

Journal 7,2

Unpublished Decisions: Should Precedent Be "Managed" or Simply Followed?

By Thomas L. Fowler

Unpublished Decisions of the North Carolina Court of Appeals: Look but Don't Touch

By Alan D. Woodlief Jr.

Lawyers and Elderly Victims of Telephone Fraud

By David N. Kirkman

Disorder in the Court: An Interview with Virginia Circuit Judge Martin Clark Author of *The Many Aspects of Mobile Home Living*

By Michael J. Dayton

Summer Reading List

By Nicki Leone

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

By Thomas P. Davis and Thomas L. Fowler

Unpublished Decisions: Should Precedent Be "Managed" or Simply Followed?

By Thomas L. Fowler

*"Judges have a responsibility to keep the body of law 'cohesive and understandable, and not muddy[] the water with a needless torrent of published opinions.'"*¹

Some believe that more law does not make for better law.² In 1964, the Judicial Conference of the United States, alarmed at the rapidly growing number of published opinions and the resulting expense required to maintain a complete law library, adopted a resolution asking federal court judges to consider publishing only those opinions having "general precedential value."³ In subsequent years, as the selective publication issue was studied and discussed, concerns were raised about the fairness of allowing citation to opinions that were not published and so were accessible only to some. Because of these concerns, the selective publication proposal came to be closely associated with a no-citation condition.⁴

In the late 1960's and the early 1970's, the number of federal appeals continued to increase dramatically and law library shelves sagged under the weight of the new volumes of the federal reporters. In 1971 the Federal Judicial Center reported the "widespread agreement that too many opinions are being printed and published."⁵ The federal circuits responded by adopting different versions of a limited publication rule.⁶ Most of the states also adopted limited publication rules.⁷ In general these rules allow selective publication of opinions and provide that such unpublished opinions either do not constitute binding precedent, may not be cited in unrelated cases, or should usually not be cited in unrelated cases.⁸

These rules have proven to be popular with the appellate courts. The statistics show that 79 percent of federal circuit court opinions are unpublished.⁹ In the Fourth Circuit the percentage is closer to 90.¹⁰ The North Carolina Court of Appeals, pursuant to the authority found in Appellate Rule 30(e), publishes only about 30 percent of the cases it decides.¹¹ In virtually all jurisdictions,

a substantial number of appellate opinions are not published. There is, then, a substantial body of law that may not be easily accessible and that may involve declarations or interpretations of law that are not precedential, i.e., they need not be applied in subsequent cases to similarly situated parties. This has troubled some—particularly some academics.¹² But it also has troubled some academically minded jurists.

In 1999, Judge Richard S. Arnold, of the United States Eighth Circuit Court of Appeals, published an article in the *Journal of Appellate Practice and Process* titled "Unpublished Opinions: A Comment."¹³ In this article, Judge Arnold discussed his concerns with his Circuit's selective publication/no-citation rule.¹⁴ First he found it startling that the rule renders judges "perfectly free to depart from past opinions" so long as those opinions are unpublished—in violation of the doctrine of precedent. This is particularly bothersome when the judges are the sole decision maker regarding whether or not an opinion is published. Judge Arnold observed that every case has "some" precedential value and so is publishable under the rules. There is a danger, then, that if "after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug." The issue is delicate, however, and Judge Arnold observed: "I'm not saying that this has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings."

Judge Arnold concluded his article with a speculation that the no-citation rule may not only be a misguided policy but it also may be unconstitutional:

Article III of the Constitution of the United States vests "judicial power" in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. We can exercise no power that is not "judicial." That is all the power that we have. When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called "judicial?" Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions? In other words, is the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?

In the June 2000 issue of the *California Lawyer*, two judges from the United States Ninth Circuit Court of Appeals, Alex Kozinski and Stephen Reinhardt, published a pithy defense of the Ninth Circuit's no-citation rule, titled: "Please Don't Cite This! Why We Don't Allow Citation To Unpublished Dispositions."¹⁵ The authors acknowledged that they publish only 15 percent of their decisions and that lawyers "complain at length" about the no-citation rule that applies to the remaining 85 percent of decisions that are not published. But the judges forthrightly rejected all criticism of the rule based on their lack of sufficient resources to write quality opinions, deserving of precedential authority, in more than the 15 percent of their decisions which they currently publish.¹⁶ The judges concluded:

Keeping the law of the circuit clear and consistent is a full-time job, even without having to worry about the thousands of unpublished dispositions we issue very year. Trying to extract from [unpublished decisions] a precedential value that we didn't put into them may give some lawyers an undeserved advantage in a few cases, but it would also damage the court in important and permanent ways. Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citation of [unpublished decisions] is an uncommonly bad idea. We urge lawyers to drop it once and for all.¹⁷

In late August of 2000, a few months after the Kozinski/Reinhardt article appeared, another

analysis of the issue was published-but this one appeared in the federal reporter. Remarkably the issue before the Eighth Circuit Court of Appeals was the precedential value of an unpublished decision. And, perhaps more remarkable, the author of this opinion was Judge Richard S. Arnold-the same Judge Arnold who had suggested in the 1999 article that the no-citation rule was unconstitutional. Would the judge follow his own suggestion? He would.

In *Anastasoff v. United States*,¹⁸ the Eighth Circuit Court of Appeals addressed the Circuit Rule that unpublished opinions are not precedential and generally should not be cited. The precise substantive issue on appeal in *Anastasoff* had previously been resolved by the Eighth Circuit Court of Appeals in an unpublished decision in another case. Appellant argued that the court was not bound by the resolution of the earlier case because it was unpublished and therefore non-precedential. The court disagreed and held that to the extent that the applicable Circuit Rule allowed the court to avoid the precedential effect of its prior decisions, the rule was unconstitutional.¹⁹

Anastasoff reasoned that the judicial power authorized by Article III of the federal constitution was limited by the doctrine of precedent, i.e., (1) that every judicial decision is a declaration and interpretation of a general principle or rule of law; (2) that this declaration of law is authoritative to the extent necessary for the decision; and (3) that such declaration must be applied in subsequent cases to similarly situated parties. A rule that allows the court to avoid the precedential effect of a prior decision thus expands the judicial power beyond the bounds of Article III and is therefore unconstitutional. The court concluded: "A more alarming doctrine could not be promulgated by any American court, that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to antecedent principles. ... [Such a doctrine] would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."

