and while we would scorn to let the fear of possible consequences influence our action in the slightest degree, we shall ever be ready to answer before any legitimate tribunal and meet the fullest consequences of our deliberative acts.

(Clark's strongest and most interesting dissent was made in *Abbot vs. Beddingfield*, and will be explained subsequently.)

In a concurring opinion in *Abbot*, Justice Douglas, aware that Justice Clark had asked what was so sacred about the *Hoke vs. Henderson* case, asked why it should be less sacred now than two years ago, when it had received the unanimous endorsement of the court in *Wood vs. Bellamay*.

At the beginning of his concurring opinion, Douglas explained the general idea of concurring, in a way not seen in any other decisions.

In view of the number of important cases involving the title of office which we have been called upon to decide under the principles laid down in *Hoke vs. Henderson*, I deem it proper to define my position in a concurrent opinion, where I have greater latitude of expression than I would feel justified in using as the mouthpiece of the Court. I believe it is the unquestioned right of a judge to express, in a fair and respectful manner, his dissent or concurrence upon every question that may come before the Court of which he is a member, and this right I shall not hesitate to exercise within the limitations of my judgment and my conscience. In fact I always prefer to give expression of my individual views in a separate opinion rather than inject them into an opinion of the Court where they are unnecessary for its determination, and thus force my brethren, who freely concur in the result, into an apparent concurrence in dicta that may not fully meet their approval. There is also danger that such dicta appearing in the opinion of the court may subsequently be mistaken for the decision of the Court.

Douglas said further, after commenting on the conflict between the Legislature and the Court,

We realize the responsibilities of this Court in settling this line of demarcation between the legislative, executive, and supreme judicial powers, which, by constitutional obligations, must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand, free from the palsied touch of interest or subserviency and the itching grasp of power.

It should be noted that Justices Furchess and Douglas, the two who commented on the threat from another member of the Court that they might be impeached, were impeached in 1901.

In *Greene vs. Owen*, Douglas wrote the opinion of the court in which he said:

The only restriction upon the Legislature's power is that after the officer has accepted office upon

the term specified in the act creating the office, this being a contract between him and the state, the Legislature cannot run him out by an act purporting to abolish the office, but which in effect continues the same office in existence. This was held in *Hoke vs. Henderson* and has ever since been followed in North Carolina down to and including *Wood vs. Bellamay*, although this state is the only one of the 45 states of the Union which sustains that doctrine.

The Court held that the previous members of the Board of Directors of the Davidson County Board of Education were entitled to retain their jobs. Justice Clark dissented as to one particular director on individual grounds concerning the method of his election. The case of *Abbot vs. Beddingfield*, *supra*, concerning the Railroad Commission and the North Carolina Corporate Commission, gave two of the justices an opportunity to express themselves. Justice Furchess wrote the opinion holding that the railroad commissioners had not been ousted by the change of title of the commission.

After repeating the general rule of *Ward vs. Bellamay*, Furchess said:

An act is not repealed by the Legislature's saying it is repealed, when the same act or contemporaneous act shows it is not repealed and it is established to be the law of this state that contemporaneous legislation about the same subject matter is in *pari materia* and may be read and construed together.

This referred to one of the newer tactics of the Legislature in abolishing a particular office or position by one act, and waiting two or three days later to reestablish the body.

Black's Law Dictionary defines "in *pari materia*" as "the rule that statutes which relate to the same subject matter should be read, construed, and applied together, so that the Legislature's intent can be gathered from the whole of the enactments."

Justice Furchess said:

The first ground taken by the defendant was an attack on *Hoke vs. Henderson*. This we will not notice further than to say that if any doctrine can be firmly settled in this Court, it is said of *Hoke vs. Henderson*, which in our opinion is able to stand alone. But it certainly should be considered by the profession to be settled, when it appears that it has been cited with approval in more than 40 cases, and not a single decision of this Court to the contrary.

