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# An Overlooked Issue: Would a Cap on Noneconomic Compensatory Damages in Medical Malpractice Actions Violate the North Carolina Constitution?

BY ALAN D. WOODLIEF JR.

The debate continues to rage in the North Carolina General Assembly and across the state as to whether there truly is a “medical malpractice crisis” and whether medical malpractice tort reform is necessary.<sup>1</sup> While proposals for reform range from allowing periodic judgment payments and curtailing contingency fees paid to plaintiff’s attorneys, the hallmark of the proposed reform legislation is a cap on the noneconomic compensatory damages available in medical malpractice actions.<sup>1</sup> While much of the discussion regarding the damages cap has centered on the factual justifications for it, or the lack thereof, very little attention

has been paid to the constitutionality of such a cap. This article leaves the factual arguments for and against the damages cap to others and, instead, briefly focuses on the potential constitutional challenges to such a cap.



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North Carolina is certainly not the first state to consider adopting a compensatory damages cap in medical malpractice actions, and the various state courts that have considered the constitutionality of these caps have reached differing results.<sup>2</sup> Most of the constitutional challenges have involved claims that the damages caps violated various state constitutional guarantees, including the right to a jury trial, open courts, and equal protection.<sup>3</sup> Because these challenges have met with mixed results and hinge largely on each state's specific constitutional language and case precedent,<sup>4</sup> it is difficult to predict whether a compensatory damages cap in North Carolina would survive a constitutional challenge. However, the North Carolina Constitution and prior decisions of the North Carolina appellate courts shed some light on the constitutional challenges that a North Carolina compensatory damages cap will likely face. Several of these potential challenges are briefly addressed below.

## Right to a Jury Trial

It has been noted that "[t]he most powerful argument against state-enacted caps [is] the constitutionally guaranteed right to trial by jury in civil cases."<sup>5</sup> Further, "[s]uccessful challenges to caps on damages almost always invoke the right to trial by jury."<sup>6</sup> In North Carolina, the right to a jury trial is guaranteed by Article I, Section 25 of the North Carolina Constitution which provides that, "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." While the North Carolina appellate courts have not had occasion to apply this provision to a cap on compensatory damages, the North Carolina Court of Appeals has considered whether the guarantee to a jury trial is offended by the punitive damages cap in Chapter 1D of the North Carolina General Statutes.<sup>7</sup>

In *Rhyme*, the court of appeals noted that the North Carolina Supreme Court has held that the constitutionally guaranteed

right to a jury trial applies only: (1) where the right to a jury trial existed at common law or by statute at the time of the adoption of the 1868 Constitution; and (2) when the cause of action "respects property."<sup>8</sup> In concluding that the right did not attach to punitive damage awards, the court contrasted punitive damages with compensatory damages. While noting that "no individual possesses the right to punitive damages as being that person's property,"<sup>9</sup> the court also recognized with regard to compensatory damages that "the person aggrieved has the right to compensation for, *inter alia*, actions for pain and suffering, emotional distress, lost wages, medical bills, disability, and loss of consortium."<sup>10</sup> Furthermore, a claim for negligence and compensatory damages existed in 1868 and there was a right to a jury trial in such actions.<sup>11</sup> Accordingly, under the reasoning employed by both the majority and dissenting opinions in *Rhyme*, a cap on noneconomic compensatory damages in medical malpractice actions may very well be held violative of the constitutional guarantee of the right to

a jury trial.<sup>12</sup>

#### Open Courts

Another common challenge to compensatory damages caps is that they violate the constitutional guarantee to open courts. In North Carolina, the right to open courts is guaranteed by Article I, Section 18 of the North Carolina Constitution which provides that, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." The North Carolina Court of Appeals just recently had the opportunity to apply the open courts provision in a case dealing with Rule 9(j) of the North Carolina Rules of Civil Procedure, *Anderson v. Assimos*.<sup>13</sup> While the North Carolina Supreme Court vacated the court of appeals' decision, concluding that the constitutional issue had not been raised in the trial court and thus was not properly before the appellate courts, the supreme court did not address or overturn the reasoning employed by the majority in the court of appeals. Accordingly, this article will utilize the reasoning employed by the court of appeals' majority opinion in *Assimos* in addressing the potential open courts challenge to the medical malpractice compensatory damages cap.

In *Assimos*, Judge Greene, writing for the majority, concluded that Rule 9(j) violated the open courts guarantee because it denied an injured plaintiff the right to have the courts of this state adjudicate in a meaningful time and manner the merits of her claim after granting a hearing appropriate to the nature of the case.<sup>14</sup> Judge Greene also noted that, while the General Assembly is permitted under the constitution to define the circumstances under which a remedy is legally cognizable, it is "clearly forbidden" from enacting any statute that "impairs" the right of any person to recover for an injury to his person, property, or reputation.<sup>15</sup> Further, "[i]n no event, . . . , may the General Assembly under the guise [of its power to define the circumstances under which a remedy is legally cognizable] deny a person, whose claim is not barred by the statute of limitations/repose, the 'opportunity to be heard before being deprived of property, liberty, or reputation, or having

been deprived of either,' deny that person 'a like opportunity [for] showing the extent of his injury' or deny that person an adequate remedy."<sup>16</sup>

Applying the reasoning from *Assimos* to a cap on noneconomic compensatory damages in medical malpractice actions, it appears that such a cap would modify a plaintiff's negligence or malpractice claim that has already vested and would impair the right of a plaintiff to recover for injury to his person. Further, while the medical malpractice plaintiff would presumably still be able to show the extent of his injury, the cap would seem to deny the plaintiff an adequate remedy.<sup>17</sup> Accordingly, a cap on noneconomic compensatory damages in medical malpractice actions may very well be held violative of the constitutional guarantee to open courts.

#### Equal Protection

Compensatory damages caps have also frequently been challenged on equal protection grounds. In North Carolina, equal protection is guaranteed by Article I, Section 19 of the North Carolina Constitution which provides that:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Plaintiffs in medical malpractice actions will likely challenge the proposed cap on noneconomic compensatory damages as treating similarly situated persons differently without compelling reason or rational justification.<sup>18</sup>

The question of whether the cap violates due process will likely hinge on whether it is examined under strict scrutiny or the rational basis test. In *Assimos*, the court of appeals applied strict scrutiny in addressing the equal protection challenge to Rule 9(j), because it concluded that the rule's classification of malpractice actions into two groups—medical and nonmedical—impacted a fundamental right, the right to open courts.<sup>19</sup> Under the rationale of *Assimos* and *Rhyme*, a cap on noneconomic

compensatory damages in medical malpractice actions, which like Rule 9(j) classifies malpractice actions into two groups, medical and nonmedical,<sup>20</sup> would impact two fundamental rights, namely the constitutionally guaranteed rights to a jury trial and open courts. Accordingly, the courts would likely apply strict scrutiny in determining whether the medical malpractice compensatory damages cap violates equal protection.

In *Assimos*, the court of appeals explained that, under strict scrutiny analysis, legislation must be narrowly tailored to serve a compelling state interest.<sup>24</sup> The court concluded that the compelling interest advanced for Rule 9(j), the prevention of frivolous medical malpractice lawsuits, had not been established.<sup>22</sup> Further, the court noted that, even if it assumed frivolous lawsuits were a problem, "there [was] nothing in th[e] record to support the claim that Rule 9(j) alleviates the problem or that the problem is not also present in the context of non-medical malpractice actions."<sup>23</sup> In addition, because other means existed to prevent frivolous lawsuits, such as medical review panels, the court concluded that Rule 9(j) was not the least restrictive method for addressing the asserted state interest.<sup>24</sup>

As mentioned earlier, there has been much debate recently regarding the necessity for a cap on noneconomic compensatory damages in medical malpractice actions. Undoubtedly, those who favor and oppose the cap would present very different evidence as to whether the state has a compelling interest in enacting the cap. However, even assuming that a compelling interest could be established, the state must still show that the damages cap constitutes the least restrictive method of addressing this interest.<sup>25</sup> Given the alternative proposed in *Assimos* and already approved by the Senate, the medical review panel, it may be that the North Carolina appellate courts will conclude that a cap on noneconomic compensatory damages is not the least restrictive method.<sup>26</sup> Accordingly, under the reasoning employed by the court of appeals in *Assimos*, a cap on noneconomic compensatory damages in medical malpractice actions may very well be held violative of the constitutional guarantee of equal protection.

## Conclusion

Given that the court of appeals' decision in *Assimos* has been vacated and the supreme court is now reviewing the court of appeals' decision in *Rhyme*, it is unclear how the North Carolina appellate courts would rule on the constitutionality of a cap on noneconomic compensatory damages in medical malpractice actions. However, when debating the advisability of enacting such a cap, it is the author's belief that the cap's potential constitutional flaws should be kept in mind. Given the significant questions surrounding the constitutionality of such a cap, as well as the conflicting factual arguments for and against it, the General Assembly may well be advised to pursue alternative methods to address any perceived crisis in the medical malpractice arena. ■

*Alan Woodlief is the associate dean for admissions and an assistant professor of law at the Norman Adrian Wiggins School of Law, Campbell University. He received his BA in Journalism and Mass Communications from the University of North Carolina at Chapel Hill and his JD from the Norman Adrian Wiggins School of Law at Campbell University.*

## Endnotes

1. During the 2003 Session of the General Assembly, proposed Senate Bill 9 and House Bill 809 both advanced a cap on noneconomic damages of \$250,000. Such damages include compensation for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary, compensatory damage. Neither bill has been approved. In September 2003, the Senate did approve a bill which included some reform measures, including, among other things, the establishment of three-referee panels for reviewing evidence in medical malpractice complaints prior to trial, increased state regulation of malpractice insurance rates, and state investigation of doctors who are sued repeatedly and lawyers who have filed numerous frivolous malpractice complaints. Interestingly, the approved Senate bill does not include a cap on damages. A special House committee is expected to take up the issue in the near future, but the full House will not take action until at least May 2004.
2. See Elizabeth Anne Keith, *Pulliam v. Coastal Emergency Services of Richmond, Inc.: Reconsidering the Standard of Review and Constitutionality of Virginia's Medical Malpractice Cap*, 8 Geo. Mason L. Rev. 587, 603 (2000) (noting that "the result is divided across the country on the constitutionality of statutory caps in medical malpractice suits").
3. See Robert S. Peck, *Caps on Damages: Adding Injury to Injury*, 38 Trial 21 (Sept. 2002) ("And [damages caps] intrude on the constitutional rights of the injured in a manner that the courts are beginning to understand. The momentum has shifted in favor of constitutional challenges to these laws.").
4. Medical malpractice damages caps might also be challenged as violating separation of powers, i.e., the legislature invading the province of juries and the courts in awarding damages, or as violating constitutional prohibitions on special emoluments and special legislation by affording medical malpractice defendants an immunity from liability for noneconomic compensatory damages not enjoyed by any other defendants in North Carolina. See Peck, *supra*, at 27. While these potential challenges have significant merit, this article will focus on what appear to be the three most commonly used challenges to these damages caps.
5. Keith, *supra*, at 602-03 (noting that "[w]hile numerous state supreme courts have addressed the validity of caps on medical malpractice damages, the United States Supreme Court has yet to entertain the issue of whether statutory medical malpractice liability caps violate the US Constitution").
6. Peck, *supra*, at 23 (noting, however, that the "guarantee, found in the Seventh Amendment, has been held inapplicable to the states," so a challenge focusing on the right to a jury trial must be based on a state constitution). While other constitutional challenges, such as those based on due process and equal protection, might be pursued under both the US and North Carolina Constitutions, this article will focus only on the North Carolina Constitution.
7. Peck, *supra*, at 23.
8. *Rhyme v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002).
9. *Rhyme*, 149 N.C. App. at 677-78, 562 S.E.2d at 88 (citing *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 385 S.E.2d 329 (1989), rev'd on other grounds, 333 N.C. 81, 423 S.E.2d 759 (1992)).
10. *Rhyme*, 149 N.C. App. at 678-79, 562 S.E.2d at 88 (concluding that punitive damages were determined by juries prior to 1868 but also concluding that punitive damages do not fall within the definition of "respecting property" since the right to punish resides with the state and no individual possesses the right to punitive damages as being that person's property). Judge Greene dissented, concluding that "a constitutional right to a jury trial exists in this state on a party's claim for punitive damages arising from any tort recognized in North Carolina prior to 1868 in which there are genuine issues of fact showing 'aggravating factors' as outlined in N.C. Gen. Stat. § 1D-15(a)." *Id.* at 693, 562 S.E.2d at 97. Because of Judge Greene's dissent, the North Carolina Supreme Court will now decide this issue.
11. *Rhyme*, 149 N.C. App. at 678, 562 S.E.2d at 88.
12. *Rhyme*, 149 N.C. App. at 693, 562 S.E.2d at 97 (Greene, J., dissenting) ("claims for false imprisonment, malicious prosecution, and negligence, however, were in existence prior to April 1868").
13. *Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001), vacated, 356 N.C. 415, 572 S.E.2d 101 (2002).
14. *Assimos*, 146 N.C. App. at 345, 553 S.E.2d at 68.
15. *Assimos*, 146 N.C. App. at 344, 553 S.E.2d at 67 (quoting *Osborn v. Leach*, 135 N.C. 628, 631, 47 S.E. 811, 812 (1904)). The court of appeals also recognized that the General Assembly can abolish or modify a claim that has not vested and may establish statutes of limitations and repose, as well as limited immunities for certain claims.
16. *Assimos*, 146 N.C. App. at 344, 553 S.E.2d at 67 (quoting *Osborn*, 135 N.C. at 636-37, 47 S.E. at 814).
17. This, of course, assumes that the plaintiff's evidence could lead a jury to believe that his noneconomic injuries, such as pain and suffering, should actually be valued at more than \$250,000. Obviously, if the jury concluded that the plaintiff's noneconomic injuries should be valued at say \$500,000, then an award capped at \$250,000 would be an inadequate remedy for that plaintiff.
18. In *Rhyme*, the court of appeals rejected an open courts challenge to the punitive damages cap, reasoning that the proper and adequate remedy guaranteed by that constitutional provision did not extend to punitive damages, since the right to have punitive damages assessed is not property. *Rhyme*, 149 N.C. App. at 681-82, 562 S.E.2d at 90 (noting, however, that "[t]he right to recover actual or compensatory damages is property"). The *Rhyme* court relied extensively on the North Carolina Supreme Court's decision in *Osborn*, where the supreme court "held that a statute eliminating punitive damages in an action for libel was not unconstitutional under the open courts guarantee because it did not limit the recovery of actual damages." *Rhyme*, 149 N.C. App. at 681, 562 S.E.2d at 90 (emphasis in original).
19. The plaintiffs in *Rhyme* advanced this argument in challenging the punitive damages cap. *Rhyme*, 149 N.C. App. at 682-83, 562 S.E.2d at 90. The plaintiffs in *Rhyme* also challenged the punitive damages cap on due process grounds, contending that it amounted to a taking of their property without just compensation, infringing on a fundamental right. *Id.* In *Rhyme*, the court of appeals summarily concluded that the punitive damages cap did not violate due process, because punitive damages do not constitute property belonging to an individual. *Id.* However, the court of appeals in *Rhyme* also emphasized that "[t]he right to recover actual or compensatory damages is property." *Id.* Accordingly, the cap on noneconomic compensatory damages would also appear to implicate due process concerns. Because most challenges to this type of cap have coupled the equal protection and due process arguments together, but have focused primarily on equal protection, this article will also focus primarily on the equal protection argument.
20. *Assimos*, 146 N.C. App. at 345, 553 S.E.2d at 68. Compare *Rhyme*, 149 N.C. App. at 683, 562 S.E.2d at 91 (concluding that, because it had already decided that there was no constitutional right to a jury trial and there was no mention of suspect classifications in the statute, the punitive damages cap did not involve a fundamental right).
21. Arguably Rule 9(j) and the damages cap classify all negligence claims into two classifications—medical malpractice and everything else. However, this arti-

cle will rely on the classifications identified by the court in *Assimos*.

21. *Assimos*, 146 N.C. App. at 345, 553 S.E.2d at 68 (noting that, under strict scrutiny, the least restrictive alternative must be favored). Compare *Rhyne*, 149 N.C. App. at 683, 562 S.E.2d at 91 (explaining that, under the rational basis test, legislation will pass constitutional muster if the legislature reasonably could have concluded that there was a rational relationship between the legislation and the legitimate interest sought to be advanced by the legislation). Obviously, legislation has a much greater chance of surviving review under the rational basis test than the strict scrutiny standard, and the cap on noneconomic compensatory damages in medical malpractice actions would likely survive if it were evaluated under the rational basis test. See e.g., *Rhyne*, 149 N.C. App. at 683-684, 562 S.E.2d at 91 (concluding that the punitive damages cap satisfied the rational basis test since it "is at least debatable" that the cap serves the state's legitimate interest in preserving and furthering the economic development of North Carolina).
22. *Assimos*, 146 N.C. App. at 345, 553 S.E.2d at 68 ("There is nothing in the record to support the claim that frivolous lawsuits were a problem in medical malpractice cases before the enactment of Rule 9(j).").
23. *Assimos*, 146 N.C. App. at 345, 553 S.E.2d at 68.
24. *Assimos*, 146 N.C. App. at 345, 553 S.E.2d at 69 ("frivolous claims can be discouraged and done so in a manner that does not deny access to the courts").