Anastasoff inspired a number of law review articles, some challenging its constitutional analysis²⁰ and others finding alternative constitutional grounds for its result.²¹ But in September 2001, another particularly significant analysis of the issue was published-significant because this one also appeared in the federal reporter. And remarkably, the author of this opinion was none other than Judge Alex Kozinski, of the United States Ninth Circuit Court of Appeals, and the co-author of the California Lawyer article. He too did not stray from the position he took in his article.

*Hart v. Massanari*²² concerned the Ninth Circuit Rule similar to the Eighth Circuit Rule regarding the precedential effect of unpublished decisions. The appellant in *Massanari* had cited an unpublished decision in its brief and the court ordered counsel to show cause as to why he should not be disciplined for violating the rule against citing unpublished decisions.²³ Writing for the court, Judge Kozinski took issue with *Anastasoff*'s conclusion that the exercise of judicial power precludes federal courts from making rulings that are not binding in future cases-or, "to put it differently," as Judge Kozinski stated, that "federal judges are not merely required to follow the law, they are also required to make law in every case." *Massanari* found no such requirement in Article III of the federal constitution. Instead, Judge Kozinski concluded that the binding authority principle was a matter of judicial policy rather than a constitutional imperative.

As a matter of judicial policy, Judge Kozinski argued for the usefulness of allowing the appellate courts to issue nonprecedential decisions. He noted how complicated it is to write an intelligible appellate opinion and stated that few appellate courts "have the resources to write precedential opinions in every case that comes before them." The appellate courts should develop a coherent and internally consistent body of caselaw and to accomplish this they

select a manageable number of cases in which to publish precedential opinions, and leave the rest to be decided by unpublished [and non-precedential] dispositions. ... That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition

does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases.²⁴

Judge Kozinski concluded that an inherent duty of the appellate court is "managing precedent to develop a coherent body of ... law," and to this end the judicial function includes "separating the cases that should be precedent from those that should not."

Both Anastasoff and Massanari make a lot of sense-but one of them must be wrong.²⁵ The questions raised by the two cases go to the very core of the judicial function.²⁶ Is precedent something forced on the courts by the cases that come before them and their resolution of those cases?²⁷ Or is it something the courts can "manage" in their discretion? If these matters are not of constitutional imperative but are mere judicial policy, what is the better policy regarding publication and citation? Are the appellate courts themselves really in the best position to manage precedent, i.e., to finally determine the precedential value of their opinion at the time they write the opinion?²⁸ Is the law, and how an appellate court will rule in a given case, less or more certain and predictable²⁹ when that court decides that a majority of its cases will be unpublished and non-binding? The United States Supreme Court may ultimately resolve these questions (and any disagreement among the federal circuits) and may explicate the proper relation between precedent and the judicial function.

The debate at the federal level is also relevant to North Carolina. Like all other jurisdictions, North Carolina has struggled with limited judicial resources to respond to ever increasing case filings. At the appellate level this struggle has led to the creation of the Court of Appeals to handle most appeals of right,³⁰ the expansion of the number of judges on the Court of Appeals,³¹ the expansion of the number of law clerks assigned to each judge, the creation of central staff attorneys to help research and draft opinions, the creation of authority for the court to decline to hear oral argument,³² and the creation of authority for the court to not publish selected decisions which then become non-precedential.³³ Are these practices subject to any state constitutional constraints?³⁴ Do they impact or undermine the court's real or perceived legitimacy in any way?³⁵ Is a better solution to increase the judicial resources provided to our appellate courts?³⁶ And, particularly with regard to the no citation provision in our selective publication rule, have the rapid advancements in technology, i.e., electronic storage of documents and electronic access to such files over the internet, eliminated or drastically reduced the concerns of equal access and expensive law libraries?³⁷ In general, attorneys appear to be dissatisfied with the selective publication/no citation rule, and prefer that the unpublished decisions be "published" on the internet.³⁸ But even if our computers resolve the accessibility issue, it may still be that judicial resources remain inadequate to properly address the huge number of appeals that the Court of Appeals must hear-so that more law may still not make for better law.³⁹ But who is to judge?

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

Endnotes

1. Hart v. Massanari, 266 F.3d 1155, 1179 (9th Cir. 2001), quoting with approval Boyce F. Martin Jr., In Defense of Unpublished Opinions, 60 Ohio State Law Journal 177, 192 (1999).

2. E.g.: "In my view, multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths (maybe nine-tenths) of [the

opinions] published in the last 20 years were utterly destroyed." Justice McReynolds, as quoted in Boyce F. Martin Jr., *In Defense of Unpublished Opinions*, 60 *Ohio State Law Journal* 177 (1999). See also Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 *Wisconsin Law Review* 11, 33: "[T]he vast number of decisions entered threatens coherence by creating innumerable rulings which are impossible to assimilate."

3. U.S. Administrative Office of the Courts, *Judicial Conference Reports 1962-64*, at 11 (1964).

4. For a general discussion of the justifications of the no-citation rule see Charles E. Carpenter Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 *South Carolina Law Review* 235 (1998). The author asserts that the real reason for the no-citation rule is overload on the appellate courts.

5. Salem M. Katsh & Alex V. Chachkes, "Constitutionality of 'No-Citation' Rules," *The Journal of Appellate Practice and Process*, Vol. 3, Number 1, Spring 2001, at 291.

6. For a summary of each circuit's rules, see Melissa M. Serfass & Jessie L. Cranford, "Federal and State Court Rules Governing Publication and Citation of Opinions," *The Journal of Appellate Practice and Process*, Vol. 3, Number 1, Spring 2001, at 253-57.

7. For a summary of each state's rules, see Melissa M. Serfass & Jessie L. Cranford, "Federal and State Court Rules Governing Publication and Citation of Opinions," *The Journal of Appellate Practice and Process*, Vol. 3, Number 1, Spring 2001, at 258-85.

