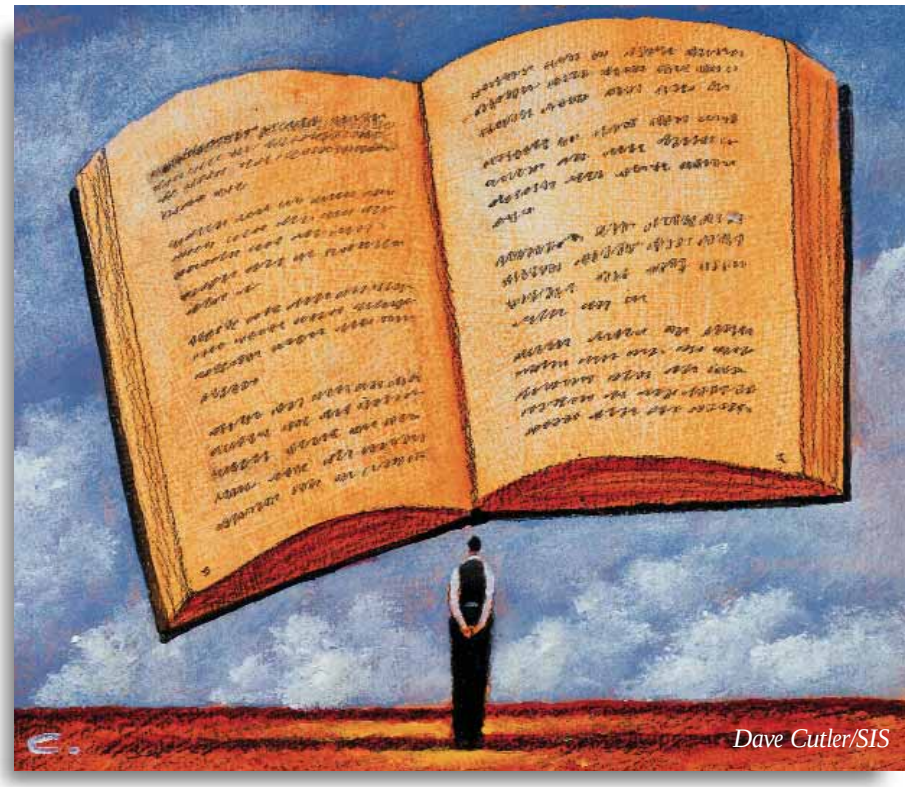
An Introduction to the North Carolina Pattern Jury Instructions

By: Alan D. Woodlief Jr.

Instructions give guidance to the jury, thereby serving a most important function in the trial process.[1] This article will introduce the practitioner to the North Carolina Pattern Jury Instructions, touching briefly on the history of the pattern jury instructions, the treatment of these instructions by the North Carolina courts, the availability, structure, and use of the instructions by practitioners and the courts, and criticisms of the instructions. It is the author's hope that this article will increase the practitioner's knowledge and comfort with the pattern instructions and, thus, encourage their increased use at various stages of litigation.



Dave Cutler/SIS

A Brief History of North Carolina's Pattern Jury Instructions

Years ago, judges had to fashion jury instructions for each new case. Jury instructions that were effective or whose use was affirmed on appeal were used again in later cases. Over time, individual judges developed their own notebooks of instructions, and judges often shared instructions among themselves. In essence, a judge's instructions became a "pattern" for him and other judges in later cases. However, these individual judges' sets of instructions were less than comprehensive, and there was no system for distributing them among all the judges.

Apparently, Illinois was the first state to have a pattern jury instruction committee, when the Illinois Supreme Court appointed the Supreme Court Committee on Jury Instructions in 1955.[2] Other states soon began to examine the possibility of compiling sets of pattern jury instructions.[3]

In 1961, a committee of the North Carolina Conference of Superior Court Judges began a project of preparing pattern jury instructions.[4] The committee solicited other judges for copies of their charges and then compiled them in a loose-leaf binder. These instructions consisted primarily of definitions and excerpts from North Carolina Supreme Court decisions. The first set of North Carolina Pattern Jury Instructions was published by the Institute of Government in 1963.

The North Carolina judges were spurred to further action when Judge Robert L. McBride, an Ohio judge, made a presentation to the judges in 1964. Judge McBride authored several books on instructing juries and was largely responsible for the production and publication of the Ohio Jury Instructions.

Inspired by Judge McBride's presentation, the Judges Conference of 1965 instructed the committee to proceed with the drafting and publication of pattern instructions that would be understandable to the jury and that would actually be used by North Carolina judges in instructing the jury. The project was promptly endorsed by the North Carolina Bar Association and received grants from the Bar Association, the Z. Smith Reynolds Foundation, and the Federal Law Enforcement Assistance Administration. The Institute of Government also participated in the project, assisting with staffing, coordinating the project, and providing the use of its facilities. Over the next eight years, the committee worked on drafting a new set of pattern jury instructions.

In the spring of 1973, the first volume of instructions, which dealt with criminal law, was made available to the bench and bar. The second volume, which dealt with motor vehicle negligence, was published in the fall of 1974. Finally, in the summer of 1975, the third volume of civil instructions was made available. In every year since 1973, the committee has drafted new instructions and has revised existing instructions as warranted by statutory and case law developments, as well as suggestions from other judges and attorneys.

Currently, the project is carried on by a committee of 11 trial judges. The committee is divided into two subcommittees: one dealing with criminal law and the other with civil law. Members and chairpersons are appointed by the president of the North Carolina Conference of Superior Court Judges. Each subcommittee is assisted by a research associate, who is usually a professor from a local law school, a retired judge, or a practicing attorney, and a law clerk, who is usually a student at a local law school. The committee members serve without compensation, volunteering their time one weekend a month from August through May each year. Additionally, committee members read all North Carolina appellate court cases when they are posted on the AOC website and monitor newly enacted legislation. As warranted, the committee drafts new instructions and revises existing ones. The Institute of Government at the University of North Carolina at Chapel Hill continues to perform the vital functions of printing, storing, and distributing the instructions to the North Carolina trial judges.

Treatment of North Carolina's Pattern Jury Instructions

Various jurisdictions afford pattern jury instructions different treatment. Several federal circuit courts of appeal have prepared pattern jury instructions for use by the district courts. However, these instructions are not binding on the district courts.[5] Several states have also developed pattern jury instructions, with some making their use mandatory and others treating them as optional guides.[6]

The use of the North Carolina Pattern Jury Instructions is not mandatory. However, the North Carolina Court of Appeals has "recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions."[7] In approving the instructions given at trial, the North Carolina appellate courts often note that they are consistent with the pattern jury instructions.[8] Accordingly, the practitioner should use the North Carolina pattern jury instructions whenever possible.

Availability, Structure, and Use of the North Carolina Pattern Jury Instructions

As mentioned earlier, the pattern jury instructions are divided into three large groups: criminal, civil, and motor vehicle negligence. The civil instructions cover the diverse subject areas of contracts, professional liability, miscellaneous torts, family matters, land actions, deeds, wills and trusts, and insurance. The criminal instructions cover various substantive offenses, including most felonies and misdemeanors, as well as various defenses. The motor vehicle instructions cover various forms of negligence in the operation of a motor vehicle.

In their paper form, the instructions are contained in multiple loose-leaf binders, which are available from the North Carolina Bar Association. Annual supplements to the paper volumes are sold by the Institute of Government. The instructions are also available on CD-ROM from CX Corporation and on the Internet at the Casemaker section of the North Carolina Bar Association's website.

Some of the major parts of the pattern jury instructions are the table of contents and the index. The table of contents serves as the outline of the book, showing the grouping of individual instructions within chapters and parts. For each instruction, the date of publication for the instruction is provided. For the criminal instructions, the table of contents indicates the statutory source for the instruction and the structured sentencing offense classification for each substantive offense. The system also contains a descriptive-word index. In this index, instructions are grouped under words describing their subject matter. For the criminal instructions, there is also a table of statutes, which serves as a cross-referencing tool. If a judge or practitioner knows the

applicable statute number, then she can reference the table of statutes to find the applicable instruction.

Most instructions can be broken into several basic parts. Each instruction has the instruction number in the upper right-hand corner of the first page. For criminal instructions, the title describes the instruction, sets out the statutory source, and describes whether the offense is a felony, misdemeanor, or infraction. The introductory paragraph, the body of the instruction, and the mandate are all read by the judge to the jury. The introductory paragraph introduces the offense charged. The body of the instruction sets out the elements of the applicable crime, tort, or other matter that must be found by the jury. The mandate restates the matter that must be found by the jury, informing the jury of the burden of proof and its duty to reach a finding on the questions presented to it.

Instructions often contain note wells and footnotes. Note wells are not read to the jury; rather, they are intended as cautionary instructions or suggestions for the judge. Often note wells explain possible edits that might be necessary or alert the judge to potential pitfalls to avoid. Footnotes are usually not read to the jury, but may be used by the judge to craft additional instructions if the judge or parties believe they are necessary or if the jury requests additional instructions. Footnotes often provide citations to relevant statutes and appellate cases, as well as definitions and explanations of the elements or terms used. In some cases, they may contain instructions to the judge much like the note wells.

The pattern jury instructions are intended to state the law applicable in typical fact situations. In certain fact situations, there may be no applicable pattern jury instruction. In these cases, the judge and attorneys will have to develop a new instruction to cover the situation. In other instances, a pattern jury instruction may be partially inapplicable and will require amendments. The pattern instructions contain additional or substitute language at certain places in an attempt to suggest adjustments for commonly encountered factual variations. Each instruction must be read and adapted to fit the particular case. "Each case has its own particular facts, and the instructions must be tailored to the requirements of the facts and issues."[9] "Counsel must exercise independent thought in adapting the pattern instructions to the particular needs of the case on trial."[10] However, "[i]t will always remain the trial judge's responsibility to determine whether a requested instruction is supported by the facts in evidence and the law applicable to the case on trial."[11]

In the North Carolina pattern instructions, alternative words or phrases are indicated in brackets. The judge must choose the bracketed terms that are appropriate under the facts of the particular case. For example, in the phrase "the defendant [used] [displayed] a firearm," the judge should choose which of the two bracketed terms is appropriate given the evidence presented. It is possible that the evidence might support the use of both terms.

Optional language is contained in parentheses. The optional parenthetical phrases should be given only when warranted by the evidence. For example, in the phrase "the State must prove that the defendant acted intentionally (and without justification or excuse)," the judge should only use the parenthetical phrase when there is some evidence that the defendant's actions were justified or might be excused. In certain instances, the judge is directed to describe the facts. These directions are set out in parentheses and are also italicized. For example, in the phrase "the defendant assaulted the victim by (*describe assault*)," the judge is called on to describe the factual circumstances of the assault.

The North Carolina Pattern Jury Instructions provide an excellent starting point for lawyers and judges in developing jury instructions for a specific case. To fully realize the benefits of the instructions, the instructions should be carefully selected and amended as dictated by the evidence and applicable law. When used in this way, the pattern jury instructions are a valuable resource that should be utilized whenever possible.

Beyond the Charge Conference: Fully Utilizing the North Carolina Pattern Jury Instructions

The pattern jury instructions are almost certainly underutilized. Most attorneys likely turn to the pattern instructions only immediately before the charge conference or before they must submit proposed jury instructions to the court.

Attorneys would be advised to consult the pattern jury instructions early in the case. The instructions provide an accurate statement of the law. They explain what the parties will have to establish. Accordingly, attorneys should reference the applicable instructions early in the case and keep them in mind when they are drafting pleadings, conducting discovery, questioning witnesses, and introducing evidence at trial.

Attorneys may also turn to the instructions as a source of research. As already explained, the instructions contain footnotes with references to relevant statutes and case law. Because the committee monitors statutory and case law developments and the instructions are updated annually as necessary, the instructions are also a good source for the current law on a particular subject. While the pattern instructions are not intended to be a comprehensive source for research, they can provide a valuable starting point.