After all of these cases and more to come, it appears that Justice Furchess was ready to bring into the open what he considered to be the motives of the Legislature. He said:

It seems to us that no one can read the Acts of 1899, Chapter 506 and 164, without coming to the conclusion that it was not the purpose of the Legislature to abolish the Railroad Commission, the duties and functions of that institution or commission, but to change the officers holding and exercising the duties and functions of the commission. And in saying this we must not be understood as criticizing the action of the Legislature or imputing its motive in passing these acts. We have no doubt but that those voting for these acts thought they had the right to do this, and to put the office the relator held, in the hands of a party in harmony with the political sentiment of that party in which controlled the Legislature, and that they thought this legislation constitutional, or that they were at the time inadvertent to the question of its constitutionality.

Justice Montgomery, loyal democrat, filed a concurring opinion which said:

I concur in the result but I do not wish to be bound by that part of the opinion in which is discussed the motives of the members of the General Assembly in the enactment of chapter 164

of the laws of 1899; nor do I think it is my part, in a judicial opinion, to make any explanations for them.

Apparently Chief Justice Faircloth had no problems in addressing the motives of the Legislature, concurring in the opinion.

Justice Clark wrote a blistering dissent, attacking Hoke vs. Henderson, questioning the Court's authority as to legislative acts, and declaring the Court to be unconstitutional in its decisions. He stated that it would be impossible for any court in the year 1899 to hold with Hoke vs. Henderson, if it were a new question brought up today. Justice Clark said:

Whence then does this Court get any power to declare null and void the statute abolishing the plaintiff's office or (even if it were true) placing the plaintiff in it. The state constitution not only does not protect the plaintiff in a legislative office, but forbids the court to stop the execution of any law. The United States Constitution, as uniformly construed by the highest court, does not protect him; for it says 'no office is a contract' but that all officers whose terms are not fixed by the Constitution may be changed or abolished at the will of the Legislature.

Clark stated that it had been called to his attention that Hoke had been cited 40 times. However, said Clark, "40 times 0 is 0 still." Clark said:

This Court has disavowed any intention to reflect upon the members of the General Assembly. With the same disavowal of any reflection upon my brethren, but with an equal right to my opinion, I think the Legislature has not acted unconstitutionally or beyond its powers, as construed by the highest court in the land, but that, on the contrary, it is this Court which has acted unconstitutionally and exceeded the powers confided to it, and in so doing has violated four separate sections of the guarantees given in the Bill of Rights.

Justice Douglas, in writing the opinion of the Court in Greene vs. Owen, had anticipated Justice Clark's attack on the Hoke case and in Greene he said:

The underlying principle of Hoke vs. Henderson has remained unchanged. It survived the wreck of southern institutions, weathered the storm of Civil War, escaped the iconoclasm of reconstruction, and stands before us hoary with age, but apparently fresh from the fountain of perpetual youth. Any of the state conventions might have adopted an ordinance or a constitutional amendment, certainly valid in its future operations, that all offices should be merely public agencies, held at the will of the creative principal or at the will of the Legislature if of legislative creation or at the will of the people if of constitutional provision. This kind of language seems to have gone out of fashion, but it is interesting to find it in opinions a hundred years ago.

In White vs. Hill supra, where the Legislature had substituted the Shellfish Commission for the oyster inspection body, Justice Faircloth wrote the opinion:

Are the provisions of the Act of 1899, Chapter 19, establishing the Shellfish Commission, the same in substance as those in the Act of 1897, Chapter 13, promoting the oyster industry in North Carolina? A careful reading shows that they are. The name, the methods, and the details are different but the same general object is found in both acts. The Act of 1899, Chapter 18, expressly provides for the amendment of certain sections of the act of 1897.

In this 1899 legislation, the General Assembly came up with a new idea, forbidding payment of salary to any shellfish officer who was not acting specifically under the 1899 act.

Even though the Court had ruled that the chief oyster inspector still held his job without being removed by the shellfish commission legislation, the state auditor refused to pay the plaintiff, White, and he had to bring suit against the state auditor.