8. Compare N.C.R. App. P. 30(e); *State v. Taylor*, 141 N.C. App. 321, 148, 541 S.E.2d 199 (12-29-2000) (Defendant's only authority for an assignment of error was an unpublished opinion. The court declined to consider the unpublished opinion specifically referring to Appellate Rule 30(e), which prohibits the citation of unpublished opinions, and so dismissed the assignment of error.). See also *Long v. Harris*, 137 N.C. App. 461, 470-71, 528 S.E.2d 633, 638-39 (2000), which noted that compliance with Appellate Rule 30(e) is mandatory and violation thereof subjects a party to sanctions.

9. Michael Hannon, "A Closer Look at Unpublished Opinions in the United States Court of Appeals," *The Journal of Appellate Practice and Process*, Vol. 3, Number 1, Spring 2001, at 201.

10. *Id.*, at 202.

11. For instance, in Volume 140 of the NC Court of Appeals Reports, 167 cases are listed as "Cases Reported," and 365 cases are listed as "Cases Reported Without Published Opinions." Of the 532 cases reported in Volume 140, the percentage of cases with published opinions (167) is 31 percent. Chief Judge Eagles has stated that the Court of Appeals publishes about one-third of its cases. See interview with Chief Judge Sidney S. Eagles Jr. of the NC Court of Appeals, "Eagles Addresses Debate on Unpublished Opinions," in *North Carolina Lawyers Weekly* (17 January 2000).

12. See William L. Reynolds & William L. Richmond, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 *Columbia Law Review* 1167 (1978); Martha J. Dragich, *Will the Federal Courts of Appeal Perish if They Publish? Or Does The Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 *The American University Law Review* 757 (1995); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 *University of Michigan Journal of Law Reform* 119 (1995); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 *Vanderbilt Law Review*

71 (2001).

13. 1 Journal of Appellate Practice and Process 219 (Summer, 1999).

14. Judge Arnold also noted that he has voted "many times" to change his circuit's no-citation rule, and that recently he has developed some support from his fellow judges. *Id.*, at 225.

15. California Lawyer 43 (June 2000).

16. The judges state that the "memdispos," i.e., the decisions that they have decided not to publish, are drafted by law clerks with relatively few edits from the judges. If these "memdispos" could be cited as precedent, "conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns." *Id.*, at 44.

17. *Id.*, at 44 (and continued at page 81).

18. 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000).

19. Anastasoff addressed only the precedential effect of unpublished decisions and expressly stated that the case was not about a court's authority to publish or not publish its decisions.

20. See, e.g., Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 West Virginia Law Review 43 (2001)(concluding that stare decisis is not a constitutional requirement but is merely a judicial policy that can be abandoned); R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, The Journal of Appellate Practice and Process, Vol. 3, Number 1, Spring 2001, at 355; Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 Notre Dame Law Review 135 (2001)("Ultimately, we conclude that the founding-era conception of precedent cannot be reconciled with the historical model proposed by Judge Arnold [in Anastasoff].").

21. See Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, The Journal of Appellate Practice and Process, Vol. 3, Number 1, Spring 2001, at 287 (arguing that the no-citation rule violates a litigant's First Amendment right of speech and petition, and violates the separation of powers and are ultra vires the federal courts' Article III powers); Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 University of Kansas Law Review 195 (2001)(while the Article III argument is insufficient, refusing to recognize unpublished opinions as precedent potentially violates both the procedural due process and equal protection guarantees of the Fifth Amendment).

22. 266 F.3d 1155 (9th Cir. 2001).

23. Massanari held that although the Ninth Circuit rule prohibiting citation to unpublished dispositions did not violate the constitution, counsel's violation of such rule was not willful so as to warrant sanctions.

24. Massanari, *supra*, at 1177-78.

25. It should be noted that Judge Arnold's decision in Anastasoff has been vacated-although not on the basis of any disagreement with his analysis. On rehearing before the Eighth Circuit Court

of Appeals sitting en banc, the court found that because the United States had paid Anastasoff (the plaintiff taxpayer) the money sought in the suit, the matter had become moot and that under these circumstances Anastasoff was properly vacated. *Anastasoff v. United States*, 235 F.3d 1054 (Eighth Circuit, 2000).

26. Alexander Hamilton stated that the judiciary is the least dangerous branch of government because it possesses only judgment, not force or will. One commentator has observed, however, that an appellate court with authority through discretionary review to decide which cases it will hear (and which cases it will not hear) violates Hamilton's view. "The ability to set one's own agenda is at the heart of exercising will." Edward A. Hartnett, *Deciding What to Decide: The Judges' Bill* at 75, *Judicature*, Vol. 84, No. 3, page 120 (November-December 2000) at 125. The ability to decide which decisions will be precedential and which decisions will not be binding (the selective publication rule) also implicates the ability to set one's own agenda raising the same conflict with the "classic justification for judicial review." *Id.* Judge Kozinski acknowledged this effect in *Massanari*: "While federal courts of appeal generally lack discretionary review authority, they use their authority to decide cases by unpublished-and nonprecedential-dispositions to achieve the same end."

27. It is usually understood that the common law develops through case-by-case adjudication adhering to precedent, rather than through the direct pursuit of a comprehensive and coherent body of law as Judge Kozinski posits in *Massanari*. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 *The American University Law Review* 757, 768-70 (1995).

28. "Critics ... argue that judges are poor predictors of whether their decisions will be useful as precedent and even advocates of limited publication usually concede this point." Robert J. Van Der Velde, *Quiet Justice: Unreported Opinions of the United States Courts of Appeals-A Modest Proposal for Changes*, *Court Review* 20, at 21 (Summer 1998). The author also notes that, at least in the federal courts, "significant numbers of cases with concurring or dissenting opinions go unpublished. Thus, even in cases in which appellate judges disagree about the law or its application to the facts the court nevertheless decides not to make this dispute public."

29. "Stability, certainty, and predictability are prerequisites to the consent of the public to be governed by law, including judge-made law." Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 *The American University Law Review* 757, 777 (1995).

30. See discussion in Thomas L. Fowler, *Appellate Rule 16(b): The Scope of Review in an Appeal Based Solely Upon a Dissent in the Court of Appeals*, 24 *N.C. Central Law Journal* 1, 2-3 (2001).