Criticisms of the Pattern Jury Instructions

While the author has not heard specific criticisms of the North Carolina Pattern Jury Instructions, generally, "[l]egal scholars and social scientists have long thought that jurors [across the nation] have difficulty understanding the instructions of the trial court."[12] While noting that "[p]attern instructions represent a step forward with respect to consistency and economy of time and effort," some still complain that they do not fully "address the lack of juror comprehension of jury instructions."[13] Still, it has been recognized that the drafters of pattern jury instructions are limited in their ability to make instructions more readily understandable to the lay juror, because ultimately the instructions must be consistent with the language of the statutes and appellate court decisions upon which they are based.[14] As new and often more complex legislation is adopted and more intricately-worded appellate opinions are handed down each year, it becomes increasingly difficult for the committee to walk the fine line between making the instructions easier for jurors to comprehend and assuring that the instructions accurately state the law. Still, the pattern jury committee continues to attempt to simplify the language of the instructions and particularly to remove any legalese or dense, complex language not necessitated by the statutory or court deci-

sion language.[15]

Conclusion

This article was intended to briefly acquaint the practitioner with the North Carolina Pattern Jury Instructions, a valuable resource at various stages of criminal and civil litigation. The pattern jury committee welcomes suggestions for new civil, criminal, and motor vehicle negligence instructions, as well as for amendments to existing instructions. You may send these suggestions to the author at awoodlief@elon.edu. ■

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Endnotes

1. *See* Don Musser, *Instructing the Jury-Pattern Jury Instructions*, 6 Am. Jur. Trials 923 (2003).
2. *See* Musser, *supra* (noting that, while a group of California superior court judges had pioneered by compiling a collection of civil jury instructions a few years earlier, the Illinois pattern jury committee was without precedent at the time).
3. The following websites contain a fairly comprehensive listing of other jurisdictions' jury instructions: *Revisiting Jury Instructions (Part 1): Alabama through Mississippi*, www.llrx.com/columns/reference38.htm (June 17, 2002); *Revisiting Jury Instructions (Part 2): Missouri through Wyoming*, www.llrx.com/columns/reference39.htm (July 15, 2002).
4. The foregoing history is derived from the Introductions to the Criminal, Civil, and Motor Vehicle Negligence volumes of the North Carolina Pattern Jury Instructions.
5. *See e.g. United States v. Norton*, 846 F.2d 521 (8th Cir. 1988).
6. *See* Musser, *supra*.
7. *See State v. Sexton*, 153 N.C. App. 641, 571 S.E.2d 41 (2002); *Caudill v. Smith*, 117 N.C. App. 64, 450 S.E.2d 8 (1994).
8. *See e.g., State v. Hyde*, 352 N.C. 37, 530 S.E.2d 281 (2000) (noting that the trial court instructed the jury consistent with the court's prior decisions and "[f]urther, these instructions [were] consistent with the pattern jury instructions"); *State v. Elliott*, 344 N.C. 242, 475 S.E.2d 202 (1996) (noting that the trial court's instruction was consistent with the pattern jury instructions and the court's prior holdings).
9. Musser, *supra*.
10. *Id.*
11. *Id.*
12. *See* Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 Tenn. L. Rev. 701, 701-02 (2000).
13. Dumas, *supra*, at 709.
14. Dumas, *supra*, at 713. As Judge Saxe of the New York appellate court noted, the pattern instructions "seek to assure that all criminal defendants receive consistent treatment by the trial courts throughout the state, that all convictions are based upon the same standard. The further a judge's instructions diverge from the standard, the greater the probability that the jury's determination was not based upon the same standard." *People v. Redd*, 698 N.Y.S.2d 214, 216 (N.Y. App. Div. 1999) (Saxe, J., concurring). Judge Saxe's rationale would apply equally to civil jury instructions.
15. *See* Jamison Wilcox, *The Craft of Drafting Plan-Language Jury Instructions: A Study of a Sample Pattern Instructions on Obscenity*, 59 Temple L.Q. 1159, 1162 (1986) (noting that "[t]ranslating the law into laymen's language is a peculiar and difficult task" and "[l]ike other drafting tasks, it is a harder one than those who have not tried it may imagine").

A Working Place—

A Photo Essay of the 1767 Chowan County Courthouse

BY MICHAEL DAYTON

For more than two centuries, the 1767 Chowan County Courthouse has been the hub of legal and community life in Edenton. The state's oldest courthouse has never been "out of service," according to local attorney Peter Rascoe. However, in recent years, the Georgian-style masterpiece had begun to show its considerable age, including a leaky roof and a collapsed plaster ceiling, prompting a comprehensive restoration in the 1990's.

Chowan County Courthouse. All photos courtesy of Michael Dayton.

The sandstone blocks that make up the courtroom floor were shipped from York, England, as cargo ballast.

Detail of the 523-pound bell from the Shane Bell Foundry, which was installed in 1891. A Seth Thomas Clock was installed at the same time and is still in use today.

Edenton lawyers Sam Dixon (left) and Peter Rascoe in the courthouse's main doorway. Dixon served on various courthouse restoration committees. Rascoe chairs the Edenton Historical Commission.

Initials have even been etched into some of the courthouse's bricks. At one time the bricks were painted. Workers removed the exterior paint in 1960, returning the building to its original appearance but pitting the locally made bricks in the process.

Designated a National Historic Landmark in 1970, the courthouse could have been turned into a museum, another velvet-roped trolley stop on some history circuit. But the folks in Edenton would have none of that. Local officials vowed to keep it "a working place," in the words of Edenton Mayor Roland Vaughn, "where legal decisions will continue to be made, just as they have been for centuries." It was fitting, then, that the courthouse's official reopening on October 8, 2004, included a session of the State Supreme Court—the first time in 144 years that the high court had met outside of Raleigh. A plaque on the wall commemorates the event.

Over time the courthouse has collected its fair share of stories. For instance, during the Civil War, the courthouse bell was melted down and recast into a cannon, aptly named "The Edenton." In April 1819, President James Monroe had dinner in the paneled Assembly Room on the second floor. Of course, there was the fabled night in November 1805 when "William Burke Boat Builder … did then and there wickedly and willfully break down and destroy the main door of the large room in the upper apartment of the Court House … to the evil of all others in the case offending and against the peace and integrity of the state." Nearly 200 years later, woodworker Don Jordan, who helped repair the damage, offered this modern translation: "Mr. Burke really did a number on that door."

In an authoritative book, *The Courthouse at Edenton*, Marc D. Brodsky meticulously chronicled decades of routine maintenance: the repair of the courtroom's Franklin stove in 1783, the 1816 purchase of window glass

Various initials and names compete for space, out of public view, in the courthouse's cupola.

The Assembly Room above the courtroom had the distinction of being the largest fully paneled room in colonial America.

for the cupola and courthouse, the repair of the clock in 1828, the purchase of black paint and putty in 1836. On and on the list goes. The restoration uncovered—and in some cases, unearthed—other details from the building's past. The foundation of the Governor's Council Chamber, North Carolina's first capitol building, was discovered beneath the courthouse floors. One architect found early cypress shingles inside the walls of the cupola. "Ghost-marks" in the courtroom paneling pinpointed the location of curved benches on each side of the chief magistrate's chair. A piece of handrail in the courtroom's crawlspace allowed workers to accurately reproduce the railing along the edge of the magistrate's platform. The restoration apparently did not cast any light on the building's dearest secret: the identity of her original architect. That remains a matter of speculation to this day, although John Hawks, the architect for Tryon Palace, is often singled out as the prime suspect.

Samuel B. Dixon, an Edenton attorney who sat on various restoration committees, also serves as the courthouse's unofficial tour guide. He can rattle off the names of Edenton's famous jurists, including: James Iredell, a justice who served on the first US Supreme Court; Samuel Johnston, a North Carolina governor and the state's first elected US Senator; Thomas C. Manning, a chief justice on Louisiana's Supreme Court and an ambassador to Mexico; and one of Dixon's ancestors, Richard Dillard Dixon. A tablet near the chief magistrate's bench commemorates those celebrated leaders. Another tablet honors William Roberts Skinner, the clerk of court from 1849-1885. Those are not the only men whose names are recorded for posterity at the courthouse. Out of public view, in the cupola, Dixon pointed out the place where generations of craftsmen and court visitors have left their own simple marks on history, carving initials, dates, and surnames into the soft wood between the windows. ■

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Legislative Timeline of Elections Administration in North Carolina 1883-2004

By: Robert P. Joyce

Imagine it's 1895. The polls are open for the election of a new sheriff. Your precinct has been laid out by the clerk of court. There is only a general election—nomination of party candidates in primary elections will not come along for another 20 years. You will vote a secret ballot for your candidate, but you will bring that ballot with you (or a party representative of your party will hand it to you at the polling place)—it will be almost 35 years before North Carolina adopts the Australian ballot system in which the election official prepares the ballots and provides them to the voters to mark at the polls.

Don Perkins

There are no voting booths at the polling—they are not necessary since you and the other voters have already marked your ballots. If you cannot make it to the polls on election day, you will simply not be able to vote—absentee voting is still some way in the future. When you registered to vote, you were required to prove your literacy "to the satisfaction of the registrar," and you did not expect that the registration would be permanent—you fully expected that you would have to come back to register with this precinct registrar again before the next election. When the ballot boxes are opened on election night, the ballots will be counted by a precinct board of elections, the results will be reported to the clerk of court, and the old sheriff will prepare the certificate of election.

In the 110 years since, North Carolina's system for administration of elections has changed dramatically.

It has become much more centralized. Today, all elections are conducted by the county board of elections under the direct control and authority of the State Board of Elections. The county board sets out the precincts and voting places, employs the elections director and other elections employees and precinct officials, prepares the ballots, distributes and counts absentee ballots, oversees the operation of the polling places, prepares the final vote total abstracts, prepares the certificates of election, and conducts hearings on election protests. The State Board of Elections provides the rules for these operations, conducts hearings (de novo or as an appellate body) on election protests, and maintains the statewide computerized voter registration

records system.[1]

It has become much more open. The literacy test is long gone. The procedures for registering to vote have been greatly streamlined. Provisional voting makes it possible for a voter who believes that he is properly registered, but who does not properly appear on the registration records, to cast a vote that will be counted if his proper registration can be confirmed.

It has become more voter-friendly. Absentee voting is universally available, by mail or, for several weeks before the election at precinct-like locations around the county. Registration is permanent—once you are registered as a qualified voter, you do not need to re-register unless you change your residence. Requirements for accommodating disabled individuals who wish to vote have been introduced and stiffened.

Our election administration system has been under stress in recent elections. That stress has had three primary sources. First, federal legislation—designed in part to remove barriers to voting—has added significant elements to the conduct of elections.[2] State legislation has incorporated the federally-required elements. Second, and related, the raw numbers of voters are up.[3] And third, public awareness of the problems inherent in election administration is elevated after the Florida problems in the 2000 presidential election.

But, of course, this is not the only era of stress on the elections system. I prepared the following time line to help North Carolina's elections officials—especially the members of the county boards of elections and county elections directors—see that the system has withstood stress before. Perhaps the lawyers of the state will enjoy looking it over.

Look for some of these highlights:

■ creation of the State Board of Elections in 1899 and its overhaul two years later

■ creation of the original "grandfather clause" with the literacy test in 1901, to restrict the exercise of the franchise by African-American citizens

■ introduction of primaries in 1915

■ introduction of absentee voting in 1917

■ adoption of Australian ballot in 1929

■ primary elections on Saturdays

■ totally new statewide voter registrations in 1939 and 1949

■ first statewide approval of voting machines in 1949

■ full implementation of full-time voter registration in 1969

■ introduction of the presidential preference primary in 1971

■ ratification of Nineteenth Amendment (women voting) in 1971 (a half century after women actually began voting)

■ provision for winning a primary election with 40% of the vote in 1989

■ abolition of the requirement of sworn, in-person registration in 1994

■ movement to nonpartisan judicial elections beginning in 1996

■ movement to no-excuse, universal absentee voting beginning in 1999

■ expansion of provisional voting in 2003

The time line begins with 1883 more or less arbitrarily. The statutes were codified that year into the Code of 1883[4] and that simply made a handy starting point.

1883

1. County commissioners (not an elected body in many counties) set precincts and appoint one or more registrars for each precinct; commissioners also appoint four judges for each precinct (two of each party).

2. Registrars and judges elect one of their number as delegate to the board of county canvassers.

3. Registrars and judges count votes and prepare statement of votes; delegate takes it to the board of county canvassers meeting.

4. Canvassers meet and elect chairman. They open and canvass and judicially determine and declare the results and make abstracts.

5. For state offices:

■ canvassers send abstracts to sheriff, register of deeds, and secretary of state

■ sheriff sends to the speaker of the house a statement of votes

■ the speaker reads the results in a joint session

■ both houses prepare abstracts

■ state board of canvassers (governor, secretary of state, attorney general, and two members of the Senate—one from each party) reviews abstracts sent from counties to secretary of state and declares the results. Secretary of state issues certificates.

For local offices:

■ canvassers send abstracts to sheriff

■ sheriff notifies winners

■ sheriff returns all original abstracts to clerk of court.

For multi-county Senate seats:

■ canvassers send abstracts to sheriffs and registers of deeds

■ sheriffs of all affected counties assemble to prepare the certificate of election.

1895

1. Chairman of state executive committee of each political party takes an oath and becomes a "commissioner of elections." He is then authorized to submit to the respective clerks of court the names of party members to be registrars and judges.

2. Clerk of superior court lays out precincts and names two registrars and judges for each precinct (one from each party, from names supplied by commissioner of elections). These four constitute the "precinct board of elections."

3. Each precinct board of elections elects one of its members chairman.

4. The precinct board of elections counts votes and prepares abstracts

■ one abstract goes to the clerk of court

■ one abstract goes to the register of deeds, who records result in "election book"

■ one abstract is conspicuously posted in the precinct.

5. Clerk of court adds up all the votes received by the candidates.

6. For state offices:

■ clerk sends abstracts to sheriff, register of deeds, and secretary of state

■ sheriff sends to the speaker of the house a statement of votes

■ the speaker reads the results in a joint session

■ both houses prepare abstracts

■ secretary of state reviews the abstracts and delivers the certificates of election.

For local offices:

■ clerk informs sheriff of the results

■ sheriff prepares the certificates of election

■ sheriff returns all original abstracts to clerk of court.

For multi-county Senate seats:

■ clerks inform sheriffs of the results

■ sheriffs of all affected counties assemble to prepare the certificate of election.

1897

1. Power of party chairmen to recommend registrars and judges eliminated.

2. Registrars and judges are named by a "county board" consisting of the clerk of superior court, the register of deeds, and the chairman of the county commissioners.

3. Judges of the supreme and superior courts are to exercise "supervision and control over the county board as to the appointments

of registrars and judges of election and shall have the power" to remove any registrar or judge and replace him, upon complaint of the chairman of either party or ten good citizens.

4. Rest of the process unchanged.

1899

1. State Board of Elections created—seven electors chosen by the General Assembly.

2. County boards of elections created—three electors chosen by the State Board of Elections.

3. County boards name registrars and judges for each precinct and set up the precincts and polling places; two judges must be of different parties.

> The said county board of elections shall make their requisition upon the secretary of state for such books, blanks, and stationary as may be necessary for the registration of voters and holding elections in their respective counties.