As noted earlier, the Senate recently approved a bill establishing medical review panels very similar to those discussed in *Assimos*. Like those described in *Assimos*, the review panels proposed by the Senate cannot preclude the filing of a plaintiff's complaint. Rather, a review panel would review the evidence before trial and reach its own conclusion as to whether the health care provider committed malpractice. If the jury then reached the same conclusion as the panel, the losing party would pay the winner's court costs and attorney's fees. Under the analysis employed in *Assimos*, the new Senate bill might survive constitutional scrutiny.

25. As in *Assimos* the court will likely also require the state to show that the cap would actually remedy any alleged problem and that the problem is not present in the context of non-medical malpractice actions. This will likely prove a heavy burden for the state. For instance, the author expects that product manufacturers and other businesses likely believe they are subjected to frivolous lawsuits as frequently as health care providers. The author further expects that automobile insurers could advance the argument that negligence and personal injury actions premised on automobile accidents occur much more frequently than medical malpractice actions and result in high noneconomic compensatory damage awards as often as do medical malpractice actions.

26. Assuming that Rule 9(j) survives further constitutional challenges, the appellate courts may conclude that Rule 9(j) and these other alternative means are less intrusive on a plaintiff's fundamental rights than a cap on compensatory damages. In addition to a damages cap, House Bill 809 proposes that the collateral source rule be abrogated. House Bill 809 and Senate Bill 9 also call for limits on contingent attorney's fees in medical malpractice actions.

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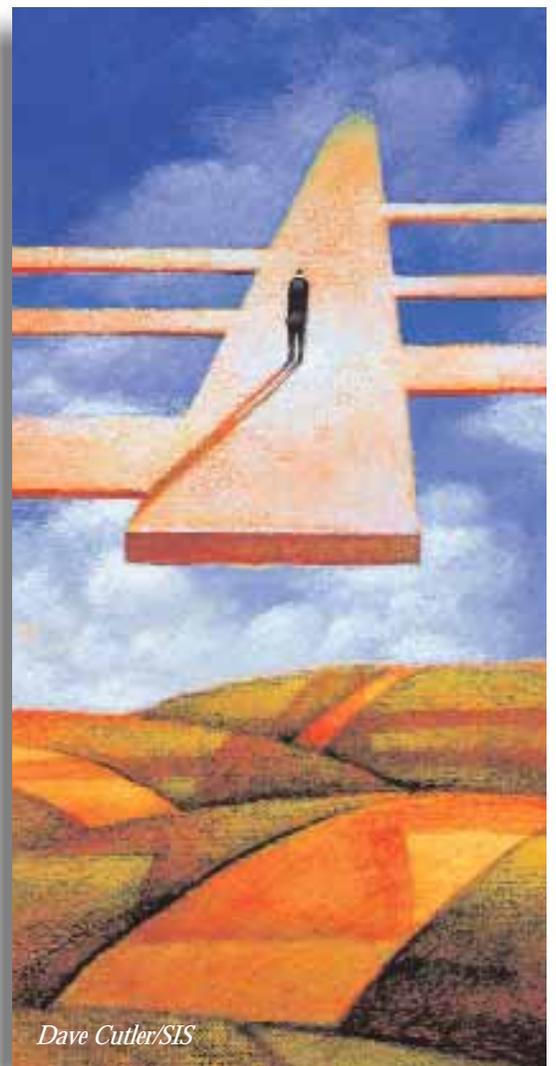


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# Measure of Damages in Property Loss Cases: The Road Less Considered

BY JOHN W. REIS

**R**eaching the proper measure of economic damages in a large property loss case can be a journey of unexpected travails. Winding through the labyrinth of liability issues is difficult enough. While addressing issues of privity, disclaimers, limitations, repose, the economic loss rule, and so forth, weary litigants can sometimes overlook the issue of what the underlying damages really are, each party assuming the matter to be a relatively straightforward calculation. It's only property, after all. However, the law on what is legally recoverable and what is not can be rough terrain indeed, even in a so-called straightforward property loss case. The following is a road map of sorts—a guide to the proper measure of property damages under North Carolina law.



*Dave Cutler/SIS*

Before beginning our road trip through property damages, consider the following hypothetical. A house is totally destroyed by fire. It had a fair market value of \$100,000 before the fire but will cost \$200,000 to rebuild, including \$20,000 in code compliance upgrades and \$5,000 in debris removal costs. What are the owners entitled to recover?

- (a) the \$200,000 replacement cost,
- (b) \$100,000 for the diminution in market value,
- (c) \$180,000 for replacement cost less code upgrades,
- (d) \$125,000 for diminution in value plus code upgrades and debris removal, or
- (e) none of the above.

If the owners also incurred \$30,000 to rent another house and furniture during the repairs, are these damages added to loss of the house and its contents? And what can the owners recover for the invaluable family heirlooms they lost?

### The General Rule of Recovery

We begin the journey with a basic rule of recovery. For both real and personal property losses, the measure of damages in North Carolina is generally limited to “the difference between the fair market value of the property immediately before it was damaged and its fair market value immediately after it was damaged.”<sup>1</sup> Referred to as the “before and after rule,”<sup>2</sup> the doctrine generally prohibits the owner from recovering for the full cost to repair or replace damaged property where that damage exceeds the diminution in value. Thus, using our above hypothetical, if the house was worth \$100,000 before the fire and costs \$200,000 to rebuild, the damages will generally be limited to \$100,000.

Recognizing the occasional harshness of this result, however, courts have adopted a flexible approach to what is admissible in proving diminution in value, allowing the jury to consider such factors as the actual replacement cost and the property’s so-called “aesthetic value.” In addition, some exceptions have arisen to the before-and-after rule under which plaintiff may be entitled to recover for damages in excess of the diminution in value.

### Establishing Diminution in Fair Market Value

On our road map, the term “fair market value” will be defined as “the amount which

would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.”<sup>3</sup> Three well-recognized guides to appraisal have evolved, all of which take the property’s pre-loss physical depreciation into account: (1) the cost approach; (2) the comparable sales approach; and (3) the income or economic approach.<sup>4</sup> The cost to rebuild or repair the property is not considered in any of these approaches.

### Expert Testimony

On any journey, we will want the ablest and most experienced guide. Generally, the use of an expert is preferred when seeking to introduce testimony on the fair market value of property. However, it is not required under North Carolina law. Indeed, case law expressly allows the burden to be met by the testimony of the owner, even if that owner is not an expert witness. *Goodson v. Goodson*, 551 S.E.2d 200 (NC Ct. App. 2001); *Appeal of Boas*, 382 S.E.2d 769 (NC Ct. App. 1989); *Bungarner v. Tomlin*, 375 S.E.2d 520 (NC Ct. App. 1989); *Craven County v. Hall*, 360 S.E.2d 479 (NC Ct. App. 1987); *Kenney v. Medlin Construction and Realty Co.*, 315 S.E.2d 311 (NC Ct. App. 1984); *Moon v. Central Builders, Inc.*, 310 S.E.2d 390 (NC Ct. App. 1984); *Responsible Citizens v. City of Asheville*, 302 S.E.2d 204 (NC 1982).

The broad standard for allowing testimony of the owner on the value of the owner’s land is demonstrated in the following passage from *Goodson*.

[T]here is no requirement that an owner be familiar with nearby land values in order to testify to the fair market value of his own property. Rather, an owner “is deemed to have sufficient knowledge of the price paid [for his land], the rents or other income received, and the possibilities of the land for use, [and] to have a reasonably good idea of what [the land] is worth.” *Highway Comm.* 285 N.C. at 652, 207 S.E.2d at 725 (quoting 5 Nichols, *Law of Eminent Domain*, § 18.4(2) (3rd ed. 1969)). As an owner of Tract C. Ms. Cobb could therefore competently testify as to its value. 551 S.E.2d at 205.

### Replacement Cost as Evidence of Market Value

The road to establishing diminution in

value is wide open in North Carolina. Indeed, not only is the jury free to consider replacement cost as a factor in that determination, but the court is obligated to instruct the jury to consider such cost in certain circumstances:

Nonetheless, replacement and repair costs are relevant on the question of diminution in value and when there is evidence of both diminution in value and replacement cost, the trial court must instruct the jury to consider the replacement cost in assessing the diminution in value.

*Huberth v. Holly*, 462 S.E.2d 239 (NC Ct. App. 1995).

Evidence of estimates of the cost to repair the damage to the plaintiff’s property may be considered by you in determining the difference in fair market value immediately before and immediately after the damage occurred.

North Carolina Pattern Instruction - Civil 810.62.

This broad standard for determining diminution in fair market value appears to be premised on the fact that when property is damaged, the ability to calculate its past worth is often problematical, especially when the property has been totally destroyed:

This rule [limiting damages to diminution in fair market value], which can be an approximation to truth in a limited number of cases, is often too remote from the factual pattern of the injury and its compensable items to reflect the fairness and justice which the administration of the law presupposes. For that reason it is applied with caution, and often with modifications designed to relax its rigidity and fit it to the facts of the particular case.

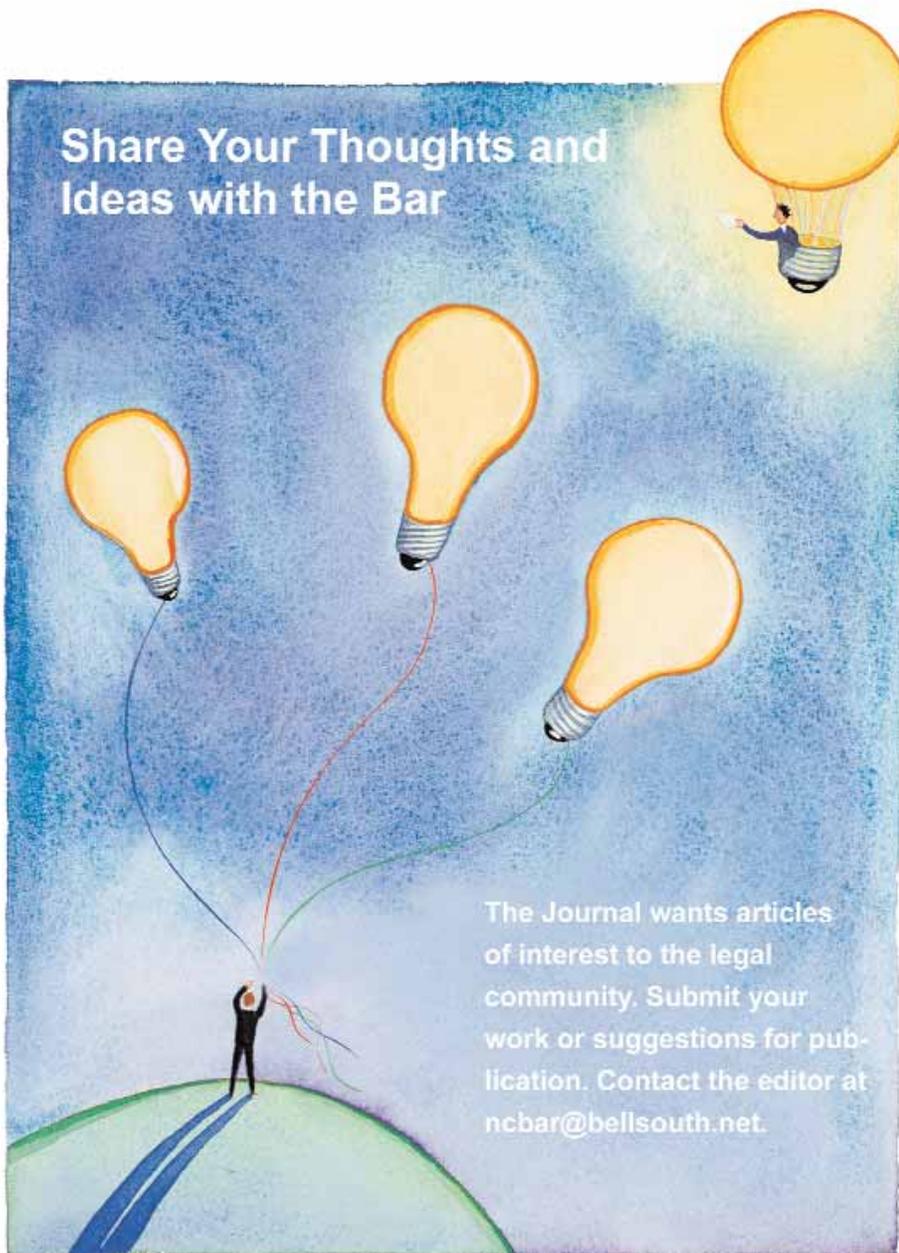
*Phillips v. Chesson*, 58 S.E.2d 343, 347 (NC 1950). Cost of repairs can inform the jury of the quality of the original construction and the extent of injury to the property:

[T]he law recognizes that the cost of repairs has a logical tendency to shed light upon the question of the difference in market value

*Richard W. Cooper Agency v. Irwin Yacht & Marine Corp.*, 264 S.E.2d 768 (NC Ct. App. 1980). This approach is consistent with that taken by our sister courts in the Southeast.<sup>5</sup>

### Aesthetic Value as Evidence of Market Value

Our road trip through property damages will lead us through lands rich with beauty but difficult to quantify in terms of objective



market value. In cases involving such landscape, North Carolina courts will allow the jury to consider the property's "aesthetic value." In *Harper v. Morris*, 365 S.E.2d 176, *disc. review denied*, 370 S.E.2d 223 (NC Ct. App. 1988), plaintiffs sued in trespass for damages to certain trees and shrubs that were cut down by defendant. The court noted that in an action for unlawfully cut timber the plaintiff has the right to elect one of two measures of damages, either the diminution of the land's value caused by the loss of timber or the market value of the timber itself plus incidental damages. The plaintiff in *Harper* elected the "diminished value method, calculated by the difference in market value before and after the cutting," i.e., the diminution in value to the land. 370

S.E.2d at 177. The court held that in arriving at the diminution in value to the land, the jury could consider not only the replacement cost of the lost timber but also its "aesthetic value":

The purpose for which these trees and shrubs were grown and maintained and the contemplated use of the land, including aesthetic value to the landowners, in our opinion, directly affects the market value of this property. Similarly, the cost of producing the trees and shrubs has some bearing on the value of plaintiffs' land, and one factor in determining the diminished value would be the cost of replacing or restoring the trees and shrubs to the same extent as is reasonably practicable. *Diggs v. Railroad*, 131 Mo.App.

457, 110 S.W. 9 (1908). *See generally* Annot. "Measure of Damages for Injury to or Destruction of Shade or Ornamental Tree or Shrub," 95 A.L.R.3d 508 (1979).

Appellant next contends the trial court erred by admitting evidence of replacement cost. We believe the testimony of the cost of replacing these trees and shrubs presented by plaintiff's expert witness was relevant and properly admitted.

365 S.E.2d at 178. *See also Lee v. Bir*, 449 S.E.2d 34, 39 (NC Ct. App. 1994) (allowing testimony of landowner that aesthetic value of property was particularly diminished by the fact that after removal of trees the "visibility of and closeness and proximity of [defendant's house] ... was the major distraction that had occurred.").

Accordingly, in the above hypothetical involving a home estimated to be worth \$100,000 before the fire but which cost \$200,000 to rebuild, there is case law to suggest that the jury may consider not only the fact that the owners were required to incur twice the home's value to get it back into livable condition but also the aesthetic value of the house before the fire.

#### Going Beyond Market Value *Service Value*

On our journey, we will cross many lands with no appreciable market value but with significant service value, such as hunting reserves, churches, hospitals, utility structures, school buildings, non-profit or charitable buildings, landmark buildings, statues, and lands or structures that have been in the family for generations. When such property is destroyed, the owner naturally desires compensation above the fair market value. North Carolina courts have recognized that the before-and-after rule does not adequately address the damages to such service structures:

However, if there is no market, there can be no market value. The foundation for the before-and-after rule is lacking. Cost of repairs is then about the only available evidence of the extent of the loss.

*Carolina Power & Light v. Paul*, 136 S.E.2d 103, at 104 (NC 1964). Drawing from case law in other jurisdictions, the court in *Paul* held that the cost to repair, rather than diminution in market value, was the proper measure of damages for the loss of plaintiff's utility pole, transformer, transmission line,



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and guy wire.