31. See G.S. 7A-16.

32. N.C.R. App. P. 30(f).

33. N.C.R. App. P. 30(e). See Robert J. Van Der Velde, *Quiet Justice: Unreported Opinions of the United States Courts of Appeals-A Modest Proposal for Changes*, *Court Review* 20, at 22 (Summer 1998): "It is apparent that one mechanism the circuits have used to cope with an increasing caseload is the increased use of limited publication rules." See also interview with Chief Judge Sidney S. Eagles Jr. of the NC Court of Appeals, "Eagles Addresses Debate on Unpublished Opinions," in *North Carolina Lawyers Weekly* (17 January 2000): "But really, the

reason we don't publish them all is the cost. ... To print the advance sheets and staff the reporter's office so that we could publish all the cases would probably require an appropriation of \$300,000 to \$400,000."

34. See articles cited in endnotes 20 and 21, *supra*.

35. See generally Charles E. Carpenter Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 *South Carolina Law Review* 235 (1998).

36. Some commentators argue the appellate courts should reduce their parajudicial staff (law clerks and staff attorneys) and hire more judges. See Charles E. Carpenter Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 *South Carolina Law Review* 235, 257-58 (1998). Although this issue seems to be a crucial link in his analysis, Judge Kozinski dodges the question in Massanari: "We take no position as to whether there should be more federal judges, that being a policy question for Congress to decide. We note, however, that Congress would have to increase the number of judges by something like a factor of five to allocate to each judge a manageable number of opinions each year." Massanari, *supra*, at fn 23, footnote 39.

37. For an in depth discussion of this issue see Kirt Shulberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 *California Law Review* 541 (1997)(a critical examination of the original justifications for limiting publication of federal appellate opinions, concluding that such rules are now suboptimal in light of modern digital storage and research capabilities).

38. As reported in *North Carolina Lawyers Weekly* (12 March 2001), in March 2000, the Wake County Bar Association proposed scrapping appellate Rule 30(e). The Wake Bar committee submitted this resolution: 'We respectfully believe that all opinions of the Court of Appeals should be published with all opinions having precedential value' "After waiting a year for an answer, the Wake County bar group has again asked the state Supreme Court to do away with unpublished opinions." See also interview with Chief Judge Sidney S. Eagles Jr. of the NC Court of Appeals, "Eagles Addresses Debate on Unpublished Opinions," in *North Carolina Lawyers Weekly* (17 January 2000); Catharine B. Arrowood, *Unpublished Appellate Opinions*, *Wake Bar Flyer*, Vol. XXV, Number 11 (December 1999).

39. This is Judge Kozinski's conclusion in Massanari (footnote 39): "In the end, we do not believe that more law makes for better law."

Unpublished Decisions of the North Carolina Court of Appeals: Look but Don't Touch

By Alan D. Woodlief Jr.

"[A] rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania, that he did not expect to be long remembered."¹

In recent years, a debate has arisen in North Carolina over Rule 30(e) of the North Carolina Rules of Appellate Procedure. Rule 30(e) allows the North Carolina Court of Appeals not to publish certain of its opinions, provides that these unpublished opinions lack precedential value, and bans courts and attorneys from using these unpublished opinions. This article will briefly look at the history of unpublished opinions in the United States and North Carolina, some of the concerns that have been raised about this practice, and the steps that the North Carolina Court of Appeals and Supreme Court have taken to address these concerns. Finally, the article will examine concerns that remain unresolved and a possible solution.

A Brief History

Unpublished opinions are not unique to North Carolina. As noted in Tom Fowler's accompanying article, the concept of unpublished opinions dates back to at least the 1960's. In 1964, the Judicial Conference of the United States resolved that the federal courts of appeals and district courts would authorize for publication only those opinions that were of general precedential value.² Prompted by this initial resolution and subsequent studies, the federal courts developed criteria to guide judicial decision-making on publication and rules regarding the subsequent use of unpublished decisions within the circuits.³ By 2000, 78 percent of the case dispositions in the federal courts of appeal were unpublished opinions.⁴

From 1968 to 1975, all of the North Carolina Court of Appeals opinions were published in the Court of Appeals Reports. However, in 1975, Rule 30 was amended by the North Carolina Supreme Court to add a new subsection (e) entitled "Decision of Appeal Without Publication of Opinion."⁵ Rule 30(e)(1) provided, as it does now, that "the Court of Appeals is not required to publish an opinion in every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as precedent, it may direct that no opinion be published."⁶ The text of Rule 30(e)(1) explained that it was being adopted "[i]n order to minimize the cost of publication and of providing storage space for the published reports."⁷ Rule 30(e)(2) provided that "[d]ecisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports."⁸ In 1979, Rule 30(e)(3) was added and provided that "[a] decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered."⁹ The text of Rule 30(e) has remained unchanged since 1979. Currently, the Court of Appeals issues unpublished opinions in a majority of the cases before it.¹¹

Until recently, these unpublished opinions were only disseminated in one of two ways. First, they were mailed to the parties and the trial judge involved in the case. Second, they were available to the public in the clerk's office at the Court of Appeals.¹² In recent years, North Carolina Lawyers Weekly has exercised this public right and has obtained copies of these opinions from the clerk's office, published synopses of them, and sold full-length copies of the opinions.

Despite this increasing availability, the Court of Appeals continued to remind the bar that these opinions should not be cited.¹² As these unpublished opinions received more and more attention in *Lawyers Weekly*, North Carolina attorneys and judges became increasingly vocal in expressing their concerns about Rule 30(e).

Concerns with Rule 30(e) and Unpublished Opinions

Just as unpublished opinions are not unique to North Carolina, the concerns they raise are also not peculiar to this state. There are two distinct issues raised by unpublished opinions: first, the availability of these decisions; and second, the ability of the courts to consider these opinions as precedent and the ability of the parties to cite these opinions.