4. Registrars and judges count votes and prepare statements.

5. One of them is elected to attend the meeting of the board of county canvassers.

6. The board of county canvassers canvasses and judicially declares the winners.

1901

1. State Board of Elections appointed by the governor; five members, not more than three of any one party. (This is the basis of the present system.)

2. County boards to consist of three members appointed by the State Board of Elections; no more than two may be of the same party. (This is the basis of the present system.)

3. County Board of Canvassers meets to canvass the returns. They have the power "to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall also have power and authority to send for papers and persons and examine the same." Canvassers prepare two abstracts: one for register of deeds and one for county board of elections. Canvassers deliver original returns to the clerk of superior court.

4. "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language, and shall show to the satisfaction of the registrar his ability to read and write any such section when he applies for registration, and before he is registered: *Provided, however,* that no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States where he then resided, and no lineal descendant of such person shall be denied the right to register and vote at any election in this state by reason of his failure to possess the educational qualification aforesaid."

5. Election statutes are set in general codification. Last time this is done until 1967.

1905

County commissioners may pay, "in addition to the compensation herein allowed" for members of the county board of elections and registrars "such additional compensation as may be by them considered fair and just." Registrars and judges get $1 per day.

1907

Judges and registrars raised to $2 per day.

1915

1. First statewide primary elections act. Primary election on the first Saturday in June, for state offices, Congress, district offices, General Assembly, and county offices.

2. State Board to appoint county boards of election on the 10th Saturday before the primary.

3. The county board meets and organizes on the 7th Saturday before the primary.

4. It appoints judges and registrars on the 6th Saturday before the primary.

5. At the first primary held, registrar is to ask each voter: with which political party are you affiliated? Registrar is to have a new registration book, into which he has transferred every name, and he is to have a new column in the new book to mark party affiliation. Compensation to registrar is to be set by the State Board for this duty, but paid by the county.

6. First candidate filing fees: Congress, $50; state and judicial offices, $20; state Senate, $5; county offices, $5; surveyor, county commissioner, coroner, $1.

7. "Nonpartisan" candidates can get on ballot with 10% petition.

8. Candidates must file statements of contributions and expenditures.

9. State Board certifies winners for state offices. County board of elections certifies winners for local offices.

10. Candidates for party nomination must sign pledge to support the candidate of their party nominated in their race in the primary.

1917

1. Absentee registration and voting allowed for first time, for people who will be absent from the county during the registration period or on election day.

2. First time someone other than registrar has power to register voters. Chairman of elections board may register people who will be absent during registration period.

3. Voter applies; chairman sends ballots; voter returns marked ballots to the precinct registrar and the registrar opens them on election day.

1919

1. Absentee voting added for those "physically unable to attend" as shall appear on a physician's certificate or affidavit.

2. Requirement of witnesses added for absentee voting application.

1923

County board granted the power to purge the registration records of "illegal or disqualified voters."

1925

Election results reporting simplified. To this time, officials' reports of results have been made through the Speaker of the House and other legislative leaders. Constitutional amendment proposed to get the Speaker of the House, et al., out of it. Vote to be held in 1926.

1927

1. Speaker of the house, et al., removed from the process.

2. State Board of Canvassers now is to "ascertain and judicially determine" the results.

1929

1. Absentee voter certificate must now be sworn before a notary, not merely signed before a witness.

2. Voter voting an absentee ballot must sign the ballot.

3. Candidates in primaries must now sign pledge to support "all candidates nominated by the __ party," not just the one in their race.

4. "Nonpartisan" candidates changed to "independent" candidates.

5. Australian ballot adopted: state given responsibility for printing state ballots. County given responsibility for printing county ballots. (Before that, people brought

their own ballots.) State expense for state ballots; county expense for county ballots. First detailed instructions for how to set up ballots for straight-ticket, etc.

6. Voting booths required for first time. (Previously, voters had already marked their ballots). First detailed instructions for setting up the voting.

7. Precinct judge delivers ballot to voter, and puts on the ballot the number that appears beside the voter's name in the poll book, along with the judge's initials.

8. The voter votes and returns the ballot (folded) to the judge, who checks to make sure that the number and initials are correct. The judge then, with scissors, clips the number off and puts the ballot in the box.

9. First provisions for assistance to voters. Each precinct is to have, for general elections, "markers," appointed by the county board of elections on nomination by the parties, to help people mark their ballots. In primary elections, there are no "markers," but in primary or general elections, a voter may have the assistance of any family member. In addition, in a primary election, the voter may have the assistance of any elections official working at the poll, or any other person requested by the voter and "approved by a majority of the election officials." Voters entitled to assistance are those with physical disability or illiteracy.

10. First provisions for precinct assistants, to be paid, like judges, $3 per day, in precincts with at least 400 voters.

11. "The State Board of Elections shall have general supervision over the primaries and elections provided for herein, and may delegate its authority to county boards appointed by it, and in case where sufficient provision may not appear to have been made herein may make such regulations and provisions as it may deem necessary."

1931

First detailed campaign finance regulation and reporting.

1933

1. Political party defined for first time: 3% of the vote in the last gubernatorial election or 10,000 signatures.

2. State Board given investigatory powers, with subpoena power, etc.

3. State Board declares results (State Board of Canvassers removed).

4. First mention in the statutes of employees of the county boards of elections.

5. First county board rule-making authority.

6. Registrars and judges dropped to $2 per day.

7. First statutory provisions regarding "residence" for voting purposes.

8. County board of canvassers eliminated—county board of elections canvasses and judicially determines the outcome and declares the winners; county board of elections still has authority to declare winner in case of tie.

9. Assistants permitted for precincts with 500 or more voters.

1935

Polling hours set differently for primaries (7:00 am to 7:00 pm) and general elections (sunrise to sunset).

1937

Refinements on absentee voting—who may request ballots, to whom they may be delivered, etc.

1939

1. Absentee ballots returned to the county board chairman, rather than to precinct registrar.

2. Assistance: anyone may have the help of a near relative, even if not disabled or illiterate; "near relative" replaces family member.

3. Primaries moved to 1st Saturday in May.

4. Judges $4 per day; registrars $5.

5. New general statewide registration ordered, to replace all old registrations: You are automatically put on new books if you voted in 1936 or 1938 (unless known to be dead or moved); there are separate books for the general election and for the Democrat and Republican primaries; in the future everyone who registers is to go into general election book and appropriate party book.

1941

1. Chairman of county board paid $5 per day.

2. All poll hours for all elections standardized at 6:30 am to 6:30 pm.

3. Registrars and judges paid for attending meetings called by chairman of county board.

1943

First edition of the "General Statutes" appears (replacing the old "Consolidated Statutes"). First appearance of Chapter 163, the current elections law chapter.

1945

1. State board may authorize county board chair to delegate to another member of the county board the authority to receive absentee ballot applications and send out ballots.

2. On ballot, use of titles such as doctor, reverend, or judge prohibited.

3. Members of the county board upped to $5 per day; chairman $7; judges and assistants $5; registrars $6.

1949

1. Prohibition adopted on county board member being campaign manager.

2. Use of voting machines approved, if accepted by State Board.

3. To be political party, must get 10% (was 3%) of governor vote.

4. New statewide registration system: state board to supply to all precincts a new registration book and the names are to be transferred; general election book and primary book to be combined. Instead of transferring voters from old to new books, county board may order a whole new registration. Instead of using new state board books, county may, at county expense, go to a "modern, loose leaf" system.

1951

1. Precincts to be supplied with ballots at 105% of voters (had been 150% when Australian ballot first came in; later lowered to 125%).

2. Campaign spending limits from 1931 repealed.

3. Judges/assistants to $7; registrar to $10.

4. Prohibition introduced against filing notice of candidacy if you are registered in another party; you may file notice of candidacy if your are unregistered, if you swear that you will register in the upcoming registration period.

1953

1. County board members to $10 per day; chairman also $10.

2. Assistants permitted if precinct has 300 voters.

3. Voting machines must be voted on by people, except in counties that already have them or in counties with more than 50,000 people.

4. Full-time permanent registration in counties with two municipalities each greater than 35,000 people.

- special registration commissioners created
- registration across precinct lines
- moving within county no longer requires new registration
- to vote, must register at least 14 days before the election
- to vote in primary, must be registered with that party at least 21 days before primary
- county board may appoint "executive secretary"

County board may delegate to executive secretary "by specific resolution so much of the administrative details of election functions, duties, and work of the county board of elections, the officers, and members thereof,...and thereafter such executive secretaries shall act within the limitation of the authority and duties delegated and imposed upon them by the county board of elections, as fully and to the same extent as though the same were actually done and performed by the county board of elections, its officers, and members: Provided, that no delegation of the quasi-judicial or policy-making duties and authority of the county board of elections may be made."

[T]he executive secretaries, if such be named, and all special registration commissioners, other clerks, employees, and other board personnel of such county board of elections to be paid such compensation for the performance of their duties as shall be fixed in the discretion of the county board of elections, by and with the consent and approval of the board of county commissioners of the county.

1955

1. Ballot counters approved everywhere.

2. Full-time permanent registration extended to all counties with one city in excess of 10,000 people: all the provisions for special registration commissioners, executive secretaries, etc., made fully applicable.

3. County board may permit polls to stay open till 7:30 pm in precincts with machines.

4. All counties may purchase machines without a vote of the people.

1957

1. "Shall show to the satisfaction of the registrar" (*see* 1901) removed from registration procedure.

2. Appeals to the board of elections authorized for denial of registration by precinct registrars.

3. Elections board members and registrars to $15 per day; judges and assistants to $10.

1959

1. Defeated primary candidates prohibited from being general election write-in candidate.

2. Elected officials and candidates prohibited from serving as "markers" of ballots—that is, giving assistance in marking ballots for voters.

1961

For the first time, the statute requires that precincts report their results to the county board on election night "by telephone or otherwise" and the county board "shall publish such reports to the press and to the radio and television."

1963

1. Applicant applying for absentee ballot within five days of the election must supply a physician's certificate that the applicant's medical condition has occurred since the fifth day before the election and will prevent atten-

dance at the polls on election day.

2. Nicknames on ballots approved.

1965

General one-year residency requirement for registration changed to 60 days for presidential elections only.

1967

1. Chapter 163 of the General Statutes completely recodified, with intent "to clarify, simplify, and codify, but not to write new law." First general recodification since 1901.

2. Primaries moved from last Saturday in May to first Saturday in that month.

1969

1. All counties (not just those with a municipality with a population above 10,000—*see* 1955) go to full-time registration. In the words of one commentator: "[T]he familiar pattern of specified registration periods prior to elections and primaries will become obsolete."

2. Nineteen counties ordered to conduct totally new registrations.

3. Precinct registrars to $20 and judges and assistants to $15.

4. Presidential electors required to vote for candidate of their party or be considered to have resigned.

1971

1. First comprehensive, uniform municipal election law enacted, setting up the four municipal election methods: nonpartisan plurality, nonpartisan election and runoff, nonpartisan primary and election, and partisan primary and election.

2. City councils no longer conduct municipal elections: they are to be conducted by either the county board of elections or a municipal board of elections.

3. State Board of Elections assigned to the Department of the Secretary of State.

4. Primaries changed from first Saturday in May to Tuesday following first Monday in May.

5. Individual who changes parties must wait at least three months before being eligible to file a notice of candidacy as a member of the new party.

6. Legislation authorizes the widespread custom of "curbside" voting for disabled individuals.

7. Nineteenth Amendment to the US Constitution giving women the vote is ratified and voting age is lowered to 18 to conform to US Constitution (following successful referendum to amend NC Constitution).

8. Residency requirement to vote in presidential election reduced from 60 to 30 days.

9. Presidential preference primary instituted.

10. Absentee voting permitted in primaries for 1972 only.

1973

1. Absentee voting permitted in statewide primary elections.

2. One-stop absentee voting initiated.

3. Absentee ballots are to be counted by the board of election, not in the precincts.

4. Challenges to absentee ballots are to be heard by the board of elections at the canvass, not by the precinct officials on election day.

5. State Board of Elections explicitly granted authority to order new election on vote of four of its five members.

6. Observers, formerly called "watchers," authorized for all counties.

7. "Continuous presence together" required for registrar and judges, as an anti-fraud provision.

8. Voting disqualification of "lunatics" and "idiots" repealed.

9. Provisions for "markers" repealed.

1974

Major, comprehensive campaign finance legislation passed. For the first time, limits are imposed on amounts that may be contributed to candidates for statewide offices, General Assembly, judges, and district attorneys. Old campaign regulations continue to apply to county offices, and no regulations apply to city offices.

1975

1. Presidential preference primary moved from May to March, and state primaries moved from May to August.

2. Public funding of parties initiated by voluntary $1 income tax form check-off for voters.

3. 1974 campaign finance law expanded to county and city offices, with exceptions.

4. Absentee voting permitted in most municipal elections.

5. Approval of executive secretary-director of the State Board of Elections (and ultimately the state board itself) required for the dismissal of county elections executive secretary. Previously, the county elections director ("executive secretary") was an at-will employee of the county board of elections.

1977

1. Presidential preference primary and state primaries moved back to May.

2. The title of the chief county elections employee is changed from "executive secretary" to "supervisor of elections."

3. Absentee voting extended to school board elections and special district elections.

1979

1. Absentee voting extended to referendums on beer and wine sales, mixed drink sales, and establishment of ABC stores.

2. Procedures for conducting hearings on challenges to voters' registrations are revised.

3. Registrars to $35 a day, judges to $30, and assistants to $15.

1981

Power to fire county supervisor of elections returned to county board of elections.

1983

1. Drivers license examiners authorized to accept voter registration applications. High school and library officials added.