Likewise, in *Huberth v. Holly*, 462 S.E.2d 239, 243 (NC Ct. App 1995), the court drew not only from North Carolina law, but also from that of other jurisdictions in holding that property imbued with a purpose personal to the owner is recoverable on a repair cost basis:

When, however, the land is used for a purpose that is personal to the owner, the replacement cost is an acceptable measure of damages. *Plow v. Bug Man Exterminators, Inc.*, 57 N.C.App. 159, 162-163, 290 S.E.2d 787, at 789 (termite damage to personal residence), *disc. rev. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982), [Dan B.] Dobbs, [*Dobbs Law of Remedies*] § 5.2(2), 718 [2d ed. 1983]; Restatement (Second) of Torts § 929 cmt. B (1979); *see also Trinity Church v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 502 N.E.2d 532, 535-36 (1987) (personal purpose doctrine applied to prevent "miscarriage of justice.").

462 S.E.2d at 243; *see also* North Carolina Pattern Jury Instruction, Civil 810.64 (Replacement February 2000).

Thus, North Carolina appears to follow the general rule adopted in other jurisdictions allowing replacement cost of a service structure where diminution in value does not adequately measure the true value of the property.<sup>6</sup>

### "Intrinsic" Value

Building memories is an important consideration on our journey. Certain photographs and trinkets we pick up along the way will hold significant sentimental value, though worth nothing on the objective mar-

ket. North Carolina law recognizes the unfairness of limiting the plaintiff to the objective market value of such items and has developed a pattern jury instruction addressing the issue. North Carolina Pattern Jury Instruction, Civil 810.66 (Replacement February 2000).

The preamble to Civil Instruction 810.66 makes it clear that the instruction is limited to situations "where damages measured by market value would not adequately compensate the plaintiff and repair or replacement would be impossible (as where items such as a family portrait are destroyed) or economically wasteful (as where obsolete property is damaged beyond the economically feasible repair)." The instruction then allows for recovery of the "intrinsic" value to the owner, but sets forth several factors for the jury to consider in making that determination:

The plaintiff is entitled to recover the actual value of his property immediately before it was damaged (less the salvage value, if any, that it had after its damage). The actual value of any property is its intrinsic value; that is, its reasonable value to its owner. In determining the actual value of the plaintiff's property, you may consider:

- [the original cost of (labor and materials used in producing) the (*specify property*)]
- [the degree to which the (*specify property*) has been used]
- [the condition of the (*specify property*) just before it was damaged]
- [the uniqueness of the (*specify property*)]
- [the practicability of [repairing] [reconstruction] the (*specify property*)]
- [the cost of replacing the (*specify property*) (taking into account its depreciation; that is, the degree to which it had been

- used up or worn out with age)]
- [the insured value of the property]
- [the opinion of the plaintiff as to its value]
- [the opinion of any experts as to its value]
- [*state other appropriate factors supported by the evidence*]

You will not consider any fanciful, irrational, or purely emotional value that (*specify property*) may have had.

The issue of whether insurance coverage on the item is admissible was addressed in *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. 73, 365 S.E.2d 183 (1988), a case involving architectural drawings destroyed from a leaking roof. In ruling that the trial court did not err in admitting evidence that the drawings were insured for only \$500.00, the court stated as follows:

Evidence of insurance coverage is generally inadmissible in negligence suits. . . . It is admissible, however, "if it has some probative value other than to show the mere fact of its existence." *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 380, 301 S.E.2d 439, 448, *disc. rev. denied*, 308 N.C. 678, 304 S.E.2d 759 (1983) (citations omitted). Here the insurance coverage was probative for a reason other than its mere existence. Since no market exists for the drawings, we believe the amount of insurance coverage was relevant in determining actual value and was properly admitted. It was for the jury to decide how much weight the testimony deserved. We do not believe the probative value of this testimony was outweighed by prejudicial impact on the jury.

365 S.E.2d at 186.

### ***Sentimental Value and Mental Anguish***

Some memorabilia of our journey may carry an emotional element. In some cases, the emotions are deep enough to cause actual mental anguish for a lost item. Although North Carolina law prohibits consideration of “fanciful, irrational, or purely emotional value,” there is no clear guidance on whether and to what degree sentimental value or mental anguish may be considered in awarding damages. Language from the case of *Thomasson v. Hackney & Moale Company*, 74 S.E. 1022 (NC 1912), however, leaves open the possibility that in unusual cases, such alleged damages may be considered by the jury.

In *Thomasson*, the plaintiff sued a photograph developer that had lost the negatives of photographs the plaintiff had taken of her dying infant child just before the child died. The plaintiff sued only for mental anguish associated with the developer’s negligence, but not for the actual value of the lost negatives. The jury’s award was thus confined to the mental anguish damages without considering the value of the negatives. In granting a new trial, the court held that it was improper to have charged the jury on mental anguish without basing those damages on the value of the negatives. In dicta, the court went on to suggest that sentimental value, or “pretium affectionis,” may be recoverable upon proper proof of mental anguish:

The plaintiff, if she establishes her cause of action, will be entitled at least to nominal damages, and she may recover the value of the films if she can prove the same. Whether, in ascertaining this value, the jury may consider the “pretium affectionis,” that is, an imaginary value placed upon a thing by the fancy of its owner, growing out of his or her attachment for the specific article, its associations, and so forth, which, perhaps, may not inaptly be called its sentimental value, we need not say, as there was no recovery for the value of the films, but it may not be irrelevant to refer to the question, and, this being so, we cannot do better than to quote what is said in *Hale on Damages* at page 184: “In most cases the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case

of family pictures, plates, etc., and we do not doubt that the ‘pretium affectionis,’ instead of the market price, ought then to be considered by the jury or court in estimating the value. When analyzed, the damage caused by the loss or destruction of property of this nature consists of two elements: First, the loss of the real property value; second, the grief or mental suffering at the loss of the cherished article. From this we gather what we apprehend to be the true rule, which is that, where property is of such a nature that its loss or destruction, under the circumstances, naturally and proximately causes mental suffering, compensation for such mental suffering may be recovered in a proper action in addition to the actual value of the property.” *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 621.

....  
Of course damages which are merely imaginary or have no real or substantial existence, should not be allowed. In this case the question is purely academic as it is not presented by any exception, but we considered it proper that we should make some reference to it, as it is contended that the films had a value peculiar to plaintiff, apart from their intrinsic value.

74 S.E. at 1024-25.

Unfortunately, the terms “mental anguish” and “sentimental value” are not further discussed in our road map of cases. Nor have courts distinguished these terms from aesthetic value or intrinsic value, begging the question of what degree of overlap there may be between the various terms.

### ***Loss of Use***

Our journey is ill-fated if we lose our gear. North Carolina allows an owner to recover not only for diminution in fair market value, but also for the loss of use of property during the time reasonably necessary for repair or replacement.

To stop there [at diminution in market value] would not fully compensate the plaintiffs for the losses sustained by them as a direct and natural result of the negligence of the defendants. Another such result of the negligent damage to or destruction of the house is that the plaintiffs cannot have the use of their house during the time reasonably necessary for its repair or replacement and must obtain lodging elsewhere for such period of time.

For this loss they are also entitled to recover from the wrongdoers, the burden being upon the plaintiffs to establish the amount of such loss with reasonable certainty.

*Huff v. Thornton*, 213 S.E.2d 198 at 204 (NC 1975). The plaintiffs in *Huff* were thus entitled to testify

as to the availability of other comparable lodging, its rental cost, the time required for repair or rebuilding of the Huff residence, and the cost of moving. These are elements of damage flowing from the plaintiffs’ loss of use of their own residence.

*Id.*

The rule is consistent with the Restatement of Torts § 928 (1939), which provides:

Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for

- (a) the difference between the value of the chattel before the harm and the value after the harm, or at the plaintiff’s election, the reasonable cost of repairs or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, and
- (b) the loss of use.

In the above example of the destroyed house worth \$100,000 before the fire, the owners would not be limited to the \$100,000 pre-loss market value for the house itself, as they would also be entitled to recover for the reasonable rental costs of their new lodging and its furnishings.<sup>7</sup>

### ***Code Upgrades***

A property owner can face an uphill struggle when repairing the property means having to comply with a regulation or code either newly enacted or from which the owner was previously exempt before the loss. Although North Carolina does not appear to have addressed the issue, other jurisdictions have allowed the additional cost of code compliance.<sup>8</sup>

### ***Debris Removal***

Just as cleaning up before moving on is a must for any journey, removing debris after a structural loss is a prerequisite for rebuilding the structure. The question of whether the cost to remove debris from the land is recov-

erable *in addition* to the diminution in market value of the structure does not appear to be directly addressed by our courts. However, one way to reason through the issue is to consider the distinct nature of the structure versus the land on which it sits. If the structure is totally destroyed, leaving debris on the land, the owner not only has lost the value of the structure but also will incur lost value to the land itself because of the need to remove the debris. A plot of land with debris is less valuable to the rational consumer than a plot of land without the debris, and the diminution in value to the land should be directly related to the cost of removing that debris. Under this reasoning, the debris removal cost is arguably recoverable as an element of the land damage separate and apart from the damage to the structure.

### Prejudgment Interest

The longer a journey, the more taxing—but also the more interesting and rewarding. North Carolina allows an additional award for prejudgment interest for both contract claims and tort claims. N.C. Gen. Stat. § 24-5 (2002). The legal rate of interest is eight percent. N.C. Gen. Stat. § 24-1 (2002). When the action is one for breach of contract, interest runs from the date of the breach. § 24-5(a). When the action is a tort claim, interest runs from the date suit is filed. § 24-5(b) (“In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied.”).

The term “compensatory damages” has been defined as “damages in satisfaction of, or in recompense for, loss or injury sustained.” *Dobrowolska v. Wall*, 138 N.C.App. 1, 12, 530 S.E.2d 590, 598 (2000). An action for damages to a house or building or other item of property would reasonably fall into that definition. It should be noted, however, that a contribution claim is not considered one for “compensatory” damages and that prejudgment interest is not allowed for such a claim until a verdict is issued. *Medical Mutual Insurance Company of North Carolina v. Mauldin*, 577 S.E.2d 680 (N.C. Ct. App. 2003).

### Finishing the Hypothetical Road Trip to Recovery

Returning to our hypothetical house fire, we have a house once worth \$100,000 that

will take \$200,000 to rebuild, including \$20,000 in code upgrades and \$5,000 in debris removal costs. Assuming the house is not a historic landmark or service building and that there are no significant family heirlooms, our measure of damages will begin with \$100,000 in the lost market value, but the jury will probably be allowed to consider the fact that it will take twice the home’s value to repair the house. The jury may also be allowed to consider the \$20,000 in code upgrades and the \$5,000 in debris removal costs the owner incurred. If the insured incurred rental costs of \$30,000, that figure will be included in the judgment if the jury believes it to be reasonable. In addition, unless the plaintiff misses the issue, the judgment will be increased by the prejudgment interest dating from the date of breach if it is a contract case and from the date suit is filed if it is an action “other than contract.” All of this assumes that there is no “service” or “intrinsic” value to the house or its contents, which could increase the judgment.

### Conclusion

The road to recovery in large property losses can be twisted, dark, and scary. The practitioner cannot simply rely on the general rule limiting recovery to the diminution in fair market value, without also understanding the nuances of the many issues discussed above. The applicable law on these issues should be read carefully and, in many cases, will need to be applied by analogy in the absence of cases directly on point. As with any rough terrain, it should be traveled carefully, cautiously, and with as many guides as possible. ■

*John W. Reis is a member of Cozen O'Connor in Charlotte. He regularly litigates large property loss cases throughout North Carolina and other Southeastern states. For more information, see [www.cozen.com](http://www.cozen.com).*

### Endnotes

1. North Carolina Pattern Jury Instruction—Civil 810.62. *See also Phillips v. Chesson*, 58 S.E.2d 343, 347 (NC 1950) (“[T]he measure of damages recoverable for injury to property is the difference between the market value immediately before the injury and the market value immediately afterwards.”).
2. *Carolina Power & Light Company v. Paul*, 136 S.E.2d 103 (NC 1964).
3. North Carolina Jury Pattern Instruction—Civil

810.62. *See also Huff v. Thornton*, 213 S.E.2d 198, 206 (NC 1975) (defining fair market value as “the amount which would be agreed upon as a fair price by an owner who wishes to sell but is not obligated to do so, and a buyer who wishes to but is not compelled to [do] so.”).

4. *In re Greens of Pine Glen Ltd.*, 555 S.E.2d 612, 616 (NC Ct. App. 2001).
5. *Cf. Fuller v. Martin*, 125 So.2d 6 (Ala. 1961); *Ryland Group v. Daley*, 537 S.E.2d 732 (Ga. Ct. App. 2000) (“This difference in value may be illustrated by the reasonable cost of repair of defects.”) (quoting *Eldridge, Georgia Personal Injury & Property Damage—Damages*, §§ 8-2 and 8-3); *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551, 561 (Tenn. Ct. App. 1985) (“Of course, the trier of fact can also take into consideration the reasonable cost of restoring the property to its former condition in arriving at the difference in value immediately before and after the injury to the premises.”); *Averett v. Shircliff*, 237 S.E.2d 92 (Va. 1977) (“The reasonable cost of repairs is one of the evidentiary factors in determining the market value of an automobile after it has been damaged.”).
6. *Trinity Church v. John Hancock Mutual Life Ins. Co.*, 502 N.E.2d 532 (Mass. 1987) (church); *Newton Girl Scout Council v. Massachusetts Turnpike Auth.*, 138 N.E.2d 769 (Mass. 1956) (girl scout camp); *Leonard Missionary Baptist Church v. Sears, Roebuck and Co.*, 42 S.W.3d 833 (Mo.Ct.App. 2001) (church); *Commonwealth of Pennsylvania v. Crea*, 483 A.2d 996 (Pa. Cmmw. 1997) (bridge); *see also Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Serv. Co.*, 618 So.2d 874, 877-80 (La. 1993); *Regal Construction Co. v. West Lanham Hills Citizens Association*, 256 Md. 302, 260 A.2d 82, 84 (1970); *Moulton v. Groveton Papers Co.*, 114 N.H. 505, 323 A.2d 906, 911 (1974).
7. *See also* North Carolina Pattern Jury Instructions, Civil 810.60 n. 1 (Feb. 2000) (“Where the evidence could justify recovery for loss of use, that should be submitted as a separate and additional issue.”)
8. *Service Unlimited v. Elder*, 542 N.W.2d 855 (Iowa Ct. App. 1995) (Court properly computed damages for inadequate insulation by using “cost of repair” instead of “reduction in value” where there was insufficient space between ceiling and roof to simply add additional layer of insulation over existing insulation, requiring installation of new insulated roof over existing roof, even though cost of repair was disproportionate to additional heating and cooling costs, where homeowners testified heating and cooling problems continued after larger air conditioner was installed, and they were still unable to maintain second level at comfortable temperature.); *see also Zindell v. Central Mutual Ins. Co. of Chicago*, 269 N.W. 327 (Wis. 1936); *Aetna Ins. Co. v. 3 Oaks Wrecking & Lumber Co.*, 382 N.E.2d 283 (Ill. App. 1978); *Peluso v. Singer General Precision, Inc.*, 365 N.E.2d 390 (Ill. App. 1977); and *A.J. Jacobson Co. v. Commercial Union Assur. Co.*, 83 F.Supp. 674 (D. Minn. 1949). *But see Mercer v. J. & M. Transp. Co.*, 103 Ga. App 141, 118 SE.2d 716 (The proper measure of damages was not the cost of restoration, where a 25 to 30-year-old house was totally destroyed, and did not originally have plumbing, wiring, bathrooms, or modern heating, and where the cost of restoration would be far in excess of the difference in value before and after the injury to the premises.).

# An Interview with Judge Sanford L. Steelman Jr.

BY THOMAS L. FOWLER

**I**n the fall of 2003, Tom Fowler talked with court of appeals judge Sanford Steelman at his office on the second floor of the Ruffin Building in Raleigh. Judge Steelman joined the court of appeals in January of 2003. The following are excerpts from this conversation.

**Fowler:** Judge Steelman, although your family has lived eight generations in North Carolina, you grew up in Texas and New Jersey, the son of an endocrinologist. You became an Eagle Scout in 1965, and you graduated from Davidson College in 1973. Were you recruited by Lefty Dreisell?

**Judge Steelman:** No, Lefty was no longer at Davidson by the time I arrived. I was there during the Terry Holland years.

**Fowler:** Did you play any college ball?

**Judge Steelman:** Not in the United States. My junior year in college was spent abroad at the University of East Anglia in Norwich, England. I played on the basketball team there and we won the North of the Thames Conference league championship. I played forward.

**Fowler:** What was your scoring average?

**Judge Steelman:** I have not the foggiest idea. The English were superb athletes as far as running up and down the court—maybe because of all the soccer they play. But they had no hand-eye skills and their shooting percentages were abominable. So the scores tended to be very low in those games because if they got outside of three feet from the bas-

ket their marksmanship deteriorated.