As noted above, unpublished opinions have always been available to the general public and bar in North Carolina, albeit not conveniently. While technically available, it was noted that few lawyers could visit the Court of Appeals every first and third Tuesday when opinions are issued to learn of the contents of the unpublished opinions.¹³ Certainly, lawyers outside the Raleigh area could not realistically monitor these opinions.¹⁴ Furthermore, while *Lawyers Weekly* brought the most important of these opinions to the attention of its subscribers, not every lawyer, and certainly not every citizen, had access to *Lawyers Weekly*.¹⁵ While lawyers did not advocate that every opinion be published in the Court of Appeals Reports, they did take issue with the fact that these unpublished opinions were not at least posted on the Court of Appeals web site along with the published opinions.¹⁶

In addition to availability, North Carolina lawyers also raised the more important issue regarding the citation, and precedential value, of unpublished opinions. As noted in Mr. Fowler's article, the Eighth Circuit Court of Appeals in *Anastasoff v. United States* concluded that its Circuit Rule that unpublished opinions were not entitled to precedential value and should not be cited was unconstitutional.¹⁷ Almost a year prior to the *Anastasoff* decision, North Carolina lawyers had also questioned the constitutionality of Rule 30(e)'s prohibition of the citation of unpublished opinions and its denial of precedential value to these decisions.¹⁸ Others raised the concern that the Court of Appeals was using unpublished opinions to hide certain decisions. Trial judges complained that unpublished opinions were routinely cited to them, despite the strict prohibition of this practice by Rule 30(e)(3).¹⁹

Because of the concerns about the unavailability of unpublished opinions and the no-citation rule, the Court of Appeals decided to study the issue of unpublished opinions. In January 2000, a committee of Court of Appeals judges chaired by the Honorable K. Edward Greene was charged with examining this issue.²⁰

The Courts' Response

After examining the issue for several months, the committee made two recommendations for amendments to Rule 30(e).²¹ These recommendations were adopted by the Court of Appeals, and Chief Judge Eagles wrote then Chief Justice Frye requesting that the Supreme Court approve these amendments to Rule 30(e).²² First, the Court of Appeals recommended unanimously that the text of all unpublished opinions be made available to the public and the bar on the internet.²³ Second, the Court of Appeals recommended that a new subsection (4) of Rule 30(e) be adopted that would allow counsel of record and pro se parties to move for publication of an unpublished opinion.²⁴ Proposed Rule 30(e)(4) would require such a motion to be filed and served within 10 days of the filing of the opinion.²⁵ Such motion would advocate publication by contending that the opinion did in fact contain new legal principles and would have value as precedent.²⁶

As of the writing of this article, the Supreme Court has approved the posting of the Court of

Appeals unpublished opinions on the Court of Appeals web site.²⁷ However, the Supreme Court has not adopted proposed Rule 30(e)(4).

Apparently, proposed Rule 30(e)(4) was intended to codify the existing motion practice in the Court of Appeals. Even without proposed Rule 30(e)(4), counsel of record or pro se litigants may file a motion with the Court of Appeals requesting that the court reconsider its Rule 30(e) ruling.²⁸ Like the motion under proposed Rule 30(e)(4), this motion would advocate publication by contending that the opinion did contain new legal principles and that it would have value as precedent. The motion must be made between the time the opinion is filed and the date the Court of Appeals mandate issues, since the Court of Appeals loses jurisdiction over the case after the issuance of its mandate.²⁹ Such motions are not granted as a matter of course, but they are seriously considered and are not infrequently granted by the court.³⁰

Lingering Concerns

The posting of the Court of Appeals unpublished opinions on that court's web site goes a long way towards addressing the availability concerns. Now attorneys and citizens across the state can access these opinions from their desktop computers. While the courts should be commended for this significant step forward, there is still room for improvement. Currently, these opinions are listed in alphabetical order on the web site.³¹ As the number of posted opinions grows, it will be increasingly difficult for attorneys or citizens to review these opinions and to find opinions on particular subject areas. Accordingly, consideration should be given to adding a search engine to the Court of Appeals web site.³² At the least, consideration should be given to adding a short descriptive summary to the listing of each case as is provided for published opinions and/or to grouping these cases under broad subject matter headings.

While the courts have addressed the availability issue, they have not modified the provisions of Rule 30(e) that prohibit citation and limit the precedential effect of unpublished opinions. Accordingly, while lawyers and citizens have greater access to these opinions, they still may not be cited or considered by the courts. These opinions are now available, but they are still essentially off limits.

Proposed Rule 30(e)(4) and the current motion practice do not solve the serious concerns raised by the limitations on the use and precedential effect of these opinions. First, proposed Rule 30(e)(4) continues to equate an opinion's precedential value with the decision whether to publish the opinion in the Court of Appeals Reports, thus diminishing the benefit of having the opinions available on the court's web site. In addition, proposed Rule 30(e)(4) rests on the questionable premise that the parties, counsel, and the Court of Appeals will realize the future significance of an opinion in a given case to the jurisprudence of the state.³³ It also rests on the shaky premise that the parties and counsel will be motivated to spend the time and incur the expense of seeking publication. In fact, in some cases, a party might argue against the publication of an opinion to avoid embarrassment or damaging publicity, rather than because of a sincere belief that the opinion does not satisfy the requirements of Rule 30(e)(1). Finally, while these motions are not infrequently granted, most of them are denied, and most unpublished opinions remain unpublished. Accordingly, proposed Rule 30(e)(4) and the current motion practice do little to solve the concerns raised by the no-citation rule and limitations on the precedential effect of these opinions.

As noted earlier, Rule 30(e)'s limitations on the citation and precedential effect of these unpublished opinions may very well be unconstitutional.³⁴ These significant constitutional concerns warrant further examination of Rule 30(e).

Rule 30(e) also potentially conflicts with the well-established rule that one panel of the Court of

Appeals is bound by an earlier panel's decision on the same issue in a different case.³⁵ In *United Servs. Auto. Assoc. v. Simpson*,³⁶ a published decision, the Court of Appeals recognized that the "precise issue" presented to that panel was presented to another panel of the court in an earlier unpublished decision, *State Auto. Ins. Cos. v. McClamroch*.³⁷ While recognizing the rule that a subsequent panel of the Court of Appeals is bound by an earlier panel's decision on the same issue, the court stated that its decision that "a different result [was] justified" did not contravene the rule since the earlier unpublished decision "established no precedent and [was] not binding authority."³⁸ It is troubling that Rule 30(e) was interpreted by the court in *United Serv. Auto. Assoc.* to allow one panel of the Court of Appeals to effectively overrule a prior decision of another panel of the court.³⁹ Because this application of Rule 30(e) conflicts with Supreme Court decisions defining the ability of one panel of the Court of Appeals to overrule another, Rule 30(e) should be reexamined.