2. Precinct transfer certificates authorized for voters who have moved within the county.

3. Absentee ballots to be mailed with the application, when a voter requests application by mail.

4. Candidates for the first time prohibited from filing notices of candidacy for more than one office at a time.

5. Power to fire county supervisor of elections once again returned to the state executive secretary-director.

1984

Rule on cross-over votes changed. If the voter marks the straight-party circle and also "crosses over" to vote for one particular candidate or candidates of the other party, those particular votes count.

1985

1. The literacy requirement for registration (long declared unconstitutional) is repealed.

2. All counties directed to named special registration commissioners.

3. Governor for first time required to name members to the State Board of Elections from lists of nominees supplied by the parties.

4. Responsibilities for making "pre-clearance" submissions under Section 5 of the Voting Rights Act of 1965 set out for the first time.

1986

Presidential preference primary moved from May to March.

1987

1. Parties permitted to allow unaffiliated voters to vote in their primaries.

2. Petition procedure for write-in candidates enacted. No write-in votes count in general elections unless the candidate has qualified by petition. (Write-ins just not allowed in primary elections. Write-ins continue to be generally permitted in municipal elections.)

3. Automatic right to a recount if spread is less than one percent.

4. Approval of county board of elections required for acquisition of voting machines. Provision for referendum repealed.

5. Requirement that absentee ballots be notarized removed. Certification of two witnesses suffices.

1988

Candidates Financing Fund, to be funded by voluntary return of income tax refunds by individual taxpayers, is enacted to provide public funding for statewide executive offices.

1989

1. "Substantial plurality" of 40% wins primary, replacing requirement of majority.

2. Resign-to-run enacted. If a person holds an elective office and wishes to run for another office (and the terms would overlap), he or she must resign the first office before filing the notice of candidacy for the second. It is later declared unconstitutional.

1991

Presidential preference primary moved from March back to May.

1992

1. In light of the Ross Perot candidacy, provision is made for presidential electors by an independent presidential candidate.

2. First state law for voter registration by mail enacted. Later supplanted by legislation conforming to the National Voter Registration Act.

1993

Implementation of the state law for voter registration by mail delayed.

1994

1. Voter registration system totally revised.

- new mail-in registration system put in place to replace the never-implemented 1992 version
- registration at drivers license offices, public assistance offices, and other selected state offices
- statewide computerized voter registration system mandated
- in-person sworn voter registration application process repealed
- special registration commissioners abolished
- old "purge" of voter list—removing voters for not voting over a certain period of time—abolished

2. Title of precinct "registrar" changed to "chief judge."

1995

1. Title of county "supervisor of elections" changed to current "director of elections."

2. Obsolete resign-to-run statute (previously found unconstitutional) repealed.

1996

1. Canvass moved from the second day after the election to the third.

2. Superior court elections made nonpartisan.

1997

1. Campaign finance reform legislation requires donors' occupations to be listed, expands coverage to most local elections, and increases civil remedies available to State Board of Elections for noncompliance.

2. Voting by machine at one-stop absentee voting sites permitted.

1999

1. Increased oversight of municipal boards of elections mandated.

2. All but the very smallest counties required to operate full-time board of elections offices.

3. No-excuse absentee voting instituted for one-stop voting in even-year elections.

4. Counties permitted to have more than one one-stop absentee voting location.

5. Major revisions to campaign finance law to comport with federal court rulings finding provisions, plus "Stand By Your Ad" legislation.

2001

1. Large portions of Chapter 163 recodified.

2. Some voter registration changes permitted by fax.

3. Punch card voting machines and butterfly ballots prospectively banned.

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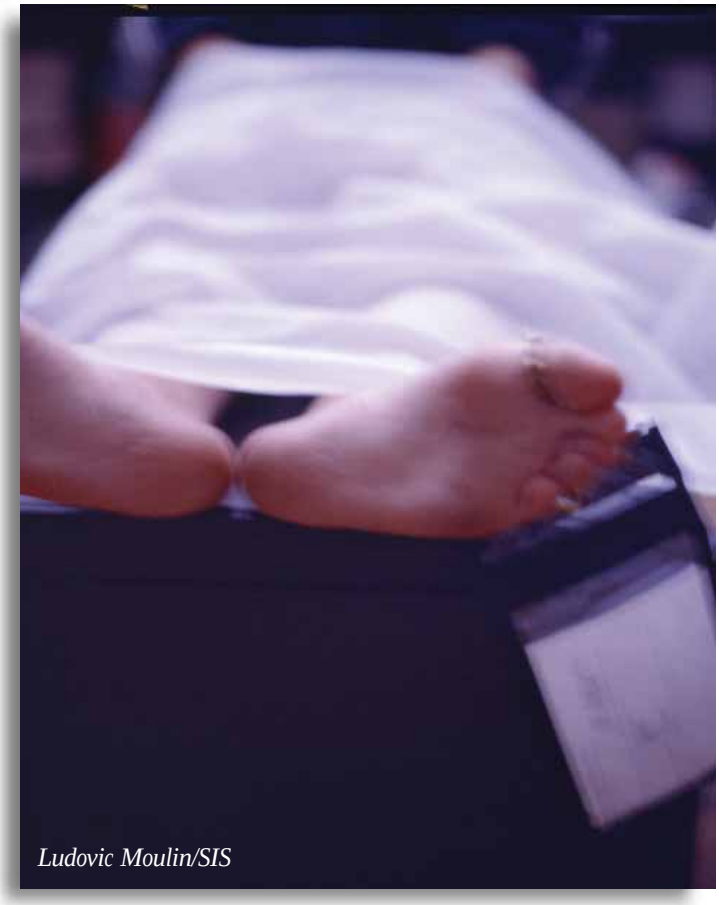
The Last One to Let You Down

By Jeffrey P. Gray

The legislature has let me down. I have always harbored the desire to run for political office but have never found one that I felt I was exactly suited for, except maybe the office of county coroner. Well, the legislature has done it again. They have abolished the office of coroner in two more counties. I only have a chance to run in three now, but I am not sure I am willing to move. Yes, it's about over. The ancient and respected office of coroner is soon to be a thing of the past in our state.



Ludovic Moulin/SIS

I have always thought this would be a great job to have. From a political platform standpoint, I was ready. I had polished my campaign speech where I was going to promise to run a professional office—one where I would have deputy coroners trained in life's vital signs, and I would guarantee that I would remove the politics from the office. I would declare someone dead regardless of their political affiliation. It truly would have been a campaign that was a matter of life and death. I had even memorized the song that the coroner of Munchkin Land sang in the movie, the *Wizard of Oz*, when he checked on the Wicked Witch of the East after Dorothy's house landed on her:

As Coroner, I must aver,
I thoroughly examined her,
And she's not only merely dead,
She's really most sincerely dead.

It must not be meant to be, for our General Assembly has sounded the death knell of my political aspirations. I would have served with pride.

There are lots of reasons to want to be the county coroner, not the least of which is the prestige that accompanies such a revered position, one so steeped in our state's history. The office of coroner in North Carolina was one of the earliest county offices. It was

essentially a judicial office with the primary duty of investigating criminal deaths. It was a constitutional office until 1962 when the North Carolina Constitution was amended to make it subject to the control of the legislature. Every county had a coroner except those in which the office had been replaced by a medical examiner. Most of the laws affecting coroners are set out in Chapter 152 of the General Statutes. The full power and duty of the coroner in the county arose when an unattended or questionable death within the county was reported to the coroner. It then became the coroner's duty to make a preliminary investigation for the purpose of determining whether the death probably resulted from a criminal act or a default on the part of another person. The responsibility of the coroner was to decide in the first instance whether an act of criminal homicide may have occurred. If the coroner decided no such act occurred, then the case was closed. If he decided that there was an act or may have been an act of homicide, he was required to continue his investigation to whatever extent was necessary to assist in making the determination or the apprehension of the person or persons criminally responsible. The coroner had the power to arrest, set bail, or commit to jail any persons found culpable of any crime in connection with a homicide. Although in many respects, the coroner was concerned with the enforcement of the criminal laws, he was not an enforcement officer in the general sense. He was more properly called an investigative officer with certain judicial powers in connection with inquests and preliminary hearings. However, if there was no person properly qualified to act as sheriff, the statutes provided for the coroner to perform the duties of the sheriff. This instance included situations where the sheriff died in office or was incapacitated due to illness and provisions for such an emergency may not have been made by the county. More interestingly, in one specific instance the coroner was responsible for serving process on behalf of the sheriff if the sheriff could not serve process, that being where the sheriff could not serve process upon himself or upon any action in which the sheriff had an interest. Therefore, the old saying that "the coroner is the only person that can arrest the sheriff" was true, although it was limited only to a situation where the sheriff would be faced with the problem of arresting himself or having a deputy do it. Who wouldn't want to be able to arrest the high sheriff of the county?

In their heyday, coroners were elected in each county for a term of four years or until a successor was elected and qualified. There were no special qualifications as to experience or education. (See, I told you I was qualified!) It was necessary only that the coroner be a voter and not subject to disqualifications applying to other public offices generally. The coroner could not hold other public office at the same time, except county medical examiner or county physician.

Chapter 152 also contained provisions for special coroners and also provided for the appointment in the event of vacancies as well as the appointment of assistants by the coroner. When the coroner was absent from the county or otherwise unable to perform his duties in a particular case, the clerk of superior court could appoint a special coroner. When the office became permanently vacant during a term, the Board of County Commissioners appointed a qualified person to fill the office for the unexpired term and until election and qualification of the successor. There was no general authority for the appointment or election of assistant or deputy coroners. Special authority for doing so could be given by the legislature and several counties actually had this local legislation. Now, there's another good reason to run—the patronage that goes with the job. Like many elected positions in this state, the coroner-elect, or a special appointed coroner, was required to take an oath of office and assume his duty only after posting a bond in the sum of $2,000.00 conditioned on the faithful discharge of duties of his office. The coroner's bond had to be approved by the Board of County Commissioners and made payable to the state. As with the bonds and sureties of the sheriff, the coroner's bond must be examined and its sufficiency determined by the Board of Commissioners on the first Monday in December of each year of his term. Failure of the coroner to post this bond will make him subject to disqualification.

And then there is the pay. As a practicing attorney with lots of mouths needing feeding in a firm, and overhead costs, insurance, and health care benefits, and all those magazine subscriptions for the lobby, the pay is also enticing. The general law provided for the payment to the coroner of $5.00 for each inquest, plus five dollars $5.00 for each additional day necessarily spent to conduct the inquest and are the same statutes authorizing reimbursement to the coroner for actual and necessary expenses incurred in the burial of a pauper over whose body an inquest was held. Payment is also authorized by the county to any physician upon whom the coroner caused to assist him in the investigation of a death. The general law did not provide for the payment of mileage or other travel expenses incurred by the coroner in the performance of his or her duties. However, many local acts have been passed increasing the amount of fees payable to the coroner, authorizing travel expenses, and changing the methods by which he or she is compensated. Similarly, many Boards of County Commissioners have been granted authority to place the coroner on a salary basis in lieu of the statutory fee.

In light of the fact that you had to stand for election, post a bond, and then be subject to being called out at all hours of the day and night for the whopping sum of $5.00, I cannot believe that there hasn't been a greater hue and cry from the public about the legislature abolishing this job. They've almost done it for sure. Bills were introduced in the 2003 session of the General Assembly to abolish two of the five remaining counties that have the office of coroner. Senate Bill 1178 abolished the office of coroner in Wilkes County and Senate Bill 1125 abolished the office in Johnston County. In so doing, both bills made the provisions of Chapter 152 inapplicable to their respective counties, thereby dwindling my opportunities to ever hold public office. I had it all planned out. I'd even created some snazzy campaign brochures that would also act as a toe tag in the event that one of my constituents needed my services.

The legislature returned to Raleigh in January, so I am sure the final three county coroners will meet their demise.

Well, I guess I'm just going to have to find another office. There's always the Soil and Water Conservation District Commissioner. ■

Jeff Gray is a partner in Holt York McDarris & High in Raleigh and a former assistant attorney general. His partners have encouraged him to run for public office since their malpractice insurance does not cover lunacy.

How to Value a Case for Negotiation and Settlement

By G. Nicholas Herman

Most lawsuits involve disputes over money and therefore are usually negotiated through adversarial bargaining. In these negotiations, because the ultimate decision to settle rests with your client, you will often be asked to advise whether it would be in your client's best interests to settle the case or take it to trial. This requires valuing the case in terms of its likely outcome at trial as compared with the outcome of accepting the opposing party's final settlement offer. It also involves taking into account how willing your client is to gamble on the outcome of a trial and your client's other motivations affecting the choice between trial and settlement. This article discusses some analytical methods that you might draw upon in valuing a case for settlement and in formulating the offers and concessions that your client might make during adversarial negotiations.

Rob Colvin/SIS

Target & Resistance Points

In traditional adversarial bargaining, the parties typically prepare for negotiation by establishing "target" and "resistance" points. From the Plaintiff's perspective, his "target point" will be the highest amount of money he realistically believes he could obtain if everything in the case went his way. From the Defendant's perspective, her "target point" will be the lowest amount of money she realistically believes she would have to pay if everything in the case went her way. The Plaintiff's "resistance point" will be the lowest amount of money he will accept in settlement; and if he does not receive at least that sum, he will take his chances at trial. On the other hand, the Defendant's "resistance point" will be the highest amount of money she is willing to pay to settle the case; and if the Plaintiff insists on a settlement that is greater than that amount, she will take her chances at trial.