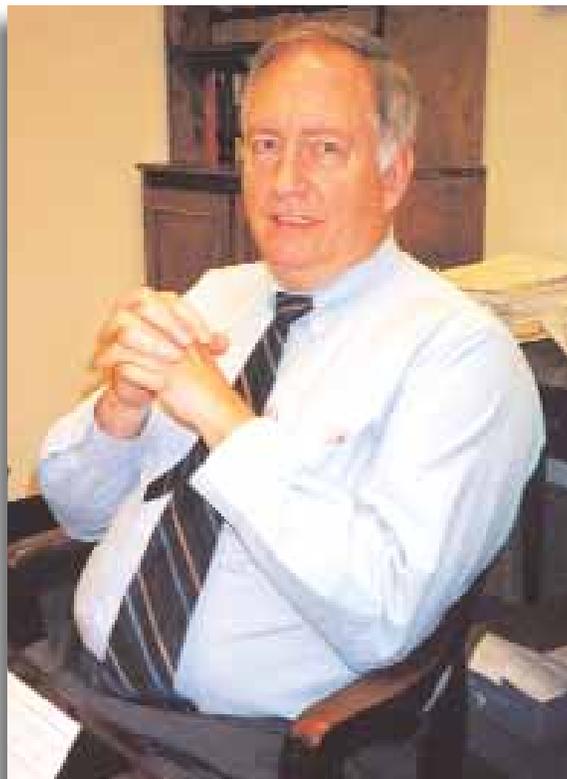
**Fowler:** Could you dunk?

**Judge Steelman:** No. [laughs] Not even close.

**Fowler:** What made you want to go to law school?

**Judge Steelman:** I had always been interested in the law. And graduating in 1973 with a degree in political science really didn't qualify me to do a whole lot of things other than continue with my education. Law school was what I'd always wanted to do even before college.

**Fowler:** You graduated from UNC Law School in 1976, practiced law in Union County from 1976 until 1994, and then served as a superior court judge from 1994 to 2002 when you were elected to the court of appeals. I believe it was former legislator, governor, supreme court justice and superior court judge Dan K. Moore who said that the best job in the state was superior court judge. Why did you give it up to run for the court of appeals?



**Judge Steelman:** I wouldn't disagree with Governor Moore on that point. Bill Helms, who was the senior resident superior court judge in the district where I first got elected judge, also told me that. And it is a wonderful job. You get to go all over the state and see the best lawyers in the state ply their trade in front of juries. But I've also always been interested in deciding the law and in that regard you have a much bigger voice on the appellate court than you do on the trial bench. The appellate court gives me the opportunity to really work intensively in the civil area which is what I enjoy.

**Fowler:** What do you miss of the superior court? And what don't you miss?

**Judge Steelman:** The only aspect of superior court I don't miss is taking repetitive guilty plea after plea after plea. That got old. The one thing I do miss is seeing all the people at the courthouses, and the personal interaction with the attorneys, the litigants, and working with the jurors. That was a lot of fun.

**Fowler:** A superior court judge does a fair amount of travelling in North Carolina. I believe you held superior court in 32 different counties. Some of our judges have held court in all 100 counties. What do you think of our system of rotation of superior court judges as practiced in North Carolina?

**Judge Steelman:** I think it is an excellent system—of course, it's constitutionally mandated. I found that at the beginning of the six-month rotation, it was exciting because you were meeting new people, seeing new lawyers, and a lot of times you were going into areas that you may never have seen before. While that was exciting, usually by the end of six months you were ready to move on to a different set of lawyers and the lawyers were ready for you to move on to another district. I think it is good because you need different perspectives and different judges going in and handling cases. I think it creates some problems if you have the same judge all the time. All of us have our idiosyncrasies and our likes and dislikes, and the longer you stay in one district it tends to magnify those. So I think it's good for the system as a whole—now, it's not so good for the judge who has to spend overnight travel time. That's not good for your family—but I think overall it's a good thing.

**Fowler:** As a superior court judge, you were occasionally assigned an "exceptional case" pursuant to Rule 2.1 of the General Rules of Practice—that is you heard the entire case from start to finish, a procedure that runs counter to the general rule of rotating judges who hear bits and pieces of any given case. What was your experience with Rule 2.1? Better than rotation?

**Judge Steelman:** I think it is for a particularly complex case. And I think every one of those to which I was assigned got resolved—I never took one of those to trial. One of the cases I was assigned was the Rick Hendrick commercial bribery case. It was pending in Stanly County. When I got into the case the

file was already about six or eight inches thick and there had already been five or six judges who had made rulings in the case. It got to the point that it would take a judge half a day to go through the file to get the procedural history to understand it enough to make what was probably a fairly simple ruling. So I think that is a good exception for a complicated case to prevent inconsistent rulings.

**Fowler:** Do you think that a citizen out boating on Kerr Lake has a right not to be stopped and searched by a Wildlife Resources Commission officer when that officer lacks any reasonable, articulable suspicion of criminal activity to justify the stop? That is, should there be the same Fourth Amendment rights for the driver of a boat as the driver of a car?

**Judge Steelman:** [laughs] Well, that sounds like *State v. Pike*, which was a case in which I was the trial judge. And I ruled that that was not a proper stop.

**Fowler:** It is the *Pike* issue! In *State v. Pike*, you held that the boater was protected by the Fourth Amendment and the court of appeals reversed you on an issue of first impression. Who was right?

**Judge Steelman:** [laughs] Well, the court of appeals did disagree with me in a unanimous decision, and as a court of appeals judge I'm bound to follow that. It's precedent—whether I personally agree with it or not.

**Fowler:** I understand and appreciate that. But it is an interesting question that I understand has not been addressed in all the states and so the matter is an open question in lots of jurisdictions.

**Judge Steelman:** Well, it's interesting that the issue has been litigated primarily in states that have coastal water. And the thing that was most peculiar about *Pike* was that the court of appeals based its decision on a case out of Texas which was decided after I ruled, after the briefs were filed, and after the case was argued in this court—which I found to be a little unusual. [laughs]

**Fowler:** The *Pike* opinion also stated: "[W]e refuse to expand the ruling in this case to other factual situations." Can the appellate court do that?

**Judge Steelman:** Well, you are not supposed to be giving advisory opinions on hypothetical facts.

**Fowler:** Do trial judges worry about being reversed on appeal? Should they?

**Judge Steelman:** Nobody likes to be reversed. Anyone who tells you it doesn't bother them is not being entirely truthful. I think you've got to make the best call that you can based on what you have in front of you—understanding that the superior court judge doesn't have the luxury of doing a lot of their own research and having a lot of time to mull over their decisions. That's one of the big differences between the trial court and the court of appeals. We've got time to have our clerks research the legal issues, to delve into the law of other states, to look into US Supreme Court cases in more detail than the trial court does. So in that context the trial judge may make a decision that is in perfectly good faith but upon more reflection and research it may turn out to be incorrect. Nobody likes to be reversed, and I don't think the appellate courts get any joy out of reversing the trial court judge. I think both are trying to get the right result based on what's in front of them.

**Fowler:** Is there any other particularly memorable case that you heard as a trial judge?

**Judge Steelman:** Well certainly trying four death penalty murder cases is something that you just don't ever forget. Sentencing people to death is still a spine-chilling experience, even removed from it by several years. But generally speaking, I always enjoyed presiding over good civil cases that were well-tried by capable lawyers.

**Fowler:** You've been on the court of appeals for over eight months now, have there been any surprises?

**Judge Steelman:** The workload is intense. In the first six months of this year, we have authored 67 opinions, three dissents, two concurring opinions, and three dissents that ultimately became majority opinions written by other judges.

**Fowler:** That's your output—from your chambers?

**Judge Steelman:** That's my output, which was 75 opinions. It's a lot of work. Now keep in mind of those opinions, 17 were "fast tracks," where the core work was done by staff counsel and not by myself and the clerks. We basically just edited those opinions. But that's still an enormous amount of work.

**Fowler:** Indeed it is. What percentage of your time is spent reading records and briefs?

**Judge Steelman:** Not a huge amount of time is spent in oral arguments. We'll have

court maybe twice a month which is six oral arguments which is not a lot. The bulk of the time during the day is spent reading, research, conferences with the clerks, reviewing other judges' work. A lot of people don't understand the time commitment involved. For every opinion I write I've got two from other judges that I have to review which takes a lot of time. Quite frankly the only way I can keep up with it is that I read usually for at least an hour every night in addition to what I do here. That's the only way I find I can keep up.

**Fowler:** How often does oral argument alter the initial impression you had after reading the briefs?

**Judge Steelman:** Probably not a lot. Maybe two or three cases in my first six months where I thought the oral argument really made a difference. Now, a lot of times you may go in there and say, "this is a very close question," and you go in there without preconceived opinion on the case and you listen to what the lawyers have to say and you get clarification. So sometimes it is very helpful. We've had some wonderful arguments this six months and we've had some abominable arguments. It runs the gamut.

**Fowler:** Do you rely on the research that is in the briefs or do you do research yourself or have your clerks do research?

**Judge Steelman:** Obviously you use the briefs as a jumping off point but we have an obligation to look at the law beyond what's in the briefs. And sometimes the briefs are absolutely wonderful. They are thoroughly researched with law from North Carolina and other states. Other times the briefs totally miss the point in the case and in that situation you really have to go and completely start from scratch because if the brief is not dealing with the law correctly you can't follow the brief because otherwise your opinion is going to be wrong.

**Fowler:** The Appellate Rules allow the court of appeals to decide not to publish its opinion if the appeal involves no new legal principles so that the opinion would have "no value as a precedent." Over the years the court of appeals applies this rule to about two-thirds of the cases it hears. Can it really be true that North Carolina attorneys are filing so many appeals in which they raise only issues where the law is already clear and settled?

**Judge Steelman:** There are a lot of cases where that is true.

**Fowler:** But is it two-thirds of the cases?

**Judge Steelman:** Well, it depends on whether you consider issues created by ingenuity of counsel ... where do those fall into that statistic? We try to look at each case to decide whether it really states something new or simply rehashes what was there before. If there is something new we go ahead and publish it. But we'll also publish cases that may not say anything new but there is a principle of law that needs to be reinforced—that the bar needs to recall this rule which may not have been expressed recently.

**Fowler:** But even with that expansion it is still only a third of the cases that deserve publication?

**Judge Steelman:** You can make an argument to publish every case that comes out of this court. You could make a legal argument for it. We are publishing an incredible number of cases and I think on some of those cases you run the risk of there being reported inconsistent rulings if you publish everything. I think there is a danger there.

**Fowler:** Are the judges who write the opinion the best people to decide whether the opinion has any value as a precedent?

**Judge Steelman:** Ultimately it's the judge who writes the opinion that makes that call. That's the judge who has researched the case and explored it in the most depth and so is most familiar with it. So I think that probably is a good rule.

**Fowler:** The new rules, of course, allow citation of an unpublished opinion if the attorney believes it has precedential value.

**Judge Steelman:** They do. I've got some mixed emotions about that new rule. Having been a superior court judge I know how often those are going to be pulled out. I constantly had people trying to cite unpublished decisions under the old rule. One can only imagine how it's going to play out with this new rule in effect. The unpublished opinions are already on the internet. They are available on the court system's web page although I don't know how far they go back.

**Fowler:** In a recent case our supreme court discussed the relative merits of balancing tests vs. bright line rules. The court noted that balancing tests provide trial courts with the flexibility to respond to unique circumstances and unanticipated situations while bright-line rules limit future judicial discretion and provide trial courts, and litigants, with predictability and consistency. And fur-

ther: the practical consequences of a balancing test include the difficulty of demonstrating equality of treatment, the decline of judicial predictability, and the facilitation of judicial arbitrariness. Some have said that it is better for an issue to be finally decided than that the issue is decided right. What is the best approach for the appellate courts, and does it depend on whether you are a trial judge or an appellate judge?

**Judge Steelman:** Sounds like *Belk v. Cheshire*. [both laugh] I wrote a concurring opinion in *Belk v. Cheshire* which dealt with what the standard was for legal malpractice in a criminal case. My position was that we needed a fairly bright line test for the benefit of the bar and the benefit of the trial bench. The majority went with more of a balancing or fact-specific type of test. And I think it depends on the particular issue. There are some issues where you need fairly clear cut law, so that everybody knows where they stand, because if you don't have a clear rule it will promulgate litigation. And then there are certain areas where the courts say we've got to balance it on a case-by-case basis. You've just got to look to the particular issue. I don't think you can make a hard and fast rule. But I'd be in favor of a clear cut rule in as many cases as possible—because the law is getting so voluminous and so complex that if you don't have some very clear rules then it doesn't provide any certainty for litigants and lawyers and the trial bench.

**Fowler:** I read a recent law review article that criticized US Supreme Court Justice Antonin Scalia for being a "disdainful smart-aleck" in some of his dissenting opinions where he colorfully characterizes the flaws in the majority's legal analysis. A recent court of appeals opinion held, despite the North Carolina Supreme Court's direction that one court of appeals panel must follow the precedent established by an earlier court of appeals panel, that a 2-1 decision of the court of appeals was not binding on subsequent court of appeals panels. I saw that you were a member of this panel and that you dissented from this approach, noting: "The effect of the majority opinion is to sow the seeds of chaos and confusion in our trial court divisions, in that they now have two directly conflicting decisions of this court on the identical issue which they are required to follow." Do you think Scalia is a smart-aleck? [both laugh]

**Judge Steelman:** Justice Scalia can be fair-

ly caustic at times. I did use an agricultural metaphor in that dissenting opinion to emphasize the reason why we have the rule set forth in *In Re Civil Penalty*. But I'm not going to go any further in discussing that case.

**Fowler:** An article in a recent *North Carolina State Bar Journal* asked the question of whether unnecessary "holdings" that are nonetheless included in appellate opinions are really just dicta. Are they?

**Judge Steelman:** We have to address the assignments of error that are raised and we need to stick with the assignments of error that are raised. It's tempting on occasion to try and illuminate the law and make it a little clearer but we need to be careful because what we say in one case may be used later and twisted out of context and used in another case. So we really need to be careful to deal only with the issues raised by the appeal. Our role is not to write a treatise on tort law or contract law but to deal with the issues before us.

**Fowler:** How does your experience as a superior court judge affect your function as an appellate judge?

**Judge Steelman:** The training as a superior court job was probably the best training I could have gotten for this job. The majority of the cases up here are superior court cases. It has been helpful to me because I understand how the case was filed and how it progressed through the system and the procedural aspects. Also, one of the things that I wrestle with here is seeing cases come up from the trial courts and I think, well, if I'd been the trial judge I wouldn't have done it that way. But you've got to step back and say, well, that's not the test. The test is, did the judge follow the law. We must realize that different judges can handle the same case differently, and just because they handle it differently doesn't mean they committed error. And I think that's not always an easy concept to apply.

**Fowler:** That's a good point—that the law allows cases to be tried in a variety of different ways, all of which could be error free.

**Judge Steelman:** Another of the things I enjoy doing on this court is reading the transcript of the charge conference. I don't know how many judges do that but it is incredibly interesting and you get to see what the lawyers' mindset was as the case was getting ready to go to the jury—which may be completely different from what they are arguing

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on appeal. It also gives you insight as to what the judge was thinking—where the judge was taking the case. For the most part I'm always impressed and proud at the breadth of knowledge and the skill with which our trial bench handles these cases.

**Fowler:** What's it like going to the superior court judges' conferences and seeing your old colleagues on the trial bench?

**Judge Steelman:** I enjoy going back and seeing them. I have to make sure I'm not sitting with them when they start discussing a case that may be in front of me on appeal—sometimes I may have to leave the conversation. [laughs] But it's a lot of fun to see these folks again.

**Fowler:** How many of your former colleagues have your reversed?

**Judge Steelman:** [laughs] Tom, I've not kept count. The affirmation rate of the trial courts is around 80% I think, or something like that. We may not affirm 100% but that doesn't mean that our trial judges aren't doing an outstanding job. They do. In the cool of the evening we can decide that a case can come out differently from what a trial

judge decided in the heat of the battle. Different forces are at play at different points in the decision-making process.

**Fowler:** In your experience, which of our state's law schools produce the best research assistants?

**Judge Steelman:** At this point I've had one research assistant from Wake Forest and one from Carolina and they were both excellent, [laughs] so I can't comment on the quality coming out of the other schools. But I've been very, very pleased with the work I've gotten out of my clerks who came from those two law schools.