The designation of an opinion as unpublished under Rule 30(e) may also impact a petitioner's chances of having the North Carolina Supreme Court grant discretionary review.⁴⁰ By designating an opinion as unpublished, the Court of Appeals declares that it "involves no new legal principles and that an opinion, if published, would have no value as precedent."⁴¹ A concern has been raised that this designation, at least implicitly, signals to the parties and perhaps the Supreme Court that the case does not warrant discretionary review because it does not involve a matter of "significant public interest" or "legal principles of major significance to the jurisprudence of the state."⁴² Interestingly, the Supreme Court has in fact granted discretionary review of numerous unpublished opinions.⁴³ Accordingly, the designation of a Court of Appeals decision as unpublished may not significantly hamper a petitioner's pursuit of discretionary review. However, while this should give petitioners some comfort, it does seem curious that an unpublished opinion deemed to "involve[] no new legal principles" and to have "no value as precedent" could warrant discretionary review under N.C. Gen. Stat. § 7A-31. Because of this apparent inconsistency between the Court of Appeals' application of Rule 30(e) and the Supreme Court's application of N.C. Gen. Stat. § 7A-31, additional consideration should be given to amending, or at least refining the application of, Rule 30(e).

As noted earlier, another concern with Rule 30(e) is the difficulty faced by the Court of Appeals in determining whether a decision involves "new legal principles" or whether "an opinion, if published, would have no value as precedent."⁴⁴ Arguably, decisions that warrant discretionary review by the Supreme Court or that involve a dissenting opinion should warrant publication. However, as noted in the preceding paragraph, unpublished opinions are frequently the subject of discretionary review. In addition, the Court of Appeals often issues unpublished opinions in decisions that involve a dissent.⁴⁵ It would seem that, at least in the opinion of the dissenting judge, the law or the application of the law to the case was not well settled. Further, it seems curious that a decision from a divided panel of the Court of Appeals would warrant an appeal as of right to the Supreme Court pursuant to N.C. Gen. Stat. § 7A-30, but would not warrant publication or precedential value under Rule 30(e). This apparent inconsistency also justifies further study of Rule 30(e) and its application to various Court of Appeals decisions.⁴⁶

Rule 30(e) also creates potential ethical conflicts for attorneys. In 1995, the American Bar Association's Standing Committee on Ethics and Professional Responsibility recognized this potential ethical dilemma in confronting the following question: "How does a lawyer who has a favorable unpublished opinion fulfill the ethical obligation of representing a client vigorously in the face of a rule that prohibits citing the opinion?"⁴⁷ While ultimately concluding that "the standard was one of appellate practice and was not intended to impose any ethical obligation on the lawyer," the committee recognized that "further exploration [of the issue] would be helpful."⁴⁸ Rule 30(e) raises the same question addressed by the ABA in the context of the North Carolina Rules of Professional Conduct. Rule 1.3 requires that an attorney "act with reasonable diligence" in representing his client, and the comment to the rule provides that the attorney "act . . . with zeal in advocacy upon the client's behalf." However, Rule 3.4(c) provides that a lawyer shall not

"knowingly disobey or advise a client to disobey a rule or ruling of a tribunal."⁴⁹ Despite the ABA's conclusion that the citation of unpublished opinions in violation of an appellate rule does not present an ethical issue, Rule 3.4(c) appears to make the failure to follow all court rules, including Rule 30(e), an ethics violation. Thus, an attorney who discovers an unpublished opinion that supports his client's position will be torn by his obligation to zealously represent his client and the strictures of Rule 3.4(c).⁵⁰ This conflict warrants further examination of Rule 30(e).

Finally, Rule 30(e)'s prohibition on citation is ineffectual because, even if these opinions cannot be cited and are denied precedential value, subsequent parties who have access to them will rely on them and use them.⁵¹ Consideration should be given to amending Rule 30(e) to conform to the reality that subsequent parties and perhaps even courts rely on unpublished opinions.

A Potential Solution

At the least, the cumulative weight of the foregoing concerns indicates that North Carolina's appellate courts should continue to study Rule 30(e). In fact, these concerns likely warrant an amendment to the rule allowing citation to unpublished opinions and affording these opinions precedential value.

The Fourth Circuit's Local Rule on this subject may be an appropriate model for North Carolina to follow.⁵² Local Rule 36(c) provides that the Fourth Circuit, "[i]n the absence of unusual circumstances, . . . will not cite an unpublished disposition in any of its published opinions or unpublished dispositions." It further provides that "[c]itation of [the Fourth Circuit's] unpublished dispositions in briefs and oral arguments in [the Fourth Circuit] and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." However, Local Rule 36(c) goes on to provide that, "[i]f counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the court."⁵³

While discouraging citation of unpublished opinions, Local Rule 36(c) puts these opinions on roughly equal footing with published opinions. The rule allows the attorney, as he would with published opinions, to base his decision to cite an unpublished opinion on whether, in his estimation, the opinion has precedential value in relation to a material issue and whether the decision is more helpful than another published opinion. Since the Fourth Circuit's rule allows for the citation of unpublished opinions and affords them precedential value, the rule eliminates most of the concerns inherent in Rule 30(e).⁵⁴

The North Carolina appellate courts should continue to examine Rule 30(e) in light of the concerns addressed above. As suggested, one plan for eliminating these concerns would be to amend Rule 30(e) to make it consistent with the Fourth Circuit's Local Rule. Of course, the courts may develop an alternate rule that would effectively address these same concerns. In any event, the courts should give serious consideration to amending Rule 30(e) to allow for citation to the Court of Appeals unpublished decisions and to afford these decisions precedential value.

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 Campbell University School of Law.

Endnotes

1. See Joshua R. Mandell, *Trees That Fall in the Forest: The Precedential Effect of Unpublished*

Opinions, 34 Loy. L.A. L. Rev. 1255, 1295 n. 100 (2001) (quoting remarks by Justice John P. Stevens at the Illinois State Bar Association's Centennial Dinner in January 1977).