Target points should not be confused with opening offers made in negotiations. The Plaintiff will usually make an opening offer to settle the case for an amount that is greater than his target point, and the Defendant will make an opening offer for an amount that is lower than her target point. Each party will thereafter make concessions (downwards for the Plaintiff and upwards for the Defendant) to propose settlement amounts that approach their respective target points. Usually, further concessions will be made such that the Plaintiff will end up offering to settle for an amount below his target point and the Defendant will end up offering to settle for an amount above her target point. However, in no event will the Plaintiff settle for an amount that is less than his resistance point, nor will the Defendant settle for an amount that is greater than her resistance point. The significance of the parties' resistance points is that a settlement will occur only if they overlap, where the minimum amount that the Plaintiff will accept is less than or equal to the maximum amount that the Defendant will pay.

For example, assume that the Plaintiff sets his target point at $70,000, resistance point at $30,000, and plans to make an opening offer of $90,000. The Defendant sets her target point at $20,000, resistance point at $50,000, and plans to make an opening offer of $10,000. Plaintiff's "settlement range" thus falls between $70,000 and $30,000, and Defendant's "settlement range" falls between $20,000 and $50,000. Plaintiff will gradually make concessions downward from his opening offer of $90,000, but never below his resistance point of $30,000; and Defendant will gradually make concessions upward from her opening offer of $10,000, but never above her resistance point of $50,000. The amount overlapping the parties' resistance points ($50,000 to $30,000), constitutes the anticipated "settlement zone"—the range within which the parties are most likely to reach final agreement. If there is no overlap between the parties' resistance points, no settlement can be achieved unless one or both of the parties revise their resistance points to expand the settlement zone.

In light of the foregoing, in advising your client about settlement and in preparing for adversarial bargaining, you must be in a position to recommend a "settlement range" represented by a resistance point and target point. Ideally, and from a purely *economic* standpoint, when the only alternative to settling the case is going to trial, an accurate resistance point for the Plaintiff would be an amount that is less than what a jury would award; and an accurate resistance point for the Defendant would be an amount that is greater than what a jury would award. Thus, you must have some analytical method to determine an appropriate resistance point for your client. Once this "bottom line" is established, the goal of bargaining will be to settle the case in an amount that is better than one's resistance point and as close as possible to one's target point.

Intuitive Case-Worth Analysis

To advise a client about an appropriate resistance point, many lawyers engage in an essentially intuitive analysis of "what the case is worth" in terms of the net recovery to the client if the case were tried. This analysis is "intuitive" in the sense that it is largely based on the lawyer's experience and best judgment. It essentially involves predicting what a likely jury verdict would be in light of all the circumstances of the case, and then adjusting that verdict expectancy downward (for plaintiffs) or upwards (for defendants) by the amount that it is likely to cost the client to litigate the case. The resulting figure may serve as the client's resistance point. In making this analysis, lawyers typically consider (1) the cause of action that would be brought and the elements of proof and damages that the substantive law provides for that cause of action; (2) the relative strength of the evidence in support of and in opposition to the client's contentions about liability and damages; (3) the amount of money that could be reasonably argued to a jury in light of the foregoing factors and jury verdicts in similar cases; and (4) the cost of gathering and presenting the evidence in a persuasive manner to a jury.[1]

The particular cause of action and elements of proof and damages involved in the case will affect the accuracy of determining what the case is worth in a variety of ways. For example, in a contract dispute where damages are measured by the financial loss to the plaintiff as a result of the breach, or in a property damage suit where the damages are usually the difference between the fair market value of the property immediately before and after the event causing the damage, the value of the case from a jury-verdict standpoint may be relatively easy to forecast assuming that the essential facts and liability are not in dispute. However, even if there is no question about liability, if the cause of action is for personal injury in an automobile accident case, or for defamation involving damages for injury to reputation and punitive damages, the elements of damage are much more amorphous and cannot be calculated with any real degree of certainty. In addition, regardless of whether the case involves damages that are objectively or only subjectively calculable, determining what the case is worth becomes increasingly difficult if liability is questionable or the facts relating to damages are in dispute. Moreover, forecasting the most likely result at trial may be even more difficult if the burden of proof involves "clear, cogent, and convincing evidence" rather than the usual "preponderance of the evidence" standard, the case involves multiple issues with shifting burdens of persuasion and production, or existing law is unclear about whether liability may be imposed under the particular facts of the case.

Similarly, trying to determine what a case is worth is complicated by the quantum and quality of the evidence available in the case. For example, factors such as the availability of corroborating witnesses and the extent of their credibility, whether one or both parties have "jury appeal," and whether the particular facts of the case would cause a jury to be

more sympathetic to one side or the other all have a bearing on the value of the case but are not capable of any precise calculation. Similarly, the cost of finding and preparing expert witnesses in a difficult case may be hard to calculate.

Nevertheless, under an intuitive case-worth analysis, a lawyer will take into account all of these factors, notwithstanding their uncertainties, to arrive at a "best judgment" about what a jury would do if the case were tried. In this connection, particularly if the damages are amorphous, some lawyers consult sources on prior verdicts in similar cases such as the *Personal Injury Valuation Handbooks* (Jury Verdict Research, Inc., Cleveland, Ohio), *The National Jury Verdict Review and Analysis* (Jury Verdict Review Publications, Inc. Newark, New Jersey), the *JVR Case Evaluation Software for the Evaluation of Personal Injury Cases* (Jury Verdict Research, Inc., Solon, Ohio), the *ATLA Law Reporter* (Association of Trial Lawyers of America, Washington, DC), or local bar publications that report jury verdicts to estimate the value of the case at hand. In addition, lawyers frequently confer with other experienced trial lawyers to solicit their views about what a jury might award in the particular circumstances, even though, when consulted about the same facts, highly experienced lawyers specializing in litigating the same type of case will often have wide differences of opinion about what a jury would do.[2]

After the value of the case is estimated from the standpoint of a most likely jury verdict, the lawyer will estimate the costs to the client of achieving that verdict (i.e., litigation expenses and lawyer's fees if based on an hourly rate) that the law will not shift to the opposing party as taxable court costs in the event of a favorable judgment. These expenses will then be subtracted (for plaintiffs) from the estimated jury verdict, or added (for defendants) to the estimated jury verdict. After consultation with the client, the resulting figure may become the client's resistance point, and the target point is then set at a higher figure (for plaintiffs) or a lower figure (for defendants) based on an estimate of the *best possible* verdict that might be obtained if everything in the case went the client's way.

Traditional Economic Analysis

As a more mathematical approach to Intuitive Case-Worth Analysis, the traditional economic method of valuing cases involves computing an "expected outcome" by multiplying the gross outcome by the probability that it will occur, and then adjusting for "transaction costs" that would be incurred in obtaining that outcome. Assuming you represent the Plaintiff, this analysis consists of four calculations:

(1) First, an average verdict expectancy is estimated assuming that the Plaintiff will prevail on liability. For example, if a reasonable verdict range for the particular kind of case is $35,000 to $45,000, the average verdict expectancy would be $40,000.

(2) Second, the $40,000 average verdict expectancy is adjusted by the probability (expressed as a percentage) that the Plaintiff will be successful in actually obtaining that amount. This results in an "*expected* outcome" for your client. For example, if you estimate that there is a 50% chance on the law and the facts that your client will win $40,000, the "expected outcome" becomes $20,000. This outcome, under probability theory, is "expected" in the sense that if the case were tried 100 times, approximately 50 trials would result in a verdict for your client and 50 would result in a verdict for the defendant; and the average recovery would be 50 Plaintiff's victories multiplied by $40,000 per victory or $2,000,000, plus 50 losses multiplied by $0 per loss, divided by 100 cases for an average recovery of $20,000. (When the analysis is conducted for the Defendant, in *theory*[3] she might use the same average verdict expectancy of $40,000 but will adjust it by her own estimate of the probability that the Plaintiff will be successful in obtaining that amount).

(3) Third, an estimate is made of all non-shiftable litigation expenses and hourly lawyer's fees that your client will incur if the case goes to trial, and these costs and hourly fees are also deducted from the average verdict expectancy. Thus, if your client is expected to incur a total of $4,000 in litigation expenses and hourly lawyer fees combined, the bottom-line settlement value of the case becomes $16,000. (When the analysis is conducted for the Defendant, the expenses and fees are added).

(4) Fourth, the time value of money is sometimes considered because an amount received now is worth more than the same amount received much later. If your client is not expected to obtain a verdict for a number of years, and the investment yield on a prudent investment is currently X% per year, the amount of money received in a year is worth about X% less than if received now. Thus, for the Plaintiff, this time value of money would also be applied to adjust the $16,000 depending upon how much time is likely to transpire from the point an offer of settlement is made until a judgement would be obtained at a trial. The resulting figure may serve as your client's resistance point.

Setting aside a calculation for the time value of money, the basic formula for establishing the Plaintiff's and Defendant's resistance points may be expressed as follows:

P's Resistance Point = Average Verdict Expectancy x P's % Estimate of P's Probability of Winning at Trial - P's Cost of Going to Trial

or: (AVE x PPW) - PC

D's Resistance Point = Average Verdict Expectancy x D's % Estimate of P's Probability of Winning at Trial + D's Cost of Going to Trial

or: (AVE x PPW) + DC

Theoretically, a settlement will occur only if Plaintiff's resistance point is less than or equal to Defendant's resistance point.[4]

Taking the example above, Plaintiff's resistance point of $16,000 was calculated based on $40,000 (the Average Verdict Expectancy) x .50 (P's % Estimate of P's Probability of Winning at Trial) = $20,000 (P's expected outcome) - $4,000 (P's Cost of Going to Trial). Assume that the Defendant calculates her resistance point as follows: $40,000 (the Average Verdict Expectancy) x .40 (D's % Estimate of P's Probability of Winning at Trial) = $16,000 (D's expected outcome) + $5,000 (D's Cost of Going to Trial) = resistance point of $21,000. Since Plaintiff's resistance point of $16,000 is less than Defendant's resistance point of $21,000, a settlement would theoretically occur within the $5,000 zone of overlap.[5]

The Fair Settlement Range Formula

The Fair Settlement Range Formula[6] for valuing cases is essentially a refinement on traditional economic analysis. Under this formula, an over-all fair settlement range for

the case is established, after which the Plaintiff might set his initial resistance point at the low end of the range and the Defendant might set her initial resistance point at the high end of the range. The components of the formula are as follows:

AVE = The Average Verdict Expectancy assuming the plaintiff will prevail on liability

PPW = The Probability the Plaintiff Will Win the Average Verdict Expectancy, considering the law and facts of the particular case.

UPV = The Uncollectible Portion of the Verdict (e.g., where some defendant is uninsured, underinsured, or is partially or completely judgment proof).

PC = The Plaintiff's Cost of going to trial.

DC = The Defendant's Cost of going to trial which the defendant would be willing to contribute to settlement.

SIF = Special Intangible Factors (expressed as a $ amount) that may increase or decrease the verdict (e.g., the particular "jury appeal" of the case for one party or the other).

FSV = The Fair Settlement Value of the case.

FSR = The Fair Settlement Range of the case.

The formula may be expressed as follows:

(AVE x PPW) - UPV - PC + DC ± SIF = FSV

Then, FSV + (10% of FSV) = FSR (upper end of range)

FSV - (10% of FSV) = FSR (lower end of range)

For example, drawing upon the hypothetical estimates given for the Plaintiff in the Traditional Economic Analysis example above, the figures that would be computed in the formula would be:

AVE = $40,000.

PPW = 50% (.50).

UPV = $0 (i.e., assuming the Defendant is not uninsured or underinsured).

PC = $4,000.

DC = $3,000 (assuming the Defendant's total cost of going to trial would be $5,000 and it is estimated she would be willing to contribute $3,000 of the costs towards settlement, thereby saving $2,000 in costs).

SIF = $5,000 in favor of Plaintiff (e.g., assuming he has much greater jury appeal than does the Defendant).

Applying the foregoing to the formula yields the following:

(AVE x PPW) - UPV - PC + DC ± SIF = FSV
($40,000 x .50) - $0 - $4,000 + $3,000 + $5,000 = $24,000

Then, to establish a Fair Settlement Range, 10% of the Fair Settlement Value is added to and subtracted from that Value to arrive at a range:

FSV + (.10 x FSV) = FSR (upper end of range)
$24,000 + (.10 x $24,000) = $26,400 (upper end of range)

FSV (.10 x FSV) = FSR (lower end of range)
$24,000 (.10 x $24,000) = $21,600 (lower end of range).

Based on the foregoing, the Plaintiff might set his initial resistance point at $21,600. He might then set his target point at $27,000 and opening offer at $70,000. The Defendant's calculation of the formula is, of course, likely to be quite different from the Plaintiff's calculation. However, assuming the Defendant arrives at the same Fair Settlement Range arrived at by the Plaintiff, the Defendant might set her initial resistance point at $26,400, her target point at $20,000, and opening offer at $7,000.

Analyzing your Client's Aversion to Risk & Motivations

The foregoing methods of valuation largely assume that the client's decision to settle or go to trial will be made solely on the basis of which course of action will yield the best result from a rote economic standpoint. However, choosing between settlement and trial is not purely an economic process. Whether a client will accept a final settlement offer or take his chances at trial depends largely on the client's psychological propensity or aversion to risk—that is, how willing the client is to gamble on losing at trial versus the certainty of receiving the amount offered in final settlement.

This risk averseness varies from individual to individual and will often vary for each individual at different points in time. For example, most people are less willing to "roll the dice" with an "all or nothing" outcome at trial where liability is questionable if the amount at stake is a million dollars versus $10,000. Similarly, a wealthy client is more likely to gamble on his chances at trial when the amount at stake is $10,000, whereas an indigent client faced with the same amount at stake may be content to settle for the certainty of receiving $5,000.