In *White vs. Ayre, State Auditor and Worth State Treasurer*, 126 NC 570 (1900), Justice Furchess, who had written the *White vs. Hill* opinion, wrote the opinion stating that the job of White had not been abolished by the Shellfish Legislation Commission and therefore he was entitled to pay. Furchess stated that apparently the Legislature, thinking that it had abolished the position, added the legislation to the effect that no one holding under the old act could be paid, but he said that the Court had found the basic act to be unconstitutional and therefore the forbidding of pay was unconstitutional.

In *White vs. Auditor*, Montgomery joined Clark in a vigorous dissent, stating that although he had concurred in *White vs. Hill*, the Supreme Court had no right to order the state to pay anybody, job or no job.

The idea of impeaching the two republican justices (the third republican, Chief Justice Faircloth, had died late in 1900) had been gaining support in the General Assembly during the office-holding cases in 1899, when the republican Court majority had prevented the Legislature from ousting state officers with unexpired terms. The new case of *White vs. Auditor*, supra, gave the pro impeachment forces a new and slightly different basis. In the other cases, the justices had logic and some fairness on their side. In *White vs. Auditor*, there was not only the 1899 law which forbade payments to anyone not acting under the new law, but now a possible constitutional violation by the justices had come to light.

Article IV, Section 9 of the NC Constitution declared that the Supreme Court had jurisdiction of all claims against the state but its decisions shall be merely recommendatory; no process in the nature of execution shall issue, but shall be reported to the next session of the General Assembly for its action. In *White vs. Auditor*, the Court ordered the auditor to issue a payment warrant, and ordered the treasurer to pay the warrant. Here was not only an opportunity to rid the court of two republican justices, but to end the hateful court control in future office-holding legislation.

On February 1, 1901, a bill of impeachment was brought before the House, asking that David M. Furchess, chief justice, and Robert M. Douglas, associate justice, be impeached for high crimes and misdemeanors in office.

Chief Justice Faircloth had died the previous December and was not named in the resolution, but throughout the subsequent trial in the Senate, Faircloth was constantly mentioned as having been an accomplice of Furchess and Douglas.

The first day of the trial in the Senate was February 25, 1901. At the start, five separate counts were read. The first, and by far the strongest, declared that the two justices had ordered the auditor to pay the warrant, ignoring the Legislature's forbidding such payment; had usurped legislative authority in order to bring the General Assembly into disrepute, public scandal and disgrace; had caused the mandamus to be issued in contempt and defiance of the General Assembly and the North Carolina Constitution; and had continually nullified proper legislation by specious reasoning. The other four counts were directed at individual allegations in the first count.

Apparently there was some feeling in the House that the justices were decent men, not evil plotters. When the first of the house managers spoke, he said:

We have never contended that they (Furchess and Douglas) had the slightest personal interest in these matters, nor was there the slightest taint of personal corruption. We have charged them

with misconduct in their official capacity. It is well settled that where an unlawful act is done, the intent to do it is the guilty intent, notwithstanding the fact that the person doing the act may have honestly believed that he was acting within his right, and had no purpose to violate the law. They did an act forbidden by law. They sinned against light and knowledge. They cannot say that their motives were good. They did the act and they are guilty. You should decide whether the great constitutional safeguards shall remain, or whether they should be destroyed by these modern absurdities, the doctrine of Hoke vs. Henderson and the doctrine of In Pari Materia. They have usurped powers subversive of the rights of the legislative department of the state government and they have committed high crimes and misdemeanors in office.

In a subsequent speech for the prosecution, James H. Pou said:

This Court has set itself up to thwart the will of the representatives of the people, and has endeavored to clothe its acts with the form of legality. It has searched for an ancient precedent to justify its acts, and it has unearthed an ancient rule of construction, and by means of an old decision, the court has endeavored to paralyze the legislative branch of our government and to take over its functions. It has assumed the power to veto acts of the Legislature and to prevent other acts.

Another speaker said:

The Doctrine of In Pari Materia has been used in other jurisdictions to ascertain the intent of a Legislature. Here, the doctrine has become a means of reversing the legislative will.