2. See William J. Miller, Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond, 50 Drake L. Rev. 181, 185 (2001).

3. Miller, *supra* note 2, at 185. The federal courts have adopted varying rules. A distinct minority of two circuits has no rule limiting citation, a silence that could be interpreted as allowing full citation. *Id.* at 186. "In nine of the 13 circuits, full and open citation to unpublished opinions is barred by the rules. In two additional circuits, citation also is limited unless the opinion is of a very specific type. Of these eleven circuits, nine allow the use of unpublished opinions to establish *res judicata* or collateral estoppel or if the subsequent case otherwise relates back to the earlier case. . . . In addition, six of the eleven circuits also allow the use of unpublished opinions . . . as persuasive authority or in the absence of another opinion stating the appropriate precedent." *Id.* at 186-187. Accordingly, limited use of unpublished opinions is the rule in the federal courts. *Id.*

4. Mandell, *supra* note 1, at 1261 (explaining the justification for unpublished opinions by noting that, while in 1945 litigants appealed one out of every forty district court decisions, by 1990 one in eight cases was appealed).

5. Additions to North Carolina Rules of Appellate Procedure, 288 N.C. 737 (1975).

6. *Id.* See also N.C. R. App. 30(e).

7. *Id.* See also Eagles Addresses Debate on Unpublished Opinions, North Carolina Lawyers Weekly (17 January 2000) (quoting Chief Judge Eagles as stating that "really, the reason we don't publish them all is the cost. . . . To print the advance sheets and staff the reporter's office so that we could publish all the cases would probably require an appropriation of \$300,000 to \$400,000.").

8. *Id.*

9. Additions to North Carolina Rules of Appellate Procedure, 296 N.C. 743 (1979).

10. In 2001, the Court of Appeals decided 1,386 appeals. Of these decisions, 825, or approximately 60 percent, were unpublished. Telephone interview with Mr. John Connell, clerk of the North Carolina Court of Appeals (April 5, 2002).

11. These decisions are public records and, therefore, the public has always been entitled to access these opinions. Generally, the public exercises this right to access by visiting the clerk's office and paying the clerk a nominal copying charge to obtain a copy of the opinions. Telephone interview with Mr. John Connell, clerk of the North Carolina Court of Appeals (April 5, 2002).

12. See *State v. Taylor*, 141 N.C. App. 321, 330, 541 S.E.2d 199, 205 (2000) (rejecting the defendant's assignment of error where the "only authority for this assignment of error [was] an . . . unpublished opinion"); *Harris v. Duke Power Co.*, 83 N.C. App. 195, 199, 349 S.E.2d 394, 397 (1986) (declining to consider an unpublished opinion and reminding counsel of the provisions of Rule 30(e)), *aff'd*, 319 N.C. 627, 356 S.E.2d 357 (1987).

13. Catharine B. Arrowood, Unpublished Appellate Opinions, Wake Bar Flyer, Vol. XXV, Number

11 (December 1999).

14. Id.

15. Id.

16. Id.

17. 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000). The original Anastasoff panel reasoned that a court could validly decide that certain opinions should not be published because they "are not important enough to take up pages in a printed report." Anastasoff, 223 F.3d at 904. However, the court concluded that a rule that allows a court to limit the precedential effect of its decisions exceeds the judicial power of the United States described in Article III of the Constitution. Id. at 905. See also Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. Rev. 695 (2001) (commenting that rules prohibiting the citation of unpublished opinions remove a deeply rooted common law procedure and therefore deprive litigants of procedural due process rights); Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. Kan. L. Rev. 195 (2001) (discussing whether refusing to recognize unpublished opinions as precedent potentially violates both the procedural due process and equal protection guarantees). But see *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (rejecting Anastasoff's conclusion that Article III of the Constitution requires that all case dispositions and orders issued by appellate courts be binding authority and concluding that managing precedent to develop a coherent body of circuit law is within the inherent powers of Article III judges).

18. *Citation Ban Unconstitutional Says Charlotte Lawyer*, Letter to the Editor from Mr. Paul B. Taylor, *North Carolina Lawyers Weekly* (24 April 2000) (contending that Rule 30(e)'s prohibition on citation or consideration of unpublished opinions unreasonably restricts the constitutional guarantees of freedom of speech, freedom to petition the government for redress of grievances, due process, equal protection, and equal access to the courts).

19. *Put Unpublished Rulings on Internet, Court Says*, *North Carolina Lawyers Weekly* (1 May 2000).

20. Id.

21. Id.

22. *Requested Rules Change Regarding Publication of Court of Appeals Opinions*, *North Carolina Lawyers Weekly* (1 May 2000) (displaying the text of Chief Judge Eagles' letter to then Chief Justice Frye).

23. Id.

24. Id. Chief Judge Eagles indicated in his letter that "[w]hile there is on our court some sentiment to publish all opinions of this court, the majority of our court believes that financial constraints currently facing the state budget process and other reasons mitigate against publication of every opinion." Id.

25. Id.

26. *Id.* Any objection to the requested publication would have to be filed within three days after service of the motion requesting publication. *Id.*

27. These opinions have been available on the web site since February 2001. Telephone interview with Mr. John Connell, clerk of the North Carolina Court of Appeals (April 5, 2002).

28. Such a motion would be governed by Rule 37 of the North Carolina Rules of Appellate Procedure, which provides for the motion practice in the appellate courts. Implicit in the provisions of Rule 37 is the requirement that the motion be made by a party or the counsel of a party. Such a motion made by a non-party would be summarily dismissed by the Court of Appeals. Telephone interview with Mr. John Connell, clerk of the North Carolina Court of Appeals (April 5, 2002).

29. Telephone interview with Mr. John Connell, clerk of the North Carolina Court of Appeals (April 5, 2002).

30. *Id.*

31. The opinions can be found on the Court of Appeals web site at www.aoc.state.nc.us/www/public/html/opinions.htm.

32. The need for a search engine is not as great for the published opinions, since these opinions are available in the Court of Appeals Reports, are indexed in the digests, and are available on the Westlaw and Lexis databases and various other CD-ROM and electronic sources that have their own search engines.

33. It would be difficult for anyone to foresee the potential future development of the law and the possible significance of a decision to subsequent decisions. See the introductory quote to this article and *supra* note 1.

34. See *supra* notes 17-18. See also Tom Fowler's article in this issue.

35. *In re Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.")

36. 126 N.C. App. 393, 485 S.E.2d 337 (1997).

37. 124 N.C. App. 461, 477 S.E.2d 703 (1996) (Table, COA 95-1331).