**Fowler:** A very politic answer, your honor! Thanks very much for talking with me this afternoon, Judge Steelman.

**Judge Steelman:** It has been my pleasure. ■

*Thomas L. Fowler is associate counsel with the Administrative Office of the Courts, Raleigh, North Carolina. He earned his BA and JD at the University of North Carolina at Chapel Hill. His e-mail address is: tom.fowler@nccourts.org.*

# True Open File Discovery: The Remedy for Discovery Violations in Capital Cases

BY S. MARK RABIL

Since the enactment of a post-conviction discovery law in 1996, North Carolina courts have vacated the death penalties of five men due to the failure of prosecutors to make constitutionally required disclosures. This means that five of the 365 death verdicts since the re-enactment of the death penalty in 1977 were wrongful or mistaken due to *preventable* discovery violations.<sup>1</sup> How many of the 200 people currently on death row should have similar relief? The statistics are disturbing and do not

comport with the time-honored maxim, "it is better that 99 ... offenders shall escape than that one innocent man be condemned."<sup>2</sup>

If discovery is not being honored in the most serious criminal litigation, then there is no doubt that there are mistaken convictions in other criminal cases. There must be a legislative or judicial remedy to ensure that there is full and fair disclosure of evidence in criminal cases so that we can be more certain that

the innocent are set free and the guilty properly convicted. Trial courts in criminal cases can also enter orders to require that established constitutional principles and current discovery statutes are being honored during pre-trial litigation.

Does it make sense that parties to civil law-



suits, like whiplash or fraud cases, have more rights to discovery of relevant information than a defendant facing the death penalty in a murder case? In the civil world, parties may obtain "relevant" information in the possession or control of the other side so long as the discovery sought is likely to lead to the discovery of admissible evidence. In the death penalty world, a defendant does not have an established right to see all the relevant evidence until after he has been convicted, sentenced to death, and lost his direct appeal. Rather, as in all criminal cases in North Carolina, the state need only provide the evi-

dence mandated by statute and “exculpatory” evidence required by the Constitution.<sup>3</sup>

Since 1996, defendants facing the death penalty have had a statutory right to take a look at all the evidence which the prosecutors and law enforcement agencies had in their files before and during the trial.<sup>4</sup> This right even includes access to the notes of the prosecutors—that is, the statute trumps the prosecutors’ claims of work product privilege.<sup>5</sup> It’s similar to being able to analyze the “black box” from an airplane crash. That is, after a defendant is convicted and sentenced to death, new post-conviction counsel have the opportunity to go back and look at all the evidence to find out whether the trial prosecutors failed to disclose evidence to which the defendant was entitled. There have been a number of examples since the post-conviction discovery law went into effect which show that evidence that should have been disclosed was not revealed. The result has been that several death penalties have been set aside because of preventable discovery violations. In response to these orders setting aside convictions, North Carolina Chief Justice I. Beverly Lake Jr. established the Actual Innocence Commission in order to examine ways to prevent wrongful convictions.<sup>6</sup>

#### Examples of Death Penalties Set Aside Because of Discovery Violations<sup>7</sup>

**Charles Wayne Munsey.** In the Wilkes County case of Charles Munsey, superior court judge Thomas Ross set aside a murder conviction and death penalty based, in part, on discovery violations.<sup>8</sup> At the 1996 trial, Timothy Hall, known in criminal law parlance as a “jailhouse snitch,” testified that Munsey allegedly confessed to him while in Central Prison. The state did not tell the defense about Hall until the witnesses were listed at the start of the trial. The defense attorneys tried to investigate the allegations during the trial, and requested the assistance of the prosecutor in collecting prison records and information. The attorney general’s office investigated and sent a memo to the district attorney stating that the Department of Correction had no record that Hall had ever been to Central and that it was “nearly impossible” for Hall to have been there without a record having been kept. Undoubtedly, this should have been disclosed because it meant that it was “nearly impossible” for Munsey to have confessed to Hall. In the memo, however, the assistant attorney general went on to

advise the prosecutor, “as a former prosecutor, I would argue that the absence of documentation does not preclude the possibility that Hall was at Central.” The district attorney in fact made this argument to the jury without disclosing the exculpatory memo to the defense attorneys. The “smoking gun” memo was only revealed because of the provisions of the 1996 post-conviction discovery statute. Judge Ross found this to be a discovery violation warranting a new trial.<sup>9</sup> Munsey was moved from death row to a different prison while awaiting a new trial, but died of natural causes a few months after the hearing.

**James Alan Gell.** On December 16, 2002, superior court judge Cy A. Grant Jr. vacated the 1995 Bertie County murder conviction and death sentence of James Alan Gell based upon documents revealed during post-conviction discovery.<sup>10</sup> Judge Grant found that the prosecutors failed to disclose nine witness statements from people who saw the victim alive—between April 6 and April 10—after the alleged date of death of April 3, 1995. This was significant because Gell was in jail between April 6 and April 14 (the date of discovery of the body). (Gell’s alibi included evidence that Gell was out of the state on April 3 up until his arrest and incarceration on April 6.)<sup>11</sup> Judge Grant also found that the prosecutors had failed to provide an exculpatory “secret tape-recording” made by investigators of the two eyewitnesses or accomplices—the two main witnesses against Gell at trial (no physical evidence connected Gell to the murder). One of the most disturbing aspects of this case is that the state failed to produce all these exculpatory statements to the defense despite a court order to do so five months before the trial, and failed to produce the evidence to the trial court during an *in camera* inspection at the start of the trial.<sup>12</sup> The state is re-prosecuting Gell, but is not seeking the death penalty.

**Curtis Womble.** A situation similar to the Gell case occurred in a March 1993 Columbus County case. Curtis Womble, who was 17 at the time of the crimes, pled guilty to burglary and first degree murder, and was sentenced to death by a jury. The 1996 post-conviction discovery law gave the defense attorneys access to statements which contradicted the date of death of the victim. In the newly revealed documents, “defense lawyers discovered that five witnesses interviewed by police had said they saw Mr. Brown alive the day after the burglary....[A] medical examiner had

testified that the fatal blows wouldn’t have allowed Mr. Brown to live more than a few seconds, [and] the witness statements could have helped Mr. Womble’s case by showing Mr. Brown must have been beaten to death later.”<sup>13</sup> As a result of these disclosures, the convictions and death sentence were vacated by superior court judge Wiley F. Bowen,<sup>14</sup> and Womble entered into a plea bargain in which he pled guilty to second degree murder, first degree burglary, and conspiracy to commit armed robbery, and received two consecutive life sentences plus ten years.

**Jerry Lee Hamilton.** On April 22, 2003, superior court judge Michael E. Beale vacated the February 1997 Richmond County conviction and death sentence of Jerry Lee Hamilton because post-conviction disclosures showed that the prosecutor failed to provide the defense with an exculpatory letter from the co-defendant.<sup>15</sup> The co-defendant was the main witness against Hamilton, his uncle. The nephew was the only eyewitness and there was no forensic evidence to connect Hamilton to the murder. At first, the nephew claimed full responsibility for the murder. Later, he changed and blamed Hamilton. The state failed to disclose a handwritten note from the nephew seeking “to work out a deal” with the sheriff’s department. This letter was written two months before the nephew implicated Hamilton in the murder. Judge Beale found and concluded:

In addition to providing an avenue for vigorous cross-examination of Mr. Knight, the letter itself—properly presented and used before the jury as a trial exhibit—would have been helpful to the defense because it constituted tangible, black-and-white evidence of Mr. Knight’s motivation to fabricate a story implicating Mr. Hamilton in hopes of “a deal” when Mr. Knight failed to obtain “a deal” at the time that he originally confessed to the murder himself.<sup>16</sup>

**Stephen Bishop.** The Guilford County murder conviction and death sentence of Stephen Bishop were vacated by superior court judge Howard R. Greeson Jr., due to the failure of a prosecutor to disclose evidence of an alibi witness.<sup>17</sup> The state indicted Bishop and his half-brother, Kenny Kaiser, for the 1991 murder of a well-known Greensboro insurance agent. Police originally charged Kaiser after they caught him using the victim’s bank card. Kaiser claimed that he had only robbed her, and that Bishop had killed her.

The prosecutors made a deal with Kaiser: if he testified against Bishop, then the state would not seek the death penalty against him. After failing a polygraph, Kaiser changed and admitted he committed the murder but that Bishop told him to do it. So the prosecutors allowed Kaiser to keep his plea bargain, and they pursued—and obtained—a death verdict against Bishop. Post-conviction discovery showed that the prosecutors “withheld a key piece of evidence: a K-Mart cashier who said she spoke with Bishop at the store around the time of the murder. That suggests Bishop may not have been around the murder scene, and contradicts Kaiser’s account of what he and his brother did that day.”<sup>18</sup> Because of the *Brady* violation, Bishop was given a new trial, and the prosecutor was forced to resign. Later, it was revealed that the prosecutor failed to make the required disclosures in two other criminal cases. The State Bar later entered into a consent order with the prosecutor, suspending his license for two years, stayed “on condition that, among other things, Goodman not work in any federal or state prosecutor’s office during the period of the stayed suspension. The DHC found that Mr. Goodman violated the Revised Rules of Professional Conduct by failing to timely disclose evidence or information known to him that tended to negate the guilt of three criminal defendants and by disregarding rulings of a tribunal made in the course of a criminal proceeding.”<sup>19</sup>

#### The Remedy: True Open File Discovery

It is not the purpose of this article to criticize the hard-working, ethical judges and prosecutors who are involved in the emotional and complex trial process when the death penalty is sought. Rather, the goal is to suggest ways to ensure that evidence which should be disclosed is given to the defense in a timely

fashion. This will prevent expensive and time-consuming post-conviction litigation over discovery matters—a problem about which superior court judges around the state have been complaining for several years. More importantly, compliance with discovery will help ensure that the death penalty trial process is fair, efficient, and constitutional.

In any criminal case, upon request of a defendant, the state must provide statutory discovery to the defense.<sup>20</sup> This includes the right to copies of the defendant’s own statements, statements of co-defendants, the defendant’s criminal record, documents and tangible objects (which are either material to the defense or intended to be offered as evidence by the prosecution), reports of examinations and tests (including DNA tests), and access to physical evidence for independent defense testing. As to the statements of state’s witnesses, the statute only provides for disclosure of the parts of the statement which relate to “the subject matter of the testimony of the witness” to the defense after the witness testifies on direct examination at trial.

In addition to these minimal rights to statutory discovery, an extraordinary obligation to disclose “exculpatory” evidence is placed in the lap of the prosecutor. That is, the prosecutor has an ethical<sup>21</sup> and constitutional obligation to search for and reveal to the defense any evidence which may tend to lessen the defendant’s culpability or the severity of the sentence if he is convicted. In *Brady v. Maryland*, the United States Supreme Court held “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218, 83 S. Ct. 1194 (1963).

The “upon request” language has been eliminated so that prosecutors have an affirmative duty to review police files and question investigators to determine whether there is “exculpatory” evidence to be turned over to the defense.

“Exculpatory evidence” is broadly defined to include “information favorable to a defendant” on guilt or punishment issues. The Supreme Court has also ruled that it includes impeachment information, *United States v. Bagley*, 473 U.S. 667 (1985), such as an investigator’s notes and letters relating to witness interviews useful for impeachment, *Stickler v. Greene*, 527 U.S. 263 (1999), promises of leniency to a witness, *Giglio v. United States*, 405 U.S. 150 (1972), a plea bargain with a witness, *Ring v. United States*, 419 U.S. 18 (1974), evidence undermining the identification of the defendant—including a prosecutor’s notes, *Kyles v. Whitley*, 514 U.S. 419 (1995), and exculpatory information in youth services files, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

The North Carolina Supreme Court has held that the defense should be given *Brady* material with enough time to “effectively use” it at trial. *State v. Taylor*, 344 N.C. 31, 473 S.E.2d 596 (1996), *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002). North Carolina courts “strongly disapprove of delayed disclosure of *Brady* materials.” *State v. Spivey*, 102 N.C. App. 640, 646 (1991). However, as most death penalty lawyers and trial judges have seen, there is rarely a case in which full disclosure occurs in advance of trial. The usual scene is that an out-of-breath police officer or paralegal comes running into the courtroom mid-trial with copies of forgotten or misplaced evidence and late-breaking discovery. This does not happen very often in civil cases in which the attorneys may seek the assistance of the court well in advance of summary judgment hearings and trial in order to obtain full and complete discovery. If there is not compliance in civil lawsuits, sanctions—such as striking of claims or defenses or exclusion of evidence—routinely follow.

The principles of *Brady* and its progeny are laudable and necessary. It would be impossible for a defendant to get a fair trial in our current system without *Brady*. However, it is not practical or reasonable to entrust the disclosure obligation to one side of the most contested type of litigation known to our system of justice—a death penalty trial. Prosecutors have a totally different perspective on a case

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than defense attorneys. This is natural, given the human desire to win. The prosecutor is looking for evidence and witnesses who will help convict a defendant and then help sentence him to death. In the midst of this difficult process, it cannot be expected that a prosecutor will be able to take off her adversarial hat and put on a defense hat to see whether a defense attorney might have a different view of evidence and see it as helpful to his client. This is one of the important lessons of the *Munsey*, *Gell*, *Womble*, *Hamilton*, and *Bishop* cases.

Most of the time, defendants and their attorneys must depend on reports, photographs, and tests provided to them after the state has evolved its theory of the crime and the defendant's guilt. Thus, normally, the discovery which is provided is provided too late, after memories have faded or changed and after physical evidence has dissipated.

Most prosecutors claim to have "open file" policies. In a recent speech, Attorney General Roy Cooper stated that he has an "open file" policy for all cases prosecuted by his office.<sup>22</sup> Usually, "open file" is defined to mean that the defense attorney can see or have copies of whatever the prosecutor has in her files, but there are variations between different prosecutorial districts.<sup>23</sup> One problem is that the prosecutor rarely, if ever, has copies of all law enforcement notes, reports, recordings, witness statements, and other evidence. That is, the prosecutor can only share with the defense the information which law enforcement officers provide to her. If the officers either negligently or intentionally fail to provide the evidence to the prosecutor, then she cannot share it with the defense attorney. Thus, "open file" is a term which rings hollow. Only a true open file policy ensures that both prosecutors and defense attorneys have access to all the evidence.

The only practical remedy, which comports with a capital defendant's 5th, 6th, 8th, and 14th Amendment rights, is for the courts—or the state legislature—to require true open file discovery. This means that all law enforcement notes, reports, and information, all witness statements, all the raw data upon which scientific conclusions are based, and everything else to which the prosecutor has access, should be provided to or made available to the defense as soon as it becomes available. This is the only way for a defense attorney to truly prepare to meet the state's case, to effectively cross-examine witnesses,

and to develop a theory of defense. It's that simple. The defense should have access to all the evidence, and let the chips fall where they may. There should be no trials by ambush, especially when the defendant's life is literally on the line.

#### Short-Term Remedies: Orders to Ensure Discovery Compliance

Short of true open file discovery, what can superior court judges do to ensure that the death penalty trials over which they preside are fair and are not tainted for years by allegations of discovery violations? One example of a court order to ensure discovery which comports with *Brady* and statutory discovery was devised by The Honorable Melzer A. Morgan Jr., one of the senior trial judges in the state. In the early 2003 death penalty trial of Eli Alvarez in Forsyth County, Judge Morgan entered a pre-trial order reciting the basic principles of *Brady* and its progeny, and setting forth deadlines, evidence to be disclosed, and remedies.<sup>24</sup> When it became apparent that the discovery order was not complied with the week before trial, Judge Morgan continued the case for two weeks and entered a supplemental discovery order which required law enforcement to provide all of their reports and records to the prosecutor and for the prosecutor to then give copies of all of the police files as well as the district attorney's notes and files to the court for an *in camera* inspection. The supplemental order also required police officers to sit down with defense attorneys and answer questions about their handwritten notes and other evidence. More than 1,000 pages of discovery documents were produced to the defense in response to the court orders. Without Judge Morgan's orders, the defense would never have been aware of certain evidence, such as:

1. An eyewitness viewed a photographic lineup, which included the defendant, within ten days of the murders, but made no identification. (The state was going to rely on a photographic lineup conducted nearly two years after the crimes in which the witness did identify the defendant. The fact that this witness only spoke Spanish added complication to this discovery violation.)
2. In a phone call digitally recorded by the local jail, a co-defendant told his "cousin" that his lawyer came to him and spoke about a deal in which this co-defendant would receive a sentence of ten to 15 years

for the two murders, but that this co-defendant really expected to receive a sentence of "time-served" after he testified.<sup>25</sup> (Without Judge Morgan's orders, the police and the prosecutors were refusing to allow the defense attorneys to listen to this recording—or any recordings of the co-defendants or witnesses.)

This writer, who was one of the defense attorneys in the *Alvarez* case, believes that Defendant Alvarez in fact received a sentence of life without parole, instead of the death penalty, largely because of the discovery provided to the defense solely due to the orders entered by Judge Morgan. This discovery was used to impeach eyewitnesses and co-defendants in this case in which the main issue centered on which of the three defendants was the shooter. In the sentencing phase, with the use of the discovery, the defense was able to raise reasonable doubt on this issue—in fact, the jury found that Alvarez was not a shooter, but that he participated in the underlying felonies.

The Alvarez Discovery Order is an excellent means of assuring compliance with currently recognized discovery laws and principles. However, it ultimately required the judge to spend a week or more reviewing the nearly 10,000 pages of the state's documents instead of holding court. It would have been more efficient for the files to have been provided to the defense attorneys well in advance of trial. True open file discovery would have prevented the need for a continuance and a lengthy *in camera* review by the trial judge.