In addition, risk aversion largely explains

why many settlements occur on the eve of trial and some occur literally on the courthouse steps. When a trial is a year or more away, the consequences of an adverse verdict appear more abstract.[7] On the other hand, those consequences often take on a different reality during the weekend before trial, with the result that many clients will at that time prefer the certainty of an agreed-upon settlement to the risk of an undesirable verdict.

Clients also have various motivations that will affect their decision to settle or go to trial. For example, settlement may be preferred to avoid the emotional strain and time demands of a trial, to preserve the personal or business relationship between the parties, to avoid unwanted publicity, to avoid an adverse legal or factual precedent, or to obtain an immediate source of funds if the client is in financial distress. On the other hand, a client might prefer a trial over settlement out of a desire to inflict punishment on the opposing party, to publicly vindicate a principle by having one side declared the winner and the other the loser, to establish a legal precedent or policy (e.g., to discourage nuisance suits), or to simply delay payment of a claim for lack of sufficient funds to pay it.

Thus, you must always analyze the extent of your client's aversion to risk and other motivations that may affect the desirability of settling the case or trying it. These factors may be analyzed by (1) identifying the various risks and personal motivations bearing upon the choice between settlement and trial, (2) reducing these to a set of consequences of settling the case on the one hand, and trying it on the other, and (3) asking your client to place a monetary value on the overall consequences in light of his preferences and values to determine how much he is willing to accept or forgo for those consequences.[8] This amount might then be applied to increase or decrease the client's resistance point that was otherwise established based on a purely economic type of analysis.

For example, assume that resistance points of $30,000 for the Plaintiff and $50,000 for the Defendant are arrived at by Intuitive Case-Worth Analysis, Traditional Economic Analysis, or the Fair Settlement Range Formula. If the Plaintiff does not want to go through the emotional trauma of a bitter trial, he might lower his resistance point by an additional $10,000 to $20,000. On the other hand, if the Defendant is more willing to take the case to trial because she has received adverse publicity from the suit and wants to vindicate herself from any wrongdoing, she might adjust her resistance point such that she will pay no more than $30,000. In this scenario, what otherwise would have likely resulted in a settlement of approximately $40,000 (i.e., the midpoint of a $30,000 to $50,000 settlement zone) is now likely to result in a settlement of approximately $25,000 (i.e., the midpoint of a $20,000 to $30,000 settlement zone).

Adopting a Holistic Analysis & Advising the Client

Most lawyers do not employ a standard mathematical formula in valuing cases for negotiation and settlement. Although a strict empirical approach may be tempting and comforting from the standpoint of providing some "objective" analysis, certainty in valuing cases for settlement is almost always illusory. The typical case presents too many factors and unknowns to reconcile through some rote computation. Indeed, if one applies Traditional Economic Analysis or the Fair Settlement Range Formula to the same case, the resulting computations will likely be very different. Moreover, if there were some fool-proof formula to valuing cases, there would be no need for negotiation at all because cases would then simply be settled by applying that formula to the particular facts and arriving at a result.

Thus, many lawyers adopt a "holistic" analysis to valuing cases for settlement that essentially draws upon the various factors considered in Intuitive Case-Worth Analysis, Traditional Economic Analysis, the Fair Settlement Range Formula, and an analysis of the Client's Aversion to Risk & Motivations. Depending on the particular type of case and the values and preferences of the client, holistic analysis considers the factors variously emphasized in the other approaches, giving those factors more or less weight as the circumstances warrant. In the process of considering and weighing these factors, however, holistic analysis does not attempt to plug them into some standard mathematical formula, but attempts to arrive at a multi-faceted, reasoned judgment about a reasonable "settlement zone" for the case (i.e., the distance between the parties' resistance points) and a reasonable "settlement range" for each side (i.e., the distance between each party's resistance point and target point).

In this process, it is explicitly recognized that the predictions made are uncertain, may well change over time, and may well be revised during actual negotiations. These limitations on the prophetic accuracy of valuing a case are accepted as a reality and reconciled under the assumption that if the lawyer and client engage in an on-going assessment of the advantages and disadvantages of settling the case versus trying it, the final decision—which should always be made by the client—will turn out to be the best decision in the end.

It follows that in advising the client about a reasonable settlement zone and settlement range, most lawyers express their opinions about these matters as a *tentative* prediction or estimate. The reason for this is not, as some might cynically believe, to somehow exonerate the lawyer from making a bad prediction relied upon by the client. Rather, the tentativeness of the prediction or estimate is merely a candid concession to the inherent complexity and difficulty of valuing cases for settlement. It is consistent with the ethical prescription that a lawyer has a duty to advise his client according to the lawyer's best overall judgment and to place the ultimate decision whether to settle the case with the client. Indeed, a lawyer should explain this to the client in just these terms.

In light of the foregoing, in employing a holistic analysis to case valuation and advising your client about that analysis, you might follow the following 6 steps:

(1) Estimate the "Average Jury Verdict Expectancy" for the type of case, by evaluating:

- The cause of action
- The burdens of proof for the cause of action
- The legal elements and measure of damages for the cause of action
- Jury verdicts in the same type of case, drawn from one's own experience, the experience of other lawyers, or from publications reporting jury verdicts

(2) Adjust the Average Jury Verdict Expectancy (upwards or downwards) to arrive at an "Estimated Jury Verdict for the Case" that reflects the particular legal and factual circumstances of the case, by evaluating:

- Any uncertainties in the law about whether the case is actionable or damages

are recoverable

■ The relative strength of the evidence in support of and in opposition to establishing liability

■ The relative strength of the evidence in support of and in opposition to establishing damages

■ What damages may be calculated as a sum certain (e.g., special damages)

■ What damages are amorphous (e.g., pain and suffering, permanent injury, punitive damages)

■ The extent to which the case has any special "jury appeal" for one side or the other

(3) Adjust the Estimated Jury Verdict for the Case (downwards for the Plaintiff and upwards for the Defendant) by the amount of the client's non-shiftable costs of obtaining that verdict to arrive at a "Potential Resistance Point," by evaluating:

■ All out-of-pocket expenses the client will likely incur and which the court will not tax against the party who loses at trial (e.g., hourly attorney's fees, and costs associated with case investigation and preparation)

■ The time value of money if a trial would not take place for a number of years

(4) Adjust the "Potential Resistance Point" (upwards or downwards) based on the client's aversion to risk and personal motivations, by evaluating:

■ The client' s financial, social, psychological, and other personal circumstances

■ The various risks and personal motivations of the client bearing on the choice between settlement and trial

■ The important consequences to the client of settling the case or trying it

■ Any monetary value that the client would place on settling the case in preference to trial or vice versa

(5) Adjust the "Potential Resistance Point" further, if appropriate, based on an evaluation of the factors under steps (3) and (4) above from the other party's perspective.

(6) Based on the Potential Resistance Point as adjusted, advise the client about a tentative resistance point and tentative target point, leaving the final decision on these matters to the client.

These steps in holistic analysis are similar to the Fair Settlement Range Formula, but place a greater premium on the effects that intangible factors play in evaluating whether it is in the client's best interest to settle the case or take it to trial. The analysis also embodies a more fluid reasoning process that is more in keeping with how most clients and lawyers think about case valuation—i.e., through a process of weighing multiple factors, probabilities, and preferences together, rather than through some rote, mathematical calculation of seemingly independent variables.

This does not mean that the particular calculations employed in the Fair Settlement Range Formula (or Traditional Economic Analysis) are inappropriate to consider when conducting holistic analysis. For example, many lawyers find it useful to arrive at an "Estimated Jury Verdict for the Case" in Step 2 above by multiplying the "Average Jury Verdict Expectancy" by the probability, expressed as a percentage, that it will occur (i.e., AVE x PPW in the Fair Settlement Range Formula). Similarly, after arriving at the "Potential Resistance Point" in Step 5 of holistic analysis, it may be useful to consider a Fair Settlement Range by establishing a bracket whose endpoints are 10% on either side of the Potential Resistance Point—i.e., the Potential Resistance Point + (10% of the Potential Resistance Point) = Upper end of Range; and the Potential Resistance Point - (10% of the Potential Resistance Point) = Lower end of Range. In sum, in an appropriate case, holistic analysis might draw upon or be combined with certain aspects of the Fair Settlement Range Formula or some other valuation method in arriving at a potential resistance point and target point.

Conclusion

The foregoing methods of case valuation are best thought of as "guides" for evaluating the most common factors that bear on your client's choice of whether to settle or take the case to trial. They should not be viewed as sum-certain calculations to blindly advocate or defend in negotiations. The very process of negotiation will inevitably warrant changes in your client's assessment about the myriad factors that affect a settlement decision. But employing one or more of these valuation methods will provide a useful starting point in helping you and your client formulate a reasoned negotiation strategy and decide upon whether to accept a final settlement offer. ■

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Endnotes

1. Some lawyers also consider the relative experience and trial skills of opposing counsel as a factor that may affect the value of the case. However, unless opposing counsel is particularly inexperienced, this factor is usually less important than some lawyers might prefer to think. In any event, when negotiations are conducted prior to the filing of a lawsuit, and the negotiator for the other side is not the person who will represent the opposing party in the event suit is brought, the factor is irrelevant because the opposing litigator is unknown.
2. *See* Gerald R. Williams, *Legal Negotiation and Settlement* 5-6 (1983) (widely divergent settlement results were reached by 20 pairs of lawyers, all of whom practiced in the same community and were given information about the same case); D. Rosenthal, *Lawyer and Client: Who's in Charge?* 202-207 (1974) (widely divergent results reached by a panel of two plaintiffs' lawyers, two insurance adjusters, and one attorney who handled both plaintiffs' and defendants' cases, when each was asked to independently evaluate cases presented in the study); R. Haydock, *Negotiation Practice*, Sec. 2.3 (1984) (30 experienced personal injury lawyers who were asked to evaluate a simulated personal injury case came up with widely divergent valuations).
3. Needless to say, the Defendant's estimate of the average verdict expectancy for the case may be quite different than the Plaintiff's estimate, and disputes about this matter exist in the vast majority of cases.
4. Expressed another way, a settlement will occur only if the Average Verdict Expectancy x P's % Estimate of P's Probability of Winning at Trial (P's expected outcome) - the Average Verdict Expectancy x D's % Estimate of P's Probability of Winning at Trial (D's expected outcome) </= P's Cost of Going to Trial + D's Cost of Going to Trial.
5. Under the formula given in the preceding note, a settlement will theoretically occur because Plaintiff's expected outcome of $20,000 ($40,000 x .50) minus Defendant's expected outcome of $16,000 ($40,000 x .40) amounts to $4,000, which is less than the sum of the costs of going to trial for the two sides of $9,000 ($4,000 for Plaintiff + $5,000 for Defendant).
6. *See* John W. Cooley, *Mediation Advocacy*, Sec. 3.12 (NITA 1996).
7. *See* D. Waterman & M. Peterson, *Evaluating Civil Claims: An Expert System Approach* 8 (1985) (one study found that the value of a personal injury case just before trial may be as much as 20% greater than the value of the case two years before trial).
8. *See* P.T. Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1 J. Disp. Res. 38-40 (1991).

Thoughts Upon Leaving the DA's Office

By Vincent F. Rabil

On March 7th, I tendered my resignation from the Forsyth County District Attorney's Office where I prosecuted cases for seventeen and a half years. In an age of legal specialization, I had specialized. I was learning more and more about less and less. At the age of 51, I realized that I could do more with a law degree. I felt the need to change course. Being the state's attorney can be exciting, frustrating, satisfying, challenging. However, being an integral part of the "machinery of justice," even in "high profile" criminal cases, can leave one empty at times, wondering whether the 38 year active sentence or the death penalty you just obtained would contribute to the construction of a better world. Not that I have any second thoughts about the "just deserts" I argued for.

At this drastic juncture in my career, I think members of the bar, especially our newest members, would like to know what advice I would give to a young attorney contemplating service to the people of this state as a prosecutor. Like Rainer Maria Rilke's, *Letters to a Young Poet*, consider this my *Letters to a Young Prosecutor.*

To succeed as a prosecutor you must be hungry. You must be hungry for justice. You must learn to know hunger as your friend and ally, and as a way of life. Hunger must be your confidant, your taskmaster. If you lose your ability to feel hunger for truth, for more evi-

dence, for explaining all facets and possibilities of innocence, as well as guilt, then you forfeit your right to enjoy the power the state gives you to destroy lives, to take away money and property and liberty.

You must not concern yourself with personal gain. You will never be rich or comfortably middle class being a prosecutor. Traffic court will seem like "fast food" justice. Calling and working one of our massive criminal dockets will have all the glamour of working an assembly line, knowing you are just an employee at will, serving at the pleasure of your elected DA. A misfit in law school or on the playground, you will suddenly find yourself "popular" when you have the power to dispense life sentences, "improper equipment" pleas, or voluntary dismissals. There will be times when you have to say "no" to an offer of free tickets to an NCAA game or a free weekend at the beach.

You must be willing to live on the vindication of the law as your sole reward. Occasionally, victims will express their gratitude, send a "thank you" card. But more often than not, doing your job correctly will not make everyone happy. There will be times when you disagree with the police or the sheriff. There will be times when it looks like everyone is lying on both sides of a case. But realize, that despite these things, you can derive great personal satisfaction from a creative new way to present evidence, or cross-examine a witness. Know that there are few emotional highs for a prosecutor greater than seeing tears of gratitude in the eyes of a victim when a verdict is returned that will let him or her heal and get on with their life knowing that everything that could be done, was done.

There will be times when you must dismiss charges and let the guilty go because you have little or no admissible evidence. And there will be times when you must go forward trusting in the adversarial process and the jury system to decide ultimate questions where certainty may only be the mask of revenge and hurt.