One congressman representing the defense answered the allegation of the unconstitutional issue of the warrant for payment. He said:

This was not a claim against the state of North Carolina, wherein the power of the court is limited. It was merely a monetary demand by the Plaintiff White upon the state auditor for salary due him, not in dispute, from funds already collected from the oyster industry. It was not a claim against the state.

Another defendant representative pointed out that many of the office-holding cases had been decided by unanimous opinions, until Justice Clark started his series of dissents.

To set the stage, the first evidence introduced was Justice Douglas' oath of office in 1897, swearing to uphold the law and the Constitution of North Carolina and then offering proof directed toward showing that he had been guilty of moral turpitude by violating that oath.

About midway in the trial, Justice Clark was called as a witness, testifying that he had tried to influence Furchess and Douglas, to urge moderation, but they had run rough shod over his dissents. He had done his best to show that Hoke vs. Henderson was dangerous to the public service and must not be extended, but the republican justices had paid no attention to him. A subsequent witness, Justice Montgomery, democrat, said:

In the discussion of the office holder cases, as far as I know, the respondents approached them with painstaking and diligent research of the authority cited by counsel, with never a word reflecting on the Legislature; never a word except strictly pertaining to the arrival of a conclusion based on law and justice.

Cross examination of Montgomery by the defense revealed that not all were harmonious among the democrats. Montgomery admitted that he and Justice Clark had had sharp words for one

another in a Court conference. He said:

I said to him, Justice Clark the time has come for me to speak. Your dissenting opinions relative to these office holding cases have been so full of appeals to the people, so full of political leaning that I cannot hear to it. You have been at the bottom of the trouble the Court has had along these lines. The newspaper attacks have come from you and I know it.

Montgomery was asked about *White vs. Auditor*. He stated that if the question had come up on the bench, he would have referred to his dissent in that case but would have said that the Court's majority had spoken, and the plaintiff was due his writ of mandamus.

Later in the trial, the house managers put an expert witness on the stand who said that he had been a lawyer for 23 years, and they asked his opinion as to whether the decision in *White vs. Auditor* was correct. This brought an hour's argument on this proposed testimony but finally the president of the Senate ruled that expert opinion is never received to enlighten a court on a question of law.

On March 29, the prosecution called for a vote on the first count. Each senator was allowed three minutes to explain his vote although most did not do so. The vote was 27 guilty, 23 not guilty: short of the 2/3 vote required to convict.

Congressman Allen, speaking for the house managers, said that the first count was much the strongest of any of the five and did not achieve the 2/3 vote. Consequently, the managers had agreed to withdraw the other charges or have all vote unanimously not guilty on these; but several democrats objected and demanded a vote on all of the charges.

On the second charge, the vote was 24 guilty and 26 not guilty. The third count was 24 guilty 26 not guilty. On the fourth count it was 25 to 25. On the fifth count there were 16 guilty votes and 34 not guilty votes.

After the trial, Furchess and Douglas completed their elected terms on the Supreme Court.

In *Mial vs. Ellington*, 134 NC 131 (1903), an office-holding case similar to the 1897 and 1898 cases, a politically changed Supreme Court had its final say on *Hoke vs. Henderson* and openly reversed the 1833 case.

Justice Henry G. Connor, who had defended Furchess and Douglas in the impeachment proceedings, wrote the opinion. He made no effort to distinguish the new case. He simply said that the *Hoke* case was wrong from the beginning, was not logical, was not supported by authorities, and was not worthy of Ruffin, Gaston, and Daniels. He stated that *Hoke* was being expressly overruled.

Justice Clarke, in an concurring opinion, stated that for years he had said that *Hoke* was wrong. He said the case was being revoked and "the doctrine of private property in public office, started on its course by *Hoke*, will, like the ghost in *Hamlet*, 'no longer walk the earth to disquiet the peace.'"