Another remedy, which should probably be employed even if there is true open file discovery, is for the court to enter an order requiring all law enforcement agencies involved in an investigation to turn over copies of all of their files, notes, reports, statements, and other evidence as the investigation progresses—at least on a weekly basis. In the experience of this writer, prosecutors usually do not object to an order requiring officers to turn over copies of their records. This also ensures that the prosecutors have no surprises and are prepared for trial. While reviewing the files, the prosecutors can also search for and inquire about any exculpatory or impeachment evidence which they are required to turn over to the defense.<sup>26</sup>

And, of course, if a trial judge sees that discovery is not being complied with, there is a statute which provides for sanctions for discovery violations, including: order the discov-

ery; grant a continuance; prohibit the party from introducing the evidence not disclosed; declare a mistrial; dismiss the charge, with or without prejudice; or enter “other appropriate orders.”<sup>27</sup> One appropriate order may be to require true open file discovery. Another may be the type of orders entered by Judge Morgan in the *Alvarez* case.

## Conclusion

Defendants receiving the death penalty should not have to wait until the “black box” of discovery is opened in post-conviction litigation to see whether they received a fair trial. In fact, no criminal defendant should have to wait to see the evidence until after the presumption of innocence no longer applies. True open file discovery is one of the only ways to ensure that the innocent are not wrongfully convicted and executed. Full disclosure of the evidence before trial will also ensure that courts will not have to continue dealing with the review of voluminous records in post-conviction litigation. ■

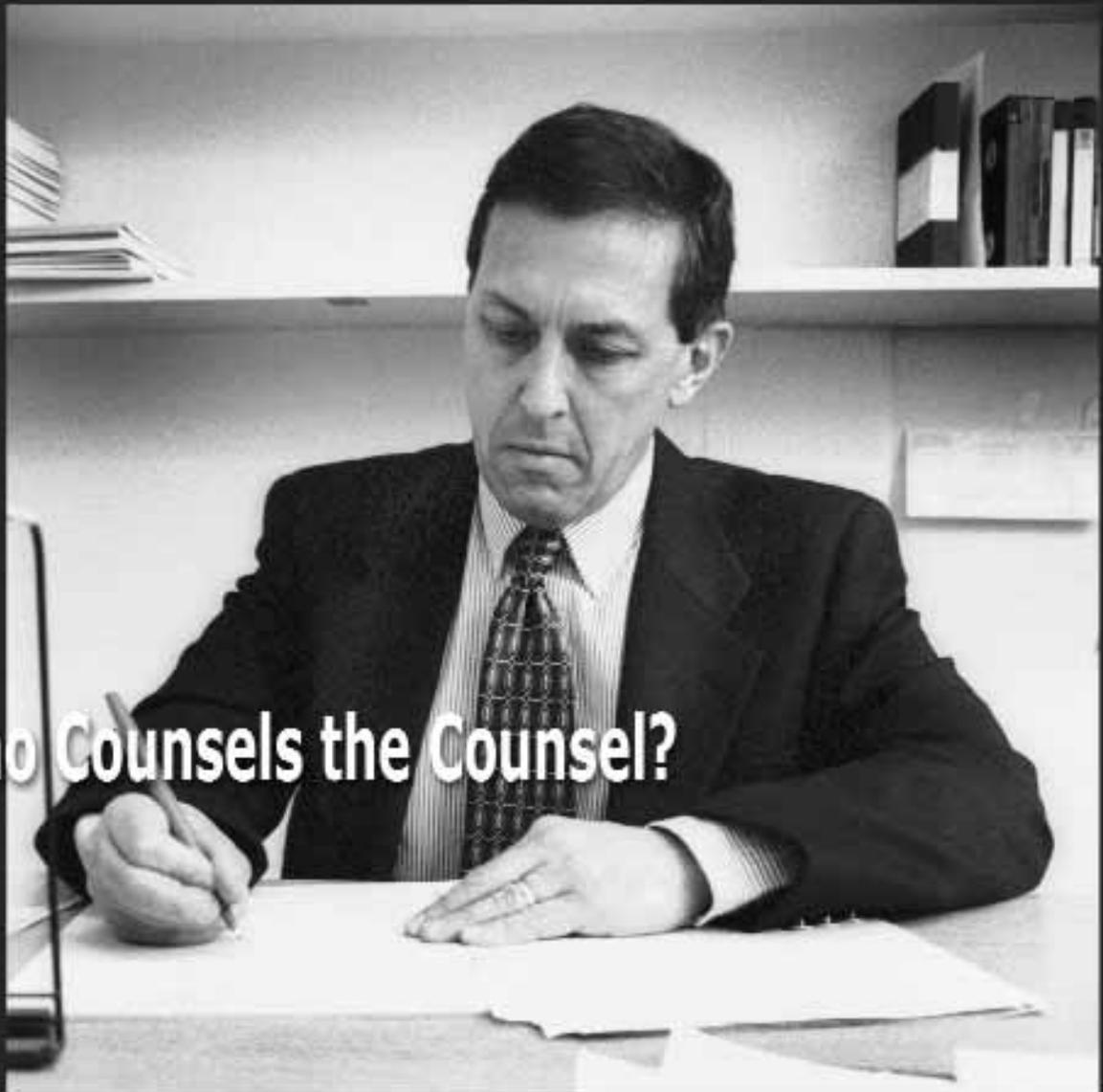
*S. Mark Rabil is an assistant capital defender with the Forsyth Regional Office of the Office of the Capital Defender, and represents clients charged with first degree murder and facing the death penalty. He practiced both civil and criminal litigation for 23 years in Winston-Salem prior to joining the Capital Defender office in May 2003. He is a graduate of Davidson College '77 and UNC School of Law '80.*

## Endnotes

1. Since 1977, there have been 365 people sentenced to death in our state. Twenty-six have been executed (as of 9/29/03). And 149 have received dispositions other than death due to new trials, clemency, etc. See [www.doc.state.nc.us/dop/deathpenalty/index.htm](http://www.doc.state.nc.us/dop/deathpenalty/index.htm).
2. *Starkie, Evidence* 751 (1824). See also *Schlup v. Delo*, 513 U.S. 298, 325, 115 S.Ct. 851, 862, 130 L.Ed.2d 808, \_\_\_ (1995): “Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the ‘fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.’” *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1068, 1077, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring).
3. “There is no general constitutional or common law right to discovery in criminal cases. *Weatherford v. Bursey*, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 42, 97 S. Ct. 837 (1977). *State v. Alston*, 307 N.C. 321, 335, 298 S.E. 2d 631, 641 (1983).” *State v. Haselden*, 357 N.C. 1, 15, 577 S.E. 2d 594, 602 (2003). The court notes that criminal defendants are entitled to exculpatory evidence and the evidence allowed by statute. *Id.* For a contrary view, and one espoused by this writer as well, see Maitri “Mike” Klinkosum, *Trial Briefs*, Winter

2004, in which the view that the 5th and 6th Amendment rights to effective assistance of counsel and to confrontation of witnesses requires true open file discovery is presented.

4. N.C.G.S. § 15A-1415(f).
5. *State v. Bates*, 348 N.C. 62, 505 S.E.2d 97 (1998)
6. “State delves into wrongful convictions,” *Raleigh News & Observer*, November 27, 2002, p. 1A and 14A. “Lake said he was motivated to establish the commission because of a string of wrong convictions in North Carolina.... ‘It’s a very disturbing thing,’ said Lake, a former trial judge and state senator who won election as chief justice of the state supreme court two years ago. ‘We need to take a look at the system and see if we can improve things at the front end, during the investigation, and after appellate review.’” *Id.* Chief Justice Lake cited such possible reforms as making police lineups more accurate, giving juries more information about deals with co-defendants, and a method of reviewing evidence of innocence after appeals are over. *Id.* “‘We need to let folks know that we’re working hard to improve the system,’ he said. One thing the project is not about, said Lake, a Republican, is undermining capital punishment. In fact, he said, improving the criminal justice system’s reliability could help maintain support for the death penalty. ‘We don’t want to forget to concentrate on convicting the guilty,’ he said.” *Id.*
7. The problem of wrongful convictions and improper death penalties is not unique to North Carolina, but is a problem throughout the United States. As of 7/28/2003, since the re-institution of the death penalty in 1977, 111 death row inmates have been exonerated. Death Penalty Information Center, [www.death-penaltyinfo.org](http://www.death-penaltyinfo.org). According to the Innocence Project of the Benjamin Cardozo School of Law, 136 defendants in cases including murder and other crimes have been exonerated by DNA testing since 1994. [www.innocenceproject.org](http://www.innocenceproject.org). Of the first 70 DNA exonerations obtained by the testing, it was also revealed that there was “prosecutorial misconduct,” including discovery violations, in 34 of the cases. *Id.* The problem is also not limited to death penalty cases, but criminal cases in general. For a complete discussion, see Paul M. Green, “Innocent in North Carolina,” *Trial Briefs*, April 2000. The present article is limited to a discussion of the death penalty wrongful convictions because the post-conviction discovery statute only applies to death penalty cases.
8. *State v. Charles Munsey*, No. 93 CRS 4078 (Wilkes County Superior Court, May 14, 1999).
9. Judge Ross also determined that Munsey was entitled to a new trial because Hall repudiated his testimony by taking the Fifth at the post-conviction hearing, and because another individual, Oid Michael Hawkins, credibly confessed to the murder at the hearing. *Id.*
10. *State v. James Alan Gell*, No. 95 CRS 1884, 1393-40, 2322 (Bertie County Superior Court, December 16, 2002.)
11. Defendant’s “Motion to Dismiss For Misconduct by the State” filed in *State v. Gell*, No. 95 CRS 1884, 1393-40, 2322 (Bertie County Superior Court, Fall 2003).
12. An *in camera* inspection of the state’s files by the court is recognized as an appropriate remedy for determination of whether documents or evidence should be disclosed. *State v. Hardy*, 293 N.C.105 , 235 S.E.2d 828 (1977).
13. “1993 Columbus Slaying: Death-row prisoner denied evidence will now serve life term,” *Wilmington Morning Star*, 7/24/1998, p. 1.
14. *State v. Curtis Ray Womble*, No. 93 CRS 1992/1993 (Columbus County Superior Court, July 22, 1998).
15. *State v. Jerry Lee Hamilton*, No. 95 CRS 1670 (Richmond County Superior Court, April 23, 2003).
16. *Id.*, pp. 15-16.
17. *State v. Steven Mark Bishop*, No. 93 CRS 20410 - 20423 (Guilford County Superior Court, January 10, 2000).
18. “Errors, inequities often cloud capital cases in the Carolinas,” *Charlotte Observer*, September 9, 2000.
19. NC State Bar, Consent Order (*NC State Bar v. Goodman*, March 27, 2001).
20. N.C.G.S. § 15A-903.
21. N.C. R.P.C. 3.8 provides that the “prosecutor in a criminal case shall...(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”
22. Attorney General Roy Cooper, Luncheon Remarks to the Annual Convention of the North Carolina Academy of Trial Lawyers, June 14, 2003.
23. Whether copies of documents are provided to defense counsel varies from district to district. For example, in District 17B (Stokes and Surry Counties), the district attorney claims to have an “open file” policy, but takes the position that defense attorneys in capital cases are entitled to come to their office and inspect the files, but that no copies will be provided; rather, the DA’s office will “type out” any matters to which a defendant is entitled under 15A-903. The 17B DA, however, does not believe that copies of Brady materials have to be provided; rather, the defense only has a right to read them in the prosecutor’s office. This position was rejected by superior court judge Joe Craig in *State v. Felicia May Hawkins*, CRS (Stokes County, February 2003). On the other hand, prosecutors in the 21st District (Forsyth County) have an “open file” policy and will provide Bates-stamped copies of documents to which the DA believes the defense is entitled.
24. For a copy of Judge Morgan’s Discovery Order in *State vs. Eli Alvarez*, 01 CRS 51700 (Forsyth County Superior Court, January 29, 2003), please contact the writer at [S.Mark.Rabil@nccourts.org](mailto:S.Mark.Rabil@nccourts.org).
25. Playing the tape-recording for the witness to refresh his recollection was extremely useful in conveying the true color of Mr. Suarez’s phone call, as shown by the following [almost] verbatim transcript: “My lawyer talkin ‘bout she came at me with a 10 to 15 year plea, man—and I was like what the f--- is ... I mean I might as well take the rap for the murder—that’s like sayin I murdered the dude....I was like, man, f--- that s---...she was like [...] I already pleaded guilty to violating my probation, and that’s two years, that’s two years, I already did my time....I pleaded guilty last month and violated my probation...that ain’t nothin but two years—I’d be time served, you know what I’m sayin? I been down here almost two years.” From Record of *State v. Eli Alvarez, Id.*
26. For an example of such an order, please contact the writer at [S.Mark.Rabil@nccourts.org](mailto:S.Mark.Rabil@nccourts.org).
27. N.C.G.S. § 15A-910.



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[eward@ncbar.com](mailto:eward@ncbar.com)  
1.877.627.3743

# Connecting to the Network: Campbell's Award-Winning Professionalism Program

BY LEARY DAVIS AND WILLIS P. WHICHARD

*We represented Carter and during negotiations we received a fax stating that we'd received an offer for \$2 million for the property that [we] were partners in. Huge conflict of interest. Should never have taken the case in the first place.*

*I handled an ethical issue badly by assuming that because Millie was a social party thrower coupled with the fact that her husband drank, that she drank alcohol too. I shouldn't have assumed that.*

*One of the main reasons that I came to law school was because I think that lawyers tell the most interesting stories, and that belief was furthered by the Travis simulation. Also, the lawyers did an incredible job of acting, which obviously led to my positive experience of the simulation.*

*Having a "Senior Partner" was a valuable addition to the simulation. Our "Partner" allowed us to struggle with the issues raised by our client and did not succumb to our pleas, as novices, that he provide the answer to the confidentiality issues raised.*

*It really makes me feel good to know that attorneys are willing to help us understand how the legal profession works and also to help us to make the profession as a whole better.*

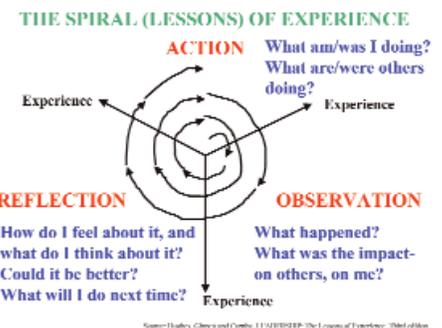
Campbell University's first-year Professionalism Development Program, the source of the student comments above, recently won the ABA's Gambrell Award for the enhancement of professionalism. Last year, over 60 lawyers from a broad range of vocational settings participated in the program by mentoring, telling stories, facilitating small-group discussions, providing feedback, serving as senior partners in simulated law firms, and demonstrating that they were all part of a unified profession to which they welcomed the students. The purpose of this article is to describe the program, trace its evolution, and discuss the ideas that led us to its development.

## Description of the Program

The program begins during first-year ori-

entation and runs throughout the year: two orientation sessions, seven biweekly workshops plus the annual law school convocation in the fall, a multi-day simulation between semesters, and seven biweekly sessions during the spring semester.

During the first orientation session students discuss concepts of professionalism and are exposed to two models to assist their professional advancement: a model of the professionalization process developed at Campbell and an action-observation-reflection model developed at the Center for Creative Leadership. The professionalization process model emphasizes that knowledge and skill are necessary but not sufficient to produce competent lawyers; it is a third element, the lawyer's personal attributes, that provide the catalyst that transforms knowledge and skill into competent representation.



The students are encouraged to utilize consciously the action-observation-reflection model (see above) to develop the knowledge, skills, and personal attributes essential to their professional development. Class recitations, their own and those of their classmates, provide the most common opportunity to utilize the model. Following a recitation, which constitutes action in the model, a student would ask herself what she observed about the recitation—exactly what happened and its impact on herself and others. The reflection stage consists of determining the causes of what was observed and thinking about how the action could be improved. The next performance, influenced by the preceding observation and reflection, will constitute another action to be observed, reflected upon, and improved. Observation and reflection, as well as action, are experiences; hence the term "spiral of experience" to describe this process of conscious professional growth.

Students are encouraged to apply the models in their substantive courses and summer employment opportunities. The models are used explicitly during the fall semester as the students interact with each other and with

lawyers and faculty members in observing videotaped representations of ethical dilemmas of lawyers in roles as fiduciaries, advocates, interviewers, negotiators, and counselors.

The students get to practice all of the roles they have explored during a multi-day simulation between semesters, and to experience the ethical dilemmas and inevitable conflicts of interest practicing lawyers must confront and deal with.