38. *United Servs. Auto. Assoc.*, 126 N.C. App. at 340, 485 S.E.2d at 339 (while noting that it was "not bound by the holding in *McClamroch*," the Court stated that it did "not lightly disagree with another panel of [the] court"). Given Rule 30(e)'s prohibition, the unpublished opinion in *State Auto. Ins.* arguably should not have been cited by the parties or the Court of Appeals even to point out that the decision lacked precedential value.

39. These conflicting decisions also illustrate the difficulty of deciding whether an opinion has precedential value. One wonders how the earlier decision in *State Auto. Ins.* was deemed to have no precedential value and thus was not published, while the later decision on the same "precise issue" was deemed to have value as precedent and was published.

40. Arrowood, *supra* note 13. See also N.C. Gen. Stat. § 7A-31(c)(1), (2).

41. See Rule 30(e)(1).

42. Arrowood, *supra* note 13.

43. In fact, the Supreme Court has reversed a significant number of these unpublished decisions from the Court of Appeals. See e.g., *Good Neighbors of South Davidson v. Town of Denton*, ___ N.C. ___, 559 S.E.2d 768 (2002) (reversing with instructions a unanimous, unpublished decision of the Court of Appeals); *In re Wallin*, 355 N.C. 212, 558 S.E.2d 87 (2002) (in a per curiam opinion, reversing a unanimous, unpublished decision of the Court of Appeals); *State v. Leazer*, 353 N.C. 234, 539 S.E.2d 922 (2000) (reversing the Court of Appeals' unanimous, unpublished decision); *Cain v. Gencor Inc.*, 347 N.C. 657, 496 S.E.2d 376 (1998) (in a per curiam opinion, reversing the unanimous, unpublished decision of the Court of Appeals).

44. See Rule 30(e)(1). See also *supra* notes 1 and 33 and the text accompanying these notes.

45. See e.g. *Saunders v. Edenton OB/GYN Ctr.*, 352 N.C. 136, 530 S.E.2d 62 (2000) (reversing and remanding in part an unpublished decision of a divided panel of the Court of Appeals); *Halford v. Wright*, 352 N.C. 144, 531 S.E.2d 213 (2000) (in a per curiam opinion, reversing an unpublished decision of a divided panel of the Court of Appeals based on the reasoning in the dissent); *Hartwell v. Mahan*, 351 N.C. 345, 525 S.E.2d 171 (2000) (in a per curiam opinion, reversing an unpublished decision of a divided panel of the Court of Appeals based on the reasoning in the dissent); *State v. Inman*, 347 N.C. 661, 496 S.E.2d 377 (1998) (per curiam affirming an unpublished decision from a divided panel of the Court of Appeals).

46. At a minimum, the application of the rule should be examined and consideration given to whether certain opinions, such as those with dissents, should be published. Other courts have established more elaborate guidelines and standards for deciding whether a decision should be published or unpublished. See Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. App. Prac. & Process 325, 336 (2001) (noting that the Ninth Circuit's rule provides seven criteria for the court to use in deciding whether an opinion should be published, including whether the opinion is "accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the court and the separate expression.>").

47. See Charles E. Carpenter Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. Rev. 235, 238-239 (1998).

48. *Id.*

49. Rule 3.4(c) does provide that an attorney may in good faith take appropriate steps to test the validity of a court rule. The comment to the rule notes that while it "permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules, [a] lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them."

50. As noted in *supra* note 13, even if citing an unpublished decision did not amount to an ethical violation, it would result in a warning from the court and an admonishment not to cite such opinions in the future.

51. See The Honorable Boyce F. Martin Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177, 196 (1999) (noting that "counsel will continue to use unpublished decisions, even if they do not cite to such dispositions"). "An unpublished opinion could point counsel in a new direction or give an otherwise overlooked cite and thereby prove advantageous." *Id.* See also Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Calif. L. Rev. 541, 563 (1997) (noting that, "[d]espite the official ban on citation, unpublished opinions are regularly used by litigants in making fundamental litigation decisions," including settlement decisions and determinations whether to appeal or oppose an appeal).

52. Put Unpublished Rulings on Internet, Court Says, North Carolina Lawyers Weekly (1 May 2000) (quoting Charlotte attorney Paul Taylor's hope that North Carolina will "conform [its] citation rule eventually to the Fourth Circuit rule").

53. Arguably, the Local Rule does not go far enough in that counsel should be able to cite all unpublished decisions that she believes have precedential value without regard to whether there is also a published opinion on point. However, while expressing a preference for published decisions, the rule affords counsel wide latitude in deciding whether a published decision would "serve as well" as the unpublished decision.

54. Interestingly, Local Rule 36(a) presumes that the Fourth Circuit's opinions will be unpublished and allows for publication "only if the opinion satisfies one or more of the [five] standards for publication" articulated in the rule. In this way, the Fourth Circuit's rule appears to be more restrictive than Rule 30(e), which presumes that all opinions will be published unless they involve no new legal principles or would have no value as precedent. Still, as discussed earlier, the electronic dissemination of opinions has made the question of whether an opinion is published in a book a secondary concern. Because Local Rule 36(c) allows unpublished opinions to be cited and to have precedential value, it addresses most of the concerns raised in this article and could serve as an effective model for amending Rule 30(e).

Lawyers and Elderly Victims of Telephone Fraud

By David N. Kirkman

Fraudulent and deceptive telemarketers rake in up to 40 billion dollars each year.¹ These transactions range from deceptive pitches for travel clubs, credit cards or long distance services wherein the consumer is misled as to material terms and conditions before electing to purchase a legitimate (if not overpriced or disappointing) product or service, to clearly fraudulent telephone pitches wherein money is obtained through assurances and promises which the caller knows will never be fulfilled.

The deceptive sales promotions are often prosecuted by state attorneys general and the Federal Trade Commission using civil Unfair and Deceptive Trade Practices laws.² The fraudulent telephone transactions, which are the subject of this article, are prosecuted by US Attorneys under federal wire fraud, mail fraud, and money laundering statutes. Local prosecutors attack them using state criminal fraud and false pretenses statutes. In many instances, these fraudulent operators are sued by civil law enforcement officials in order to shut them down quickly with restraining orders and preliminary injunctions while criminal investigations and grand jury proceedings take their