Justice Montgomery dissented, saying that even if *Hoke* were wrong, it had been the law of North Carolina for 70 years, had not been undercut by more than 30 Legislatures, and had been left untouched by three constitutional conventions. He stated that such acceptance by the people of North Carolina should not be reversed out of hand.

Justice Douglas, also dissenting, praised the wisdom and integrity of the 1833 justices.

He said, "it has been intimated that these justices, like Homer, nodded occasionally. Even if Homer sometimes nodded, I have not heard of his going to sleep for 70 years. It remained for the Courts of North Carolina to make this more than a Rip Van Winkle nap. Now as we wake, we are being asked to say that these justices knew not whereof they spoke. Let this be said by those who may. It shall not come from me. I must rest in my ignorance, if such it be, in union with the deathless dead, content to be no wiser than Ruffin and no purer than Gaston."

Robert Dick Douglas Jr. is the grandson of Robert M. Douglas, one of the impeached justices. His great grandfather, Robert P. Dick, was on the North Carolina Supreme Court before the Civil War. Another great grandfather was Stephen A. Douglas, the Illinois Senator who debated Abraham Lincoln in 1858. Dick Douglas has practiced law in Greensboro since 1936.

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

By Thomas L. Fowler and Thomas P. Davis

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.

I. Recently Published Articles of Interest to North Carolina Attorneys¹

Sarah V. Corley, Uniform Mediation Act Approved by NCCUSL, 10 Disp. Resol. 11 (March 2002): After a four year collaboration between the NCCUSL and the ABA, the Uniform Mediation Act has been completed. "The act protects the confidentiality of mediation communications in subsequent legal proceedings and the integrity of the mediation process through required disclosures of conflict of interest and, upon request, the qualifications of the mediator." "The UMA . . . provides greater protection for the confidentiality of mediation communications than provided under current North Carolina law. Its potential adoption in North Carolina should be carefully evaluated"

Pamela A. Scott, Agency Final Decisions — On Time or Void?, 14 Admin. Law. 1 (May 2002): "Administrative agencies must issue their final decisions on time or risk having the administrative law judge's (ALJ) recommended decision become the final decision. This is the clear message from a series of North Carolina Court of Appeals opinions which recognize and strictly enforce the jurisdictional nature of the statutory time frame for agencies to issue final decisions in contested cases."

Special Issue: The Right to Privacy in North Carolina, 67 Popular Gov't (Spring 2002): This special issue contains many good articles, including Privacy and Public School Students, Privacy and the Courts, Privacy and Computer Security, Health Privacy, Employee Privacy and Workplace Searches, The Fourth Amendment, Privacy, and Law Enforcement.

Chief Judge Sidney S. Eagles Jr., Address from Chief Judge Eagles in Symposium: Caught in the Middle: The Role of State Intermediate Appellate Courts, 35 Ind. L. Rev. 457 (2002)

AOJ Task Force Takes Aim At Judicial Funding Crisis, N.C. Law. 1 (May/June 2002): The Bar Association's Administration of Justice Task Force has been "looking into what the NCBA could do to support the AOC's quest for additional funding," and has determined that the situation is serious. "Our courts, it appears, are struggling for survival." "[T]he core constitutional function of the courts is in jeopardy."

Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions By Appellate Courts, 69 Tenn. L. Rev. 245 (2002): The authors think decisions of such issues are "illegal and imprudent," as they are inconsistent with due process and the "American judicial system's reliance on the adversary process." Also, they are an abuse of discretion. When an appellate court identifies an issue not raised by the litigants, the authors recommend an order for supplemental briefing. If a court decides "a case on an issue that it raised without hearing from the parties, it should grant the losing party's request for rehearing as a matter of right" "Third, if a court chooses not to grant a rehearing, attorneys in subsequent cases should argue that the sua sponte decision should, like dicta, be given lesser deference as precedent" Finally, "appellate courts should identify when they are issuing a sua sponte decision and, if they fail to do so, dissenting or concurring judges and justices should indicate this in their opinions."