When you suspect a witness is lying, recall the gleeful power you felt as a child lying to escape a spanking by blaming the other kid for stealing cookies or breaking a new lamp. You must see this glee in the eyes of this kind of witness and learn to cross- examine by letting the lying witness go on, encouraging his or her story-telling and eventually showing your jury what is going on.

Never take anything for granted. If your investigator tells you he has a confession, be from Missouri, make him show it to you. Ask yourself what the suspect was really saying. Identify what elements of the crime they did or did not admit to. Is there corroboration in the time sequence, in the physical evidence? Does it jibe with other witnesses? What inducements or promises were made to get the statement?

To bring a case on circumstantial evidence it must be so compelling as to rule out any other rational explanation other than what it is being offered for, such as identity, knowledge, absence of mistake or accident.

Be professional. Respect the court, even when you disagree with a ruling. You should understand the difference between arguing the law and the evidence to the court, and arguing with the judge. Remember, your authority flows from the bench. You are nothing without the judge or the jury backing you up. Your professional reputation is everything.

The days of abusing the calendar power of the DA should be over. You should not engage in personal vendettas against other attorneys just because they "annoy you" by filing discovery motions or because they ask the court to dismiss a case. You should know the law. If the other side files frivolous motions, seek your remedy from the court.

Look at the big picture. Fight your battles when they matter. Understand the difference between not "sweating the small stuff" and knowing when "God is in the details." Details that matter like skin cell DNA, fiber comparisons, fingerprints, handwriting characteristics, or an ejector marking on a 9MM shell casing.

Don't be afraid to ask officers to re-investigate or do another search of the same crime scene if you think more evidence is out there. Don't be afraid to ask the medical examiner more questions about time of death, order of wounds, scenarios of possible self-defense, mechanisms and modalities of death, as well as cause of death.

Don't be afraid to "scrape the earth" for all documents and witnesses who can shed light on what happened and why.

Never assume anything. Never assume a hospital records custodian will locate and send you *all* the records you subpoena. What you really need may be stored in more than one place in a large facility.

Don't be afraid to seek scientific analysis because it might be exculpatory.

A DA is not a civil plaintiff's attorney. It is not your duty to win at *all costs*. Recognize that the duties of a defense attorney are different under the law and under ethical guidelines. Fear and respect that difference because in that difference are the core values of our democracy and the individual liberties of American citizenship.

A prosecutor has power. The power to accuse. To enforce laws. To take liberty. This power can be intoxicating and self-justifying. You must temper these dangers with the

awareness that with this power comes a higher responsibility to see not one side, but all sides of an investigation, all sides of an argument on law and evidence.

The cynical say there is no such thing as justice. It may be true that victims can never really be made whole again. That guilty verdicts or sentences may never satisfy for the loss of a loved one. You must realize that justice is a star to aim for, knowing you may never get there.

Hunger for justice defined as a result based on a relentless search for, discovery of, and professional consideration of all the evidence, good or bad for the state. Be willing to settle or dismiss weak cases. Have the courage to pursue significant ones which will make a difference in your community. Don't squander your power engaging in petty tactics that demean your authority. Don't surrender your professionalism or you will lose your greatest weapon: the moral high ground.

Above all, if you go to trial, know your case. Know your witnesses, your experts, and the strengths and weaknesses of their opinions. Know your crime scene. Ferret out what has not been done by investigators and, if it reasonably can be done, do it.

It is said that winners are simply willing to do what losers aren't. But for a DA "winning justice" sometimes means acquitting the innocent as well as convicting the guilty. Now, as I embark upon the second half of my career as an attorney, I look forward to the struggle for justice, trusting that in this country justice will always be our common goal. From the stellar perspective of justice, I take comfort in knowing that toward this end we are all on the same side. ■

After three years in general civil and criminal practice in Fayetteville and Winston-Salem. Rabil became an ADA in Guilford County under Jim Kimel. In 1988 he came to the Forsyth County DA's Office under Warren Sparrow. Over the last 14 years he has prosecuted over a dozen capital cases and hundreds of other violent felonies under Thomas J. Keith. In April he joined the firm of White and Crumpler where he is doing criminal and civil litigation.

Elections Administration (cont.)

4. No excuse absentee voting extended to all elections.

5. Title of the state elections board "executive secretary-director" changed to "executive director."

6. Participation by county elections directors in state certification program made mandatory.

7. All (but four) municipal boards of elections abolished.

8. In light of the Florida experience, legislation provides for the appointment of presidential electors in the case that the state presidential election is not resolved by the deadline for sending electors to the Electoral College.

9. District court elections made nonpartisan.

2002

1. All judicial elections made nonpartisan.

2. Public financing of judicial elections instituted.

2003

1. Statewide computerized voter list made the "official voter registration list for the conduct of all elections." Until this time, official lists have been held at precinct or county level. County records are now termed "backup."

2. Voting machines required to provide "second chance" on overvotes.

3. Provisional voting expanded to virtually any voter who shows up at the polls (including, it seemed, voters who come to the wrong precinct; State Supreme Court in 2005 interprets statute not to include such voters[5]).

4. Voters required to sign pollbook.

5. Some voters (those who registered by mail after January 1, 2003, and have not previously voted in an election for federal office in North Carolina) required to show ID at polls.

6. Canvass pushed back to seventh day after the election.

2004

Electronic Voting Systems Study Commission created.

Today and Tomorrow

Over the last century and a quarter, North Carolina's system for the administration of elections has become more centralized, more open, and more user-friendly. One trip to the website for the State Board of Elections (www.sboe.state.nc.us) illustrates all three. You can look up your voter registration record, your voting history, confirm your polling location, and get a map to it if you want to. This example of openness and user-friendliness is possible because of a key element of centralization: the statewide, computerized voter registration database has, since 2003, been the "official voter registration list for the conduct of all elections," replacing the patchwork of 100 separate county systems.

What does the future hold? In Oregon, there are no polling places; all elections are done by mail. In Georgia, every polling place has exactly the same kind of touch-screen electronic voting machine. Everywhere, visionaries are looking to possibility of conducting elections over the Internet.

Whatever the future holds, we can hope in North Carolina that our history of free and honest elections will see us through all changes to come. ■

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Endnotes

1. The elections laws are codified in Chapter 163 of the General Statutes. The powers and duties of the State Board of Elections are set out in G.S. 163-22. The powers and duties of the county boards are set out in G.S. 163-33.
2. The chief federal statutes are the Voting Rights Act of 1965, 42 USC §§ 1973 et seq., National Voter Registration Act of 1993, 42 USC §§ 1973gg-gg10, and the Help America Vote Act, 42 USC §§ 15301 et seq.
3. For example, the number of voters in the 2004 presidential election in North Carolina was 39.2% higher than it had been just eight years earlier: 3,498,746 in 2004 (from official results reported on web site of the State Board of Elections, www.sboe.state.nc.us) and 2,513,357 in 1996 (from North Carolina Manual 1997-1998, published by the secretary of state).
4. The Code of North Carolina, Enacted March 2, 1883, Prepared by William T. Dortch, John Manning, and John S. Henderson.
5. *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (February 4, 2005). The General Assembly reacted to the James decision by enacting S.L. 2005-2, "An Act to Restate and Reconfirm the Intent of the General Assembly with Regard to Provisional Voting in 2004."

Should You Advise Your Clients to Apologize When They Make Mistakes?

By J. Kim Wright

When we were children, our parents taught us we should always apologize when we hurt someone. In the legal profession, the prevailing wisdom has been to tell clients to admit nothing and never to apologize. While lawyers have meant well and have thought they were saving their clients from liability, recent research has shown that lawyers may have been on the wrong track.

Tomek Olbinski/SIS

A lawyer friend, Sharif, spent Thanksgiving Day of 2004 in the hospital. He went there for emergency surgery to remove his appendix. A few hours after the surgery, Sharif found himself in a pool of blood. Nurses tried to be super-professional in the midst of the emergency, but Sharif said he could tell they were in a panic and he thought he was going to die. The quick diagnosis was internal bleeding (although Sharif said it looked very external to him!). He was taken back into surgery and the two little holes from the laparoscopic surgery became a five inch incision. A few days later, Dr. A., the first surgeon, sat down to talk with Sharif. Dr. A. told Sharif that he was sorry for what had happened, that he thought maybe he had failed to close a blood vessel properly, that his colleague Dr. B. who performed the second surgery, may have acted hastily in such an invasive procedure, that the second surgery might not have been necessary at all and even if it had been, the laparoscopic punctures might have been the better access to repair the bleeding. In addition to his explanation and apology, he told Sharif that the hospital was going to forgive the bill for the extra surgery and extra recovery days.

Sharif told me that as the doctor talked, at first, he was seeing dollar signs and he was drafting the malpractice claim in his head. He was incredulous that the doctor was admitting his mistakes and long forgotten rules of evidence began to emerge from memory. As the conversation continued, he found himself listening from a place of compassion, impressed by the doctor's candor, and recalling that he'd made mistakes in his life. By the end of the conversation, anger and thoughts of suing had disappeared.

Sharif's story isn't unique. Doctors around the country are discovering that leveling with their patients and apologizing are effective tools for lowering their malpractice claims. A recent *Associated Press* story[1] reported that since 2002, hospitals in the University of Michigan Health System have been encouraging doctors to apologize for mistakes. Their annual attorney fees have since dropped to

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Lapsus Linguae

BY JUDGE MARTY MCGEE

I am back with more submitted anecdotes from around the state. I have also included several stories from US District Court Judge Jerry Buchmeyer's columns in the *Texas Bar Journal*. Judge Buchmeyer has been writing his et cetera column since 1980 and a collection of his stories have been published under the title of *Texas Courtroom Humor.* The *Buchmeyer Blog: Say What?!*, which includes some of Judge Buchmeyer's stories, can be found at www.texasbar.com/saywhat/weblog/index.html.

I also want to thank Judge Buchmeyer for his encouragement and I appreciate those of you who have submitted stories.

Divorce Pending

From Judge Jerry Buchmeyer, Dallas, Texas. In the *Texas Bar Journal's* September 2002 edition, Judge Buchmeyer included this story submitted by Timothy M. Quill: In answers to a lengthy jury questionnaire, a female prospective juror indicated that she and her husband were in the process of divorce, a proceeding that the husband had initiated. She made clear that she had some bitterness about the matter.

Q. What are your spouse's hobbies, favorite recreations, or pastimes?

A. Drinking and adultery.

A Minor Error

From Judge Jerry Buchmeyer, Dallas, Texas. Judge Buchmeyer included this one in the January 1995 edition of the *Texas Bar Journal*. He indicates that after the jury reaches its verdict, it's usually a pretty simple matter for the foreperson to sign and deliver to the judge the proper jury form—but not always.

The Court: Would you please hand the verdict form to the bailiff for inspection by the court.

At this time, I'll ask the defendant to please rise. The verdict form is signed by... [the] presiding juror. At this time, I'll read the verdict to the defendant. "We, the jury, find the defendant *not* guilty as charged."

Presiding Juror: Damn! I signed the wrong one.

A Financial Hardship

From Karen Harris, Concord, NC. Ms. Harris, the judicial assistant in District 19A, showed me the following Request for Excuse or Postponement of Jury Service:

The Excuse: I would like to be excused from jury duties because if I only received $12.00 per day, this would put me in a compelling personal hardship.

Occupation: Unemployed.

The Alibi

From Judge Marty McGee, Concord, NC. In a case against a defendant charged with larceny of motor fuel, the gas station clerk identified the defendant as the female who pumped gas and drove off without paying. The defendant called her boyfriend as an alibi witness, and he testified emphatically that it was physically impossible for the defendant to be a gas thief because: (1) she did not have a driver's license, (2) she does not drive, (3) he always drives her everywhere she goes, and (4) she is always with him.

On cross-examination, the following exchange took place:

ADA: Where were you and the defendant on May 22, 2004, at 3:00 pm (the time of the theft)?

Witness: I don't know. I have had nine concussions. I have no short-term memory. I probably won't remember talking to you ten days from now.

Plop, Plop, Fizz, Fizz...

From Judge Ron Spivey, Winston-Salem, NC. Judge Spivey recalls that when an officer testified in a DWI case that the pro se defendant had taken a roadside alcohol test known as the AlcoSensor test, the defendant immediately blurted out:

Defendant: Judge, I object. I didn't take no *alcaseltzer* test.

The Appointment

From Judge Ron Spivey, Winston-Salem, NC. Judge Spivey recalls an incident in which a man in child support court had been proven beyond all doubt in the world as the father of a child in question. The mother said he was the father, the blood test was 99.9% certain, and the baby even looked like the defendant. After Judge Spivey declared that the defendant was the father of the child, he responded:

Defendant: Judge, I guess this means I'm gonna have to pay child support now that I'm the *court-appointed father* for this baby.

We Are Ready

From Judge Marty McGee, Concord, NC. In a request to calendar a case for trial, an attorney *representing himself* included the following statement in his filing: "In my opinion, the above-entitled case is ready for hearing. I have contacted *my client* and *said client* will be available on the above requested date."

The Plant

From Jeff Noecker, Wilmington, NC. A client of Mr. Noecker was in jail and his older brother was attempting to handle some of the client's business such as paying bills and cashing checks. Mr. Noecker alerted him that he may need some documentation establishing an agency relationship

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Should Your Client Apologize (cont.)

one-third, from $3 million to $1 million, and malpractice lawsuits and notices of intent to sue have fallen by half, from 262 filed in 2001 to about 130 per year.