During the spring semester the students are once more involved with a broad range of lawyers who share with them the challenges and opportunities of their practices and lives in various settings and locales, the opportunities for pro bono and public interest contributions, the obligation of lawyers to provide civic leadership, and the rewards of such service. The semester concludes with two sessions with clients. The first is with business clients and their lawyers, discussing lawyer professionalism as seen through the eyes of clients (see sidebar page 30). The concluding, powerful workshop is with clients who have experienced the most horrible of personal plights, the murder of family members.

The students leave this extensive first-year program, in which the Rules of Professional Conduct are discussed only collaterally, with an experiential foundation that makes the study of those rules in the required second-year course more logical, practical, relevant, and meaningful.

### The Program's Evolution

Unlike most law schools, for the first 20 years of its existence Campbell taught the professional responsibility course required for ABA accreditation in the first year of law school, rather than the second or third year. The faculty believed students should be exposed to the behavioral expectations of the profession as early as possible, even if they had not yet developed a complete conception of the legal order.

In the early 1980s, Raleigh lawyer Roger Smith shared with the professional responsibility students his perspective on representation of criminal defendants. The following year he was joined by Greensboro's Jim Williams, who talked with the students about the challenges of representing civil clients who were involved in questionable business transactions. A couple of years later the North Carolina State Bar's Tom Lunsford spoke with the students about the profession's disciplinary

process. Two decades later all three continue to be a part of the Professionalism Development Program.

At the midpoint of his Campbell deanship, Pat Hetrick initiated a "Dean's Professionalism Lecture Series" for first-year students. Leaders of the profession were invited to speak at this program, at which attendance was mandatory and students wore courtroom attire. Both the lecture series and the required first-year professional responsibility course were featured in a national 1996 ABA report on the teaching of professionalism.<sup>1</sup>

In 1999 the Campbell faculty modified its curriculum by moving the required professional responsibility course to the second year, retaining the Professionalism Lecture Series in the first year, and instituting a one-week "intersession" between semesters, to be utilized for intensive skills and perspectives courses.

Professor Catherine Dunham and Mel Wright, executive director of the North Carolina Chief Justice's Commission on Professionalism, collaborated in adapting a multi-day simulation utilized in Columbia University's third-year Profession of Law course for Campbell's first-year students. With the assistance of a dozen North Carolina practicing lawyers, they made the simulation a dazzling intersession success.

The continuous improvement of Campbell's program of professional responsibility and professionalism, leading to its receipt of the Gambrell Award, was stimulated not only by Mel Wright and the Chief Justice's Commission on Professionalism, but also by the ideas in two books, Walter Bennett's *The Lawyer's Myth* and VISA founder Dee Hock's *Birth of the Chaordic Age*. They help provide some of the basic premises that underlie Campbell's Professionalism Development Program, particularly those that led to the involvement of even more practicing lawyers in the program.

### Basic Premises A "Talking with Lawyers" Program is better than a "Lecture to Students" Series.

In harmony with the ideas of Bennett and Hock, the program transitioned in form from a lecture series, with men in suits "lecturing" to first-year law students, to a campfire around which men and women lawyers and law students sit and talk, sometimes with clients, about their experiences and about the

needs, values, attitudes, and interests that draw them to the legal profession.

### Ray Patterson was Right: Disciplinary Rules are Based Upon Common Morality

The students reacted to the videotapes of lawyers in their roles of advocate, interviewer, counselor, and negotiator without the benefit of having read the Rules of Professional Conduct. By doing so they tested former Emory Dean Ray Patterson's statement that lawyers' rules of professional conduct are based on fundamental notions of the right thing to do, and that laypeople would come up with the same rules for lawyer conduct that lawyers devise, if they but thought as deeply about the issues. The students' analyses of the professionalism issues with which they were presented were in fact consistent with the Rules of Professional Conduct and with the experience of the practicing lawyers in their workshops.

### Walter Bennett is Right: Lawyers Don't Talk with Each Other Often Enough, and We Should "Rekindle the Campfire"

In *The Lawyer's Myth*, Walter Bennett provides examples of senior lawyers and judges who understand their professional lives as a "high calling," at the same time lamenting our loss of professional mythology and the disappearance of opportunities for professional development through storytelling.<sup>2</sup> He calls for a "rekindling of the campfire" around which we can build a new professional mythology for a modern, more representative profession. Bennett, a lawyer, former judge, and UNC-CH law professor, and now full-time writer, facilitated the initial workshop of the fall semester and laid the groundwork for the rekindling of his campfire at Campbell.

### So is Dee Hock: The Profession is a Network

In her 1994 book, *A Nation Under Lawyers*, Harvard law professor Mary Ann Glendon wrote that the American legal profession was on "the edge of chaos." Dee Hock would argue that the profession *should* be on the edge of chaos. He says that ideal, healthy institutions are "*chaordic*," blending harmoniously characteristics of chaos and order, as do dynamic networks in nature. These networks in nature are self-governing organisms whose members compete fiercely but cooper-

Randy Currin's Top Ten  
Professionalism Tips for Lawyers  
From a Client's Perspective

1. Don't try to profit from every minute you spend with a client; rather respect and do not abuse what might become a long-term and profitable relationship.
2. Bill your clients at least monthly.
3. Avoid posturing in interactions with other lawyers and clients.
4. In counseling with clients, give wise advice; exercising their legal rights might not serve their best interests.
5. Don't schedule client deadlines for your convenience without letting your clients know your reason for so doing.
6. Know what you don't know, and be willing to admit it.
7. Be accessible, and use modern technology that your clients use.
8. Don't be afraid to demonstrate your religious faith.
9. Don't consistently abuse your family; treat them with love.
10. Learn a few lawyer jokes, and don't be afraid to tell them.

ate intensely in an environment of shared information. In nature the strongest networks are the most complex and diverse. When we view the legal profession as a complex, diverse, chaotic system within which we compete fiercely to further the interests of our clients while cooperating intensely to maintain and continuously improve our system of justice, we realize that the diversity inherent in the bifurcation and segmentation of the profession can be a source of synergy as easily as a source of conflict. The choice is ours.

#### Individual Lawyers Need the Network to Maximize Our Professional Development

Opportunities to discuss the ideas of Bennett and Hock and be a part of the rekindled campfire at Campbell enriched our theories of practice. In the process they added to our previous model of the professionalization process feedback loops that facilitate the con-

tinuous testing and refining of ideas about what law is and about the operation of law in society; and the idea that personal attributes are expanded by the lessons of experience, and strengthened by action, observation, reflection, and discussion. All of these processes are enhanced when we undertake them jointly with others as well as introspectively.

#### Competence is an Essential Professional Value, and Personal Attributes are as Essential to Competence as are Knowledge and Skill

It is interesting that lists of professional values formulated for different purposes are not particularly consistent. However, all of the lists will include competence as a core value. Law school can focus so intensely on those elements of competence that help students write good law school examinations that students can forget, or never realize, that legal knowledge must be applied, and that there are lawyers with adequate knowledge and skill who nevertheless cannot or will not deliver high quality legal services in a timely manner at an affordable price in a way that makes clients feel good about their relationship. The stories of lawyers and the conceptual frameworks within which those stories are told at Campbell help students realize the importance of lawyers' personal attributes in making knowledge and skill accessible to their clients.

#### The "Spiral of Experience" Can Be Applied Vicariously, and to Simulations

Around the campfire, lawyers talk about their failures as well as their successes. We all, lawyers included, tend to learn more from our mistakes than from our triumphs. We also learn from the mistakes of others, and from what they do right. The lawyers who participate in the Professionalism Development Program share both failures and successes with Campbell's students. Students learn from these vicarious experiences. They also learn from watching lawyers deal with ethical dilemmas in videotapes and then talking with practicing lawyers about their impressions, and from being "associates" in the Travis simulation. The lessons of all of these experiences will inform their practices when they begin representing actual clients.

#### Lawyers Learn From Their Clients

The prominent legal ethicist Tom Shaffer has long emphasized the extent to which

clients can teach their lawyers about matters of morality and practice if lawyers are willing to have conversations with them.<sup>3</sup> After Dunn lawyer Joe Tart listened to his client, Linda Garner, tell the Campbell students about a case in which they had achieved a result most lawyers would consider the pinnacle of their careers, and tell them also how good a listener Joe was, Joe responded. He gave Mrs. Garner and her husband Bobby credit for turning him from a pessimistic analysis of their case through their confidence in our system of justice and their insistence that the wrong done them must have a remedy. They were correct, and because he was willing to have the conversation with them about what should be, he discovered the theory of the case that had always been there.

#### Conclusion

One of the ABA's goals in making the Gambrell Award is to spread good ideas that enhance professionalism. Campbell has benefited from the work that Columbia did in its Profession of Law course and that Walter Bennett did in helping his students collect oral histories of lawyers at UNC-CH, and from the stories and other contributions of the practicing bar to the professional development of its students. It is Campbell's hope that in a like manner its Professionalism Development Program will help strengthen the network that is our "chaordic" profession. ■

*Leary Davis is professor of law at Campbell University Norman Adrian Wiggins School of Law, where he also served as founding dean. He is president of LAWLEAD, the National Institute to Enhance Leadership and Law Practice, and director of Campbell's Institute to Study the Practice of Law and Socioeconomic Development (IS-POL-SED).*

*Willis P. Whichard is dean of the Campbell University Norman Adrian Wiggins School of Law and is a professor of law.*

#### Endnotes

1. American Bar Association Section of Legal Education and Admissions to the Bar, Report of the Professionalism Committee, *Teaching and Learning Professionalism*, pp. 50-57 (1996)
2. The examples came from student reports on oral histories the students had taken in a course taught by Bennett when he was a law professor at UNC-CH
3. See, e.g., Shaffer, *Legal Ethics and the Good Client*, 36 Cath. U.L. Rev. 319 (1987)

# Starting an Inn of Court

BY G. S. CRIHFELD

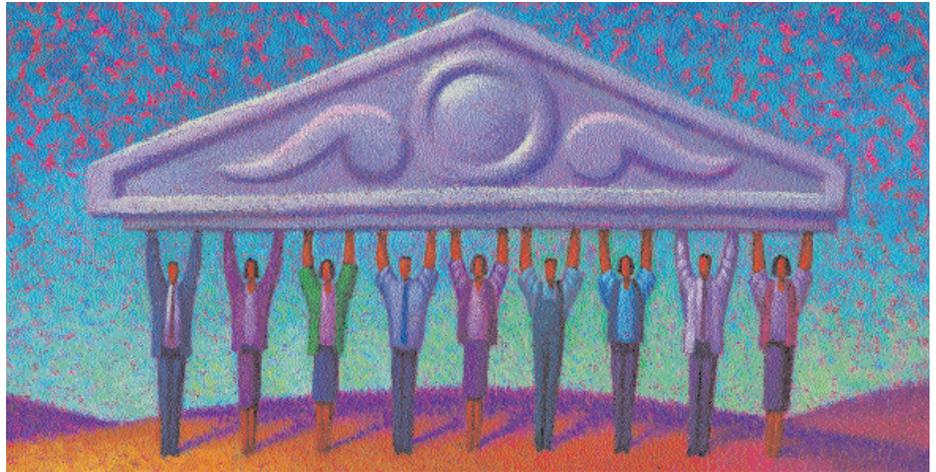
Dean Walsh of the Wake Forest Law School has written an insightful and informative article in this publication regarding the American Inns of Court movement (see the Fall 2003 *Journal*). In that article Dean Walsh described how the Inns were founded in this country, their purpose, and his early involvement before coming to North Carolina.

In 1989 Dean Walsh began to work with some Wake Forest alumni to establish an Inn at the Wake Forest School of Law. In 1990 the Inn was established and at the same time an Inn was established in Charlotte. The Joseph Branch Inn is connected with the Wake Forest Law School while the William H. Bobbitt Inn in Charlotte does not have a connection to a law school.

Most of the Inns around the country have a connection to a law school but that is not a necessity. I first learned about the establishment of these two Inns in the early 90's and had an interest in the Inns of Court in England since law school. I took the first Legal History seminar taught by Mary Oliver, the law school librarian, and my term paper was about the Inns of Court and their purpose in the English judicial system.

Similarly to Bob Walsh's efforts, I contacted several lawyers in Greensboro and discussed the idea of starting an Inn of Court in Guilford County. They were enthusiastic about the idea and we agreed that we would pursue it. However, as the road to hell is often paved with good intentions, the idea languished for some time.

Then, fortuitously, a client of mine who was a philosophy professor at Elon College, and with whom I discussed the Inn concept, advised me that he had invited the then executive director of the American Inns of Court, to speak at the college. He proposed that I call a meeting of interested lawyers for a breakfast meeting to hear him talk about the concept.



We set up a breakfast for a number of lawyers from Greensboro and High Point who we thought would be interested. Enthusiasm was widespread and we undertook the formation of an Inn. At that time, we had not made a decision about affiliation with the American Inns of Court.

A steering committee was established of approximately 12 lawyers from Greensboro and High Point and it was agreed that the initial membership would be selected from the Guilford County Bar. Since we were not connected to a law school, we did not have a category of student members. We had Masters, experienced lawyers who would remain members of the Inn indefinitely; Barristers, who had been practicing five to 15 years; and associates who had been practicing less than five years. Both of these categories would have terms of three years and then rotate out of membership. Thus, by the rotation, people have an opportunity to come into the Inn who may eventually rotate to another membership category, i.e. Associates to Barristers or Barristers to Masters. It was agreed that there would have to be a gap of at least three years between becoming a member in a second category.

Because the Inns of Court movement

highly recommends that members of the judiciary participate, we invited appellate judges, superior court judges, district court judges, and federal judges to be members. We were fortunate to have a number of people who had practiced in Greensboro who were on the appellate courts as well as sitting incumbents who were interested in joining. The initial membership was approximately 60 with 20 members in each of the three categories as a goal. We have now expanded our membership beyond that point and have approximately 75 members.

Invitations were sent to those persons who the steering committee identified as potential members. They were furnished a letter of invitation from the committee together with reprints of several articles regarding the American Inns of Court movement. It was interesting to me that many lawyers at that time did not know of the Inns of Court movement (and many practicing lawyers still do not).

The appeal to trial lawyers that we targeted was refreshing. Because we wanted to have a broad-based membership, we sought members from large firms as well as sole

CONTINUED ON PAGE 35

# Knowing the Legal Pitfalls when Dealing with Public Officials

BY M. GRAY STYERS JR.



**W**hether representing a licensed service provider, a regulated utility, a government contractor, or any business whose strategy and market environment is affected by government action, attorneys often need to communicate and interact with public officials on behalf of their clients. If not careful, seemingly innocuous methods of communication can be a minefield, and the consequences of a misstep severe. Recent newspaper headlines recount some of these consequences: voided contracts, damaged reputations, even criminal indictments. “But I would never bribe anyone,” you protest. No, but the line between permissible and illegal conduct can be hard to distinguish.

There are many pitfalls companies and their attorneys can encounter, including bribery (“Bribery” is such an ugly word; shall we say “improper gift” instead?), conflicts of interest, *ex parte* communications, unregistered lobbying, and unreported campaign contributions. This article identifies a few of these issues and outlines some of the very basic rules in these areas under North Carolina law.