Edward J. Imwinkelreid, The Historical Cycle in the Law of Evidentiary Privileges: Will

Instrumentalism Come into Conflict with the Modern Humanistic Theories?, 55 Ark. L. Rev. 241 (2002): The author describes the early humanistic rationale for privileges as such: "the privilege was a means of enabling the attorney to comply with his or her code of honor and professional ethics. The thought was that evidence law should not require the attorney to do what professional or social ethics forbade the attorney from doing." "In the 1700's, the courts started to modify the stated justification for recognizing evidentiary privileges." "[T]he courts articulated a new instrumental or consequentialist rationale." "The rationale rested on the factual assumption that unless prospective and actual clients had the assurance of an evidentiary privilege, they would either altogether refrain from consulting an attorney or withhold necessary information from the attorney." "Just as instrumentalism developed against the backdrop of an early, dominant humanistic theory, new humanistic theories are making their debut today . . ." These new theories "all are based on the interests of the layperson consulting the third party. The basis is either the layperson's general privacy right, his or her right to informational privacy, or his or her right to autonomy or decisional privacy. In the final analysis, each theory represents an effort to vindicate some interest of the layperson rather than of the consultant."

Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia's Fourth Amendment*, 79 Wash. Univ. L.Q. 1013 (2001): Beneath its surface, *Kyllo* is important because it vindicates Justice Scalia's view of the Fourth Amendment in two ways. First, *Kyllo* endorses Justice Scalia's criticism of the Katz test [which "has come to mean the test enunciated by Justice Harlan's separate concurrence" that "government conduct is a search when it interferes with an individual's reasonable expectation of privacy"]. Second, *Kyllo* continues the Court's trend of narrowing the class of cases in which warrantless searches are presumptively invalid. Although these developments do not totally vindicate Justice Scalia's view of the Fourth Amendment, they produce a Fourth Amendment that differs dramatically from the one that existed when he joined the Court."

Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies from Wisconsin*, 85 Marq L. Rev. 593 (2002): The authors study 11 judicial elections in Wisconsin in 1999, including the memorable election of incumbent Chief Justice Shirley S. Abrahamson. The race for chief justice was particularly memorable: it "marked the first time that Wisconsin judicial candidates' combined expenditures exceeded one million dollars;" "a majority of the court criticized Abrahamson's administration of the court system;" and half her colleagues on the bench "made the extraordinary move of explicitly endorsing Abrahamson's opponent." "One of the more robust observations available from this study is that print media coverage of the elections tended to be dominated by whatever issues the candidates in a particular race brought to the forefront. In other words, it is evident that newspapers in the state did not devote substantial resources toward accumulating information about the judicial races . . ." "A summary overview of our study suggests that while a fair amount of information about judicial candidates is made available to voters, that information still seems to lack the educative component needed to overcome the general public ignorance that we have little doubt exists concerning judicial officeholders and judicial elections."

II. Jurisprudence Beyond Our Borders²

Rendon v. Valleycrest Productions, Ltd., ___ F.3d ___ (11th Cir. filed June 18, 2002): Plaintiffs alleged that defendants violated the Americans with Disabilities Act (ADA) by operating a telephone selection process that screened out disabled individuals who wished to be contestants on the show "Who Wants To Be A Millionaire" (Millionaire). Plaintiffs alleged they could not register their entries to compete on Millionaire by calling the automated hotline, either because they were deaf and could not hear the questions on the automated system, or because they could not move their fingers rapidly enough to record their answers on their telephone key pads. The district court dismissed Plaintiffs' complaint, finding that the automated selection process was not a place of "public accommodation" under the ADA. The Court of Appeals held that the contestant

hotline was a discriminatory procedure that screened out disabled persons aspiring to compete on Millionaire, a place of public accommodation. Defendants had contended that the Millionaire contestant hotline could not serve as the basis for an ADA claim because it was not itself a public accommodation or a physical barrier to entry erected at a public accommodation. The Court disagreed, noting that the definition of discrimination provided in Title III covered both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services, and privileges, and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services, and privileges. "There is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA."