Jonathan Cohen, a law professor at the University of Florida Levin School of Law, was an early researcher in the apology trend. In a 2000 presentation, I heard him speak about the Veterans Affairs Hospital in Lexington, KY. Cohen said that the VA hospital adopted the policy of apologizing in 1987 after some big malpractice cases. They went from being one of the highest net legal cost hospitals to among the lowest net legal cost hospitals in the VA system.[2]

Heath care providers who apologize to patients for things that go wrong in their care or the care of relatives are not just doing the right thing, it makes sense business-wise. Kathryn Johnson, RN, Director of Risk Management at the University of North Carolina Healthcare System, in *Essentials of Physician Practice Management*,[3] writes that studies show litigation by patients was reduced when providers were forthcoming about mistakes they'd made and took responsibility for them. This was especially true of smaller mistakes. Patients who are communicated with honestly and in an ongoing manner feel their providers are acting in good faith, are more forgiving of their human errors, and are less likely to want to punish them with lawsuits. Hospitals across the country are adopting similar policies.

Apology isn't just for medical malpractice. In 2002 the *National Law Journal*[4] reported that The Toro Co., the lawn mower company, had adopted a revolutionary policy. When an accident was reported to the company, a non-lawyer "product integrity specialist" contacted the injured party, expressed the company's condolences, and initiated an investigation to discover the cause of the accident. An engineer went with the product integrity specialist to look at the equipment that caused the injury and, where appropriate, the company took steps to improve the equipment to prevent future injuries. In two thirds of the cases, the product integrity specialist was able to resolve the matter without legal intervention. If not, the company offered to mediate and almost all cases were resolved in mediation. According to the article, Toro reported that for 1992 to 2000 with more than 900 products liability claims referred to the program, legal costs per claim (attorney fees and litigation expenses) were reduced by 78%, from an average of $47,252 to $10,420. The average resolution amount for the period was reduced by 70%, from $68,368 for settlements and verdicts to $20,248.

In 2000, California passed a law barring the introduction of apologetic expressions of sympathy ("I'm sorry that you are hurt") but not fault-admitting apologies ("I'm sorry that I injured you") after accidents as proof of fault. Other states are now debating proposed apology legislation, including bills that would exclude fault-admitting apologies from evidence.[5]

Beyond the financial savings, there are other benefits. In the AP article, one man said that an apology might not have stopped him from suing over the misdiagnosis of a brain aneurysm that he contends left his wife severely disabled. But it might have saved his relationship with the doctor, who was once a close friend, he said.

According to Aaron Lazare, author of *On Apology*,[6] apologizing can be motivated by strong internal feelings such as empathy for another or the distress of guilt and shame. In such cases, the person issuing the apology seeks to restore and maintain his own self-esteem. Other motivating factors are external: wanting to impact another person's perception. In such cases, a person apologizes due to fear of abandonment, stigmatization, damage to reputation, retaliation, or punishment. People who don't apologize often say they don't do so because they fear the reactions of the people to whom they apologize, such as losing the relationship, humiliation, punishment, etc., or they are embarrassed and ashamed of the image they would have of themselves as weak, incompetent, or in the wrong. Lazare points out the healing benefit of the apology to both parties, the harmed and the one causing the harm. The apology fulfills several possible psychological needs for the offended party, among them: restoration of self-respect and dignity, a sense of connection and shared values with the other person, a sense of safety in the relationship, assurance that the offense was not his fault, and sometimes the sense that the offender is suffering from the harm. While it appears that the apology is for the person who was injured, the results for the person issuing the apology may be more dramatic. The apology often restores the person's self-esteem and

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Lapsus Linguae (cont.)

between he and his brother. The brother quickly assured Mr. Noecker that: "I got the papers right here where my brother signed to make me his *gardenia*."

A Bad Vacation

From Judge David Cayer, Charlotte, NC. Judge Cayer remembers a litigant telling him while he was on the district court bench that she had tried to get "a divorce from bed *and breakfast*."

The Demand Letter

From Judge Jerry Buchmeyer, Dallas, Texas. In the *Texas Bar Journal's* January 2005 edition, Judge Buchmeyer included the following story: Phillip A. McKinney of Corpus Christi (McKinney & Hernandex) sent me this marvelous letter from a Beeville attorney, Dean Patton, to an optometrist in the same city, dated November 18, 1970. Patton died "a good while back," but his son recently found this letter, which represents a certain eloquence and directness that we just don't see anymore in the practice of law:

We have been consulted by our client, and your patient...concerning his continuing problems with the spectacles which you prescribed and have tried to fit for him. He advised that you have tried to fit several types of lenses, none of which have been successful, and which has resulted in extensive pain, suffering, embarrassment, humiliation, expense, inconvenience, and general discomfort.

As you know from your observation and examination...his face is mis-shapen from his being violently struck by a golf ball several years ago (breaking his nose). This, in itself, causes him a certain amount of self-consciousness and sensitivity about his appearance. After all, *not just everyone has a nose further to one side of his face than the other, and one eye lower than the other.* This type of thing should be taken into consideration in treatment of this patient. The mis-fit of the eyeglasses has caused a deep, ugly, nasty, repulsive depression on one side of his nose, and is, indeed, resulting in serious consequences.

[He] has become very apprehensive about his appearance, and has *developed a belief that he is repulsive to other persons, especially the opposite sex.* This has resulted in extreme and constant tension and self-concern, and there are indications that this may be causing impotency. (To negate any erroneous assumptions on your part, [his] age has nothing whatsoever to do with this condition). He is, and has been, quite a Casanova, and the possibility of this condition continuing is frightening, to say the least.

Further, these problems have affected his normal body function, resulting in abnormalities and irregularities in his digestion and waste elimination, These are directly related to this continuing worry, stress, strain, and mental (as well as physical) irritation. He is suffering from what is commonly referred to as "irregularity," with its accompanying ill-humor and general "out-of-sorts" feeling.

To sum it up, [he] is in a hell of a shape, suffering from loss of companionship, finances, sleep, vision, etc., ad infinitum. Something must be done, and he has instructed us to advise you that you will either fix those damned spectacles immediately, or he will resort to some drastic action. *We are trying to restrain him from physical violence, but may not be able to do so indefinitely.* Please give this your immediate attention. ■

Judge McGee is a district court judge in Cabarrus County. Lapsus Linguae is a Latin term for a misstatement or slip of the tongue. Please send contributions to Lapsus Linguae *to: Judge Marty McGee, PO Box 70, Concord, NC 28026 or cjdmbm@nccourts.org.*

Notice to Attorneys

The following prepaid legal services plans have not registered with the North Carolina State Bar for 2005.

The MHN Legal Service
Americus Legal, Inc.

As a result of the plans' failure to register with the North Carolina State Bar in 2005, North Carolina licensed attorneys shall not participate in these plans by providing legal services to the plans' subscribers.

LAMP Committee Attorneys—
Answering the Call to Educate the Defenders of Our Country

BY GILL P. BECK

The War on Terror has brought into sharp focus the hardships that the men and women of the United States military services are forced to bear on a daily basis. Such difficulties apply not only to active duty military personnel, but also to over 200,000 Reserve and National Guard military personnel, who have been mobilized in support of the War on Terror. These hardships happen not only on the battlefield, but also at home when legal issues occur, and they do not wait for convenient times, but frequently arise when the soldier, sailor, marine, or airman is far away attending to our nation's business.

NC State Bar President Bud Siler presents a certificate of appreciation to Renny Deese at the November 2004 LAMP CLE.

Military attorneys—judge advocates—provide the first line of legal support to military personnel and their family members. These judge advocates are typically assigned to the legal assistance division of the Staff Judge Advocate's Offices on military bases, posts, and installations located throughout North Carolina. Many of these legal assistance attorneys are newly graduated from law school and are often licensed in a state other than North Carolina.

Since these judge advocates may not be fully conversant with North Carolina law dealing with landlord-tenant, contract, indebtedness, and family law issues, the North Carolina State Bar's Standing Committee on Legal Assistance for Military Personnel (LAMP), under the leadership of Judge Robinson O. Everett of Duke University's School of Law, for the past 22 years, has undertaken projects to provide legal assistance attorneys assigned within North Carolina greater access to North Carolina law and cases and to enable them to obtain prompt and professional advice from experienced North Carolina practitioners in relevant areas. These projects include an annual continuing legal education (CLE) program, outreach to bar associations, and the dissemination of legal information.

Annual CLE

On November 18-19, 2004, the NC LAMP Committee conducted a CLE program at the Holiday Inn-Bordeaux in Fayetteville, North Carolina, for active duty, Reserve, and National Guard judge advocates. The CLE was well-attended, drawing judge advocates from all of the military services. The program addressed estate planning, pitfalls for legal assistance attorneys, land-

lord-tenant issues, paternity and child support, child custody, and consumer protection. Leading experts on North Carolina law, including Raleigh attorneys Mark Sullivan, John Huggard, Gerald Robbins, Jennifer Porter, and Bert Nunley, along with Fayetteville attorney Renny Deese, Greensboro attorney Jeremy McKinney, and Statesville attorney David Benbow, made presentations on North Carolina law.

State Bar President Robert Siler addressed the group and thanked the judge advocates from army, navy, air force, coast guard, and marine units from throughout the state. He stated that he and the State Bar, through its LAMP Committee, were honored to provide the annual LAMP CLE to educate military attorneys on North Carolina law issues. He praised the judge advocates and poignantly noted the importance of taking care of those service members who defend our freedom. President Siler thanked the NC State Bar LAMP Committee and North Carolina attorneys for their dedication and commitment to educating and assisting legal assistance attorneys stationed in North Carolina, and made special presentations to Colonel Malinda Dunn, staff judge advocate of XVIII Airborne Corps and Fort Bragg, State Bar Councilor Renny Deese, LAMP executive director Paul Raisig, Rear Admiral Edwin Daniels, US Coast Guard (Ret.), Mark Sullivan, and others for their efforts to ensure that military personnel in North Carolina were fully apprised of their legal rights and duties under North Carolina law.

Outreach to Bar Associations

Over the past year, Mark Sullivan has led the efforts of the NC LAMP Committee to reach out to bar associations located throughout the state to provide training and also to encourage support for committee activities. In addition, the LAMP Committee has worked with the North Carolina Bar Association to sponsor Operation Legal Eagle NC, in which North Carolina attorneys provide pro bono legal assistance to service members. Lori Kroll, a Raleigh attorney and army reserve major, who works for the NC Attorney General's Office, has served in a key position on the American Bar Association's LAMP Committee, coordinating LAMP training not only in North Carolina, but throughout the country.

Dissemination of Information

The LAMP Committee produces numerous legal publications to distribute information regarding North Carolina law to judge advocates. In the early 1980's Colonel Mark Sullivan (USAR, Retired) implemented a preventative law handout program to (1) help prevent legal problems before they arise, (2) answer some of the military client's questions before he or she is interviewed by a legal assistance attorney, and (3) provide legal assistance attorneys written information on applicable North Carolina law and procedure. The materials designed to address the frequently asked questions of legal assistance clients are called "TAKE-1" handouts and "The Legal Eagle." Those handouts designed as attorney-to-attorney resources for legal assistance attorneys are called "Co-Counsel Bulletins" and "Silent Partners." Copies of the handouts are available on the NC State Bar LAMP website—www.ncbar.com/home/lamp.htm. Recent publications also include "The Judge's Guide to the Servicemembers' Civil Relief Act in North Carolina." These publications provide valuable information to judge advocates throughout the state and are constantly updated to reflect new developments in the law.

Conclusion

The North Carolina State Bar and its LAMP Committee, and attorneys throughout the state who have volunteered in support of the LAMP Committee's mission of educating and assisting military judge advocates, represent what is best about the legal profession in North Carolina. Their efforts have directly aided judge advocates from all of the military services in providing more accurate legal advice to soldiers, sailors, marines, and airmen throughout the state. In doing so, North Carolina attorneys have answered the call to do their part in ameliorating some of the hardships associated with military life. While the hardships for the army private in harm's way in Iraq remain, that private can rest assured that he or she is not forgotten and that the NC State Bar's LAMP Committee and attorneys throughout North Carolina remain committed to supporting the military legal assistance attorneys taking care of that private's family. By doing this, these North Carolina attorneys have joined a long line of North Carolina attorneys who recognize that our profession's highest calling is one of service. ■

Gill Beck, at the time of publication, is on active duty in Iraq. In Iraq, Colonel Beck has been mobilized as a US Army Reserve Judge Advocate, assigned as the chief legal advisor for detainee operations. He currently works as an Assistant US attorney general in Greensboro. He is a graduate of Duke Law School.

Should Your Clients Apologize (cont.)

dignity, allows him the opportunity to make reparations, and reconnects him with the other person.

And, as our mothers always said and as Dr. Steve Kraman, former chief of staff of the VA Hospital in Kentucky pointed out: apologizing is "the right thing to do." ■

J. Kim Wright, JD. is the managing attorney of Healers of Conflicts Law and Conflict Resolution Center in Asheville, publisher/editor of a new magazine for lawyers called The Cutting Edge, *founder of the Renaissance Lawyer Society, speaker, writer, workshop leader, coach for lawyers, and mother to eight grown children who taught her to multi-task. See www.jkimwright.com.*

Endnotes

1. Tanner, Lindsey, "'Sorry' Seen As Magic Word to Avoid Suits", (November 8, 2004) Associated Press
2. See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=238330 for his paper "Apology and Organizations: Exploring an Example from Medical Practice" and http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=238331 for many others.
3. Blair Keagy, MD, and Marci Thomas, CPA, MHA Editors, Essentials of Physician Practice Management, Risk Management Chapter by Kathryn Jackson, (2004) Jossey-Bass
4. Aronson, Peter, "How not to be sued Lawn mower maker Toro moves quickly to mollify victims of accidents", from National Law Journal/Business, June 24, 2002.
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6. Lazare, Aaron, *On Apology*, Oxford University Press (2004)