## Improper Gifts (aka Bribery)

Certain acts are clearly forbidden under the law, such as bribery. According to one

well-worded definition by the North Carolina Supreme Court, “The essence of bribery is the prostitution of a public trust, betrayal of public interests, and debauchment of public conscience.”<sup>1</sup> Under state criminal law statutes, the elements of the offense are: (1) offering a sum of money; (2) to a public officer; (3) with corrupt intent; (4) to influence the recipient’s action as a public officer in discharge of legal duty.<sup>2</sup> Corrupt intent exists when the purpose in offering the bribe is to gain some advantage, without regard to whether the official performs his duty or not.<sup>3</sup> It is a felony for any

person to accept a bribe<sup>4</sup> or—of course, to be equitable and erase any (wink wink) loophole—to offer a bribe, regardless of whether it is accepted or not.<sup>5</sup>

The Code of Legislative Ethics uses very similar language to apply these rules to the General Assembly.<sup>6</sup> The Governor's Executive Order Number One has also defined illegal gifts to executive branch employees, as well as gubernatorial appointees to boards, commissions, councils, task forces, and other similar public bodies.<sup>7</sup> It authorizes the North Carolina Board of Ethics to impose sanctions against any public official who “knowingly asks, accepts, demands, exacts, solicits, seeks, assigns, receives, or agrees to receive anything of value (such as gifts, favors, or promises of future employment) in exchange for the ability to influence his behavior when performing his duty.”<sup>8</sup> A narrow exception is made for public officials to attend a public breakfast, lunch, dinner, or banquet events sponsored by companies that operate within the field of interest of the official.<sup>9</sup>

North Carolina law also prohibits in certain circumstances making and receiving gifts and favors by any contractor, subcontractor, or supplier to a governmental agency, its officers, and its employees.<sup>10</sup> Although the statute is “not intended to prohibit customary gifts or favors between employees or officers and their friends and relatives, . . . where it is clear that it is that relationship rather than the business of the individual concerned which is the motivating factor for the gift or favor,” this exception should also be narrowly construed.<sup>11</sup> The law is designed to prevent companies that are, have been, or anticipate being in a contract with a particular governmental unit, from currying favor with the officers and employees of that unit in ways unrelated to their qualifications and the merits of their performances.<sup>12</sup>

So consider the following: A friend has three tickets to a Carolina football game. Seats are on the 50-yard line. Knowing that you (as the manager of a small water utility) have been looking for a chance to meet one of his other friends (a member of the Utilities Commission), as a favor to you, he invites you and the commissioner to join him at a game. Is this acceptable? Well, it depends (the typical lawyerly answer), but probably not. If a neutral observer (a “reasonable person” in legalese) would consider this to be a gift to the commissioner, from you (rather

than from your friend), as the employee of a public utility, you could not give it unless the commissioner paid your friend the face value of the ticket price. On the other hand, if the guest were a state legislator, the answer might be different: the ticket would probably not be illegal (unless expressly given in exchange for a specific vote in the General Assembly), but might have to be disclosed as a lobbying expense.<sup>13</sup>

For attorneys, the Rules of Professional Conduct are also clearly concerned that giving gifts or loans threatens the impartiality of the legal system. “A lawyer, therefore, is never justified in making a gift or a loan to a judge, officer, or an official or employee of a tribunal.”<sup>14</sup>

### Conflicts of Interest

Sanctions can also be imposed against public officers (whether in state or local governments) who act in their official capacity for their own personal benefit rather than in the public interest, and specifically when they benefit personally from public contracts.<sup>15</sup> A contract made under such circumstances will be considered void, and no recovery, including quantum meruit, will be allowed.<sup>16</sup>

An obvious example of a conflict of interest is when an elected board member votes (or encourages his colleagues to vote) in favor of granting a public contract to a company in which the board member (or her family or friend) has a financial interest. If such a contract comes before the board for consideration, the conflicted board member should recuse herself from all discussion about the contract and certainly should not vote. A more subtle (and harder to detect) impropriety may occur if an official advocates or votes to reduce (or increase) funding for a department or a particular position because he didn't (or did) like a particular employee or that employee's action that pertained to the official's business (or that of the official's family or friend). In either scenario, the board member or official would be acting according to personal motivation rather than in the public interest.

Criminal sanctions are also imposed when public officials misuse confidential information to their benefit.<sup>17</sup> “The law applies to officers and employees of the state and all of its political subdivisions. It forbids them to benefit, or help others to benefit, in certain ways from confidential information

that they obtain in their public positions.”<sup>18</sup> Similar language is also used in the governor's executive order.<sup>19</sup>

In addition to state laws, many local governments have specific conflict of interest policies that apply to their employees and/or elected officials.<sup>20</sup>

A lawyer who also holds a public office (or who has a partner who does) has an additional set of issues that must be considered, as governed by Rule 6.6. She cannot use her position to obtain a “special advantage” for her client or to influence a tribunal for the benefit of her client.<sup>21</sup> She also is prohibited from accepting anything of value when it is clear that it is given with the intent to sway the lawyer in performing his duty as a public official.<sup>22</sup>

Although these rules are fairly easy to recite, their application has led to a plethora of finely nuanced ethics opinions by the State Bar. For example, if an attorney serves on, or advises as counsel to, a governing body (such as a county Board of Commissioners), this may create a conflict that disqualifies him from representing criminal defendants when a member of the sheriff's department is a prosecuting witness.<sup>23</sup> In another situation, an attorney may represent a party adverse to a public entity (e.g. city) in a civil action, although his partner serves on the entity's board; however, appropriate disclosures and recusal by the public official partner on matters pertaining to the action are required.<sup>24</sup> These opinions acknowledge that “lawyers should be encouraged to serve on public bodies,”<sup>25</sup> but if you or your partner is a public official, the potential conflicts issues that arise under Rule 6.6. should be closely monitored.

### Ex Parte Communications

The First Amendment expressly guarantees our freedoms of speech, assembly, and “to petition the government for the redress of grievances.” These freedoms include the rights to meet, call, and write letters (and more recently, send e-mails) to your representatives, participate in the electoral process (including running for office), and support candidates of your choice. However, these rights can be regulated to ensure due process, to promote the fair administration of justice, and prevent corruption. The rules governing contacts with public officials can be viewed as the balancing of these interests. This is particularly true for the next three areas dis-

cussed below.

All licensed lawyers are aware that *ex parte* communications are generally prohibited by the Rules of Professional Conduct.<sup>26</sup> What is less well known is that the rules on *ex parte* communications apply not only to contact with judges at court, but also to administrative hearings and even to Special Use Permit zoning hearings before the local Board of Adjustment. The test is not whether the public official is a judge, but rather whether he or she is acting in a judge-like (or “quasi-judicial”) capacity, i.e. considering and evaluating evidence in the light of established rules in order to determine whether the standards or requirements of those rules are satisfied or violated.

The General Assembly specifically codified this prohibition as it pertains to the Utilities Commission because of the significant impact of the work of the commission and the potentially harmful consequences of “back-room” deals.<sup>27</sup> However, this requirement does not mean that commissioners or other officials on administrative quasi-judicial boards must live a cloistered existence devoid of human contact. So long as the communication does not involve a current—or likely foreseeable, or imminent—matter or dispute, they can receive general information from or about the companies that they regulate or who otherwise appear before them. Most acknowledge that a very fine line separates improper *ex parte* communications and “educational/general information” conversations.

### Lobbying

Lobbyists can provide considerable assistance to both executive branch officials and to legislators by providing valuable background information, education, and expertise in complicated and arcane policy areas. Effective lobbying can also make a substantial difference in the state budget and appropriations process, as different interest groups fight for every dollar of public funding in these times of an uncertain economy and tight budgets.<sup>28</sup> These high stakes may tempt some to take short-cuts in trying to achieve their goals. In order to curb abuses, members of the General Assembly and those who lobby them are governed by the Legislative Ethics Act.<sup>29</sup> These laws, in general, require registration of lobbyists and public disclosure of all lobbying activities and expenditures.

Litigation and lobbying have more in common than simply their first letter. Both endeavors include marshalling facts and policy arguments to support your client’s position and presenting that position in the most persuasive manner possible before a public official, usually orally but sometimes in writing. Although not all lobbyists are attorneys, it is not surprising that many are. Because lobbying is subject to specific statutory and regulatory requirements, including registration, an initial threshold issue is whether or not your work on behalf of a client is, in fact, “lobbying.”

Lobbying is defined as “[i]nfluencing or attempting to influence legislative action through direct oral or written communication with a member of the General Assembly; or solicitation of others by lobbyists to influence legislative action.”<sup>30</sup>

A lobbyist is defined as anyone who is paid by his or her employer (or client) for the purpose of lobbying.<sup>31</sup> A lobbyist’s compensation cannot be contingent on whether proposed legislation passes or is defeated.<sup>32</sup> Furthermore, a lobbyist cannot attempt to influence legislators by promising financial support, or by explicitly threatening to contribute to an opponent’s campaign instead.<sup>33</sup> It is also worth noting that the Rules of Professional Conduct require that a lawyer not “state or imply an ability to influence improperly a government agency or official.”<sup>34</sup>

The North Carolina Secretary of State is responsible for administering the reporting requirements and regulation of lobbyists in North Carolina. All lobbyists must register with the secretary of state prior to engaging in any lobbying activities, and the principal for whom they are lobbying must file an authorization statement within ten days thereafter.<sup>35</sup> In addition, both lobbyists and the companies they work for must report all expenditures for their lobbying efforts within 60 days after the last day of each regular session of the legislature.<sup>36</sup> In general and in light of the constitutional rights discussed above, the purpose of these requirements is not to restrict lobbying activity, but rather to require disclosure of that activity to be evaluated by the public and the press.<sup>37</sup>

### Campaign Contributions

In the 2002 elections in North Carolina, all 14 candidates elected to Congress and 154 of the 170 state legislators either out-

spent their political opponent or had no political opponent.<sup>38</sup> Members of the General Assembly spent a total of \$17.2 million for the 170 seats—an average of \$101,000 each.<sup>39</sup> Both participants and observers of the political process recognize the importance of money—campaign contributions—to elected officials who wish to be re-elected.<sup>40</sup>

The rules governing political contributions by companies (including limited partnerships and LLC’s) are straightforward and absolute: “[n]o candidate, political committee, political party, or treasurer shall accept any contribution made by any corporation, foreign or domestic . . . .”<sup>41</sup> Businesses and organizations may form “political action committees” (PAC’s) that pool together voluntary contributions from individuals (e.g. employees, owners, members, etc.) to be spent pursuant to the directions of the PAC committee.<sup>42</sup> PAC’s must have a designated treasurer,<sup>43</sup> must register with the state Board of Elections, and must file reports identifying their contributors and their expenditures/contributions—just as if they were political candidates themselves.<sup>44</sup>

Of course, individuals can contribute to PAC’s, political parties, and directly to candidates, but no individual donor can give more than \$4,000 per election to any one campaign (unless the donor is related to the recipient candidate).<sup>45</sup> Moreover, the recipient of the contributions must report them to the Board of Elections to ensure their compliance with the applicable laws. For contributions that exceed \$100, the candidate or PAC is responsible for reporting the donor’s name, address, and occupation, as well as the amount and date it was received.<sup>46</sup> Such contributions also must be by check, draft, or money order—not cash.<sup>47</sup> The only time a candidate is exempt from any of these reporting requirements is if he does not receive more than \$3,000 in total contributions, loans, or cash.<sup>48</sup>

Politics has changed a lot since the “see no evil, hear no evil” practices prior to Watergate, but the value of personal relationships has not been, and cannot be, overestimated. The fine line that attorneys must now walk may be the difference between being a friend and buying a beer, and being a potential influencer and buying dinner (or a ticket to a football game). The distinctions can seem absurd at times, but the rules attempt to ensure that public officials serve

their constituents (and the public in general) and not themselves or the narrow interests that may seek to unfairly skew government policy. In these days of investigative reporters and aggressive prosecutors, those who ignore these rules do so at their own peril. ■

*M. Gray Styers is a partner at Kilpatrick Stockton, where he practices primarily in the areas of government relations, utilities, and zoning law, and also teaches Professional Responsibility at the UNC School of Law. He expresses his appreciation to Lorien Golaski, a student at the Tulane University School of Law, for her assistance with this article.*

## Endnotes

1. *State v. Greer*, 77 S.E.2d 917, 920 (N.C. 1953).
2. *State v. Brinson*, 168 S.E.2d 228, 229 (N.C. App. 1969).
3. *State v. Hair*, 442 S.E.2d 163, 165 (N.C. App. 1994).
4. N.C. Gen. Stat. § 14-217(a).
5. N.C. Gen. Stat. § 14-218.
6. N.C. Gen. Stat. § 120-86. It states that no one is allowed to give a state legislator anything of monetary value, when a reasonable person could infer that it would influence the legislator in performing his duty.
7. Exec. Order One § 3(f) (2001).
8. Exec. Order One § 7(a)(2) (2001).
9. N.C. Gen. Stat. § 62-327. (Although this exception is in the statute directly applicable to the Utilities Commission, it is a generally recognized exception for all officials.)
10. N.C. Gen. Stat. § 133-32.
11. N.C. Gen. Stat. § 133-32(d).
12. A. Fleming Bell, II, *Ethics, Conflicts and Offices: A Guide for Local Officials*, 70 (1997).
13. But only if a specific bill was discussed. Otherwise, expenditures simply to generate “goodwill” are not required to be disclosed as lobbyist expenditures. See *infra* fn. 31.
14. R.P.C. 3.5, comment 7.
15. N.C. Gen. Stat. § 14-234 (2003); See Bell at 51.
16. Bell at 56.
17. N.C. Gen. Stat. § 14-234.1.
18. Bell at 71.
19. Exec. Order One § (7)(a)(4) (2001).
20. See, e.g., City of Raleigh Resolutions 632 (1987) and 150 (1988); Charlotte City Code §§ 2-71 to -76.
21. R.P.C. 6.6.
22. *Id.*
23. See RPC 73. If the attorney only serves on the governing body, his partners are not disqualified. If his representation of the governing body includes representing the sheriff’s department in criminal matters, then his partners are also disqualified. *Id.*
24. 2002 FEO 2.
25. *Id.*
26. See R.P.C. 3.5(3).
27. N.C. Gen. Stat. § 62-70(a). Any utilities commissioner who engages in *ex parte* communications can be impeached. *Id.* Any company who violates the law is subject to penalties, which include a fine of \$1,000 for each offense. N.C. Gen. Stat. § 62-310(a).
28. The Center for Public Integrity recently issued a report revealing that, in the 39 states that report overall lobbying expending in the aggregate (which does not include North Carolina), more than 34,000 interests—including companies, unions, organizations—hired 42,000 lobbyists who spent more than \$715 million. At the federal level, more than 25,500 lobbyists spent at least \$1.6 billion—48 lobbyists and more than \$3 million per Congressman. [www.publicintegrity.org/dtaweb/index.asp?L1=20&L2=10&L3=23&L4=0&L5=0](http://www.publicintegrity.org/dtaweb/index.asp?L1=20&L2=10&L3=23&L4=0&L5=0)
29. N.C. Gen. Stat. § 120-106.
30. N.C. Gen. Stat. § 120-47.1(5). But note that simply building relationships or generating “good will” is not “attempting to influence legislative action” and therefore does not fall within this definition.
31. N.C. Gen. Stat. § 120-47.1(6).
32. N.C. Gen. Stat. § 120-47.5.
33. N.C. Gen. Stat. §§ 120-47.2 and -47.3.
34. R.P.C. 8.4(e).
35. N.C. Gen. Stat. § 120-47.4.
36. N.C. Gen. Stat. §§ 120-47.6 to -47.7.
37. Interestingly, in Pennsylvania, a commonwealth court struck down a law requiring disclosure, holding that such disclosures violated the court’s exclusive authority to regulate the practice of law. *Gmerek and Artz v. State Ethics Commission*, 751 A.2d 1241 (Pa. Cmwlth. 2002). The state supreme court declined to hear the case, the result being that there are no disclosure requirements in Pennsylvania. Although the state Senate adopted voluntary internal audits, the House has yet to agree.
38. This data was compiled by Democracy North Carolina. See [www.democracy-nc.org/nc/ResearchPapers/2002/moneyadvantage110702.html](http://www.democracy-nc.org/nc/ResearchPapers/2002/moneyadvantage110702.html).
39. [www.democracy-nc.org/moneyresearch/cost-tops100K.html](http://www.democracy-nc.org/moneyresearch/cost-tops100K.html)
40. Campaign contribution are defined as “any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge, or subscription of money or anything of value whatsoever . . .” N.C. Gen. Stat. § 163-278.6(6).
41. N.C. Gen. Stat. § 163-278.15.
42. N.C. Gen. Stat. § 163-278.6(14)
43. N.C. Gen. Stat. § 163-278.7(a)
44. N.C. Gen. Stat. § 163-278.9
45. N.C. Gen. Stat. § 163-278.13(c). A week before submitting this article for publication, the Fourth Circuit invalidated this \$4,000 limitation as it applies to contributions to independent expenditure political action committees (IEPACs). See *NC Right to Life, Inc. v. Leake*, -- F.3d --, 2003 WL 22180445 (4th Cir., Sept. 23, 2003).
46. N.C. Gen. Stat. § 163-278.11(a)(1). The \$100 ceiling and reporting requirements also apply to “in-kind contributions”—any goods, services, or other items of value received by the candidate N.C. Gen. Stat. § 163-278.13(c).
47. N.C. Gen. Stat. § 163-278.14(b).
48. N.C. Gen. Stat. § 163-278.10A(a). Of course, any candidate with so few resources is likely to be irrelevant to any seriously contested political race.

## Starting an Inn of Court (cont.)

practitioners and lawyers who practiced both civil and criminal law. Because Inns emphasize advocacy, all of the original members were people who practiced in the trial court system.

After our initial founding in 1995 we began to invite interested law students from both Wake Forest and Chapel Hill to be student members. We have had several from each school over the years and have one person who was a student member at Chapel Hill and who is now practicing in Greensboro. We

later became affiliated with the American Inns of Court.

Since Dean Walsh has described how their meetings are held, which is a pretty consistent pattern across the whole system, I will not repeat that. Suffice it to say our meetings are held in a similar fashion in a location between Greensboro and High Point for the mutual convenience of the members. Once a year we have a joint meeting with the Branch Inn at alternating sites between the two counties.

I can truly say that the Inns of Court experience has been one of the best that I have had

in the professional realm since practicing law. By emphasizing ethics, professionalism, and civility rather than continuing legal education, it brings out very interesting facets of your colleagues at the bar and goes a long way toward improving the environment in which we all practice. I heartedly recommend that any community that is interested in such a program undertake it without further delay. Needless to say I am sure that Bob Walsh and I would be happy to assist you. ■

*G. S. Cribfield is a State Bar Councilor representing the 18th Judicial District.*