Sharon v. City of Newton, 769 N.E.2d 738 (Mass. 2002): In a case of first impression, the court considered the question of the validity of a release signed by the parent of a minor child for the purpose of permitting her to engage in public school extra-curricular sports activities. In 1995, 16 year old Merav Sharon was injured while participating in a cheerleading practice at her high school. Merav fell from a teammate's shoulders while rehearsing a pyramid formation cheer and sustained a serious compound fracture. In 1998, having reached the age of majority, Merav filed suit against the city of Newton, alleging negligence. The city answered and offered a document entitled "Parental Consent, Release from Liability, and Indemnity Agreement" signed by Merav and her father in August 1995, approximately three months prior to the injury. The trial court granted summary judgment for defendants. The Supreme Judicial Court reversed, holding that parents may execute an enforceable preinjury release on behalf of their minor children. The Court noted that Merav's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons. He made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. "In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts."

State v. Costello, 646 N.W.2d 204 (Minn. 2002): Defendant was charged with DUI. Before trial began, the district court informed the parties of its intention to allow jurors to question witnesses during the trial. Defendant lodged a blanket objection to the practice. The court informed the jury: "In this trial you will be allowed to submit questions for the witnesses. This is a procedure that I'm applying on a case by case basis, so if you're in another trial, you may not be provided this opportunity. If you have a question for a particular witness, you must write it down. ... But I also want to stress that it's not necessary for you to ask any questions, and I've had more than one trial where not one question was asked by a juror. All right? So, just an opportunity, that's all it is." At trial several questions posed by jurors were asked of witnesses. Defendant was convicted. On appeal, the court of appeals affirmed, concluding that the practice of allowing juror questioning was within the district court's trial-management authority and would be reviewed on a case-by-case basis. The Supreme Court reversed holding that juror questioning violated defendant's right to a fair trial by an impartial jury under both the state and federal constitutions. The Court noted: "Juror questioning is now supported by the American Bar Association and is allowed, in some form or another, in federal courts and in the majority of states. ... The apparent prevalence of juror questioning is misleading, however, because even when allowed, the practice is rarely encouraged." The Court concluded: "The fundamental problem with juror questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral factfinder in the adversary process. Those who doubt the value of the adversary system or who question its continuance will not object to distortion of the jury's role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct."

Winston v. State of Texas, ___ S.W.3d ___ (Tex. App., Houston, 14th Dist., March 28, 2002): Defendant's conviction for burglary was upheld when the appellate court held that expert testimony that described identification of defendant by two trained police bloodhounds in a scent lineup was admissible. The investigating deputy, Pikett, brought his bloodhound, Quincy, to track a scent from the crime scene. Quincy trailed a scent from the house to appellant's front door. Subsequently, in the presence of his attorney, appellant gave police a scent sample. Deputy Pikett then had Quincy and another bloodhound, Columbo, each compare the scent obtained from the crime scene to a "scent lineup" of five gauze pads, one of which contained appellant's scent sample. Over appellant's objection, Deputy Pikett testified that both bloodhounds "alerted" to the gauze pad containing appellant's scent. Deputy Pikett testified that he interpreted the dogs' actions as indicating a match between the scent obtained from the house and appellant's scent. The jury found appellant guilty of burglary and defendant appealed. Appellant challenged the qualifications of Deputy Pikett as an expert as well as the admissibility of his testimony regarding "the dog sniff test." The appellate court affirmed, noting: "For purposes of judging the reliability of evidence based on a dog's ability to distinguish between scents, we believe there is little distinction between a scent lineup and a situation where a dog is required to track an individual's scent over an area traversed by multiple persons. ... Accordingly, we conclude that the use of scent lineups is a legitimate field of expertise." The Court then concluded that the proffered expert testimony was properly admitted based on three factors: (1) the qualifications of the particular trainer, (2) the qualifications of the particular dog, and (3) the objectivity of the particular lineup.

Endnotes

1. A more comprehensive list of recent articles of interest is accessible on the world wide web from the homepage of the North Carolina Supreme Court Library, at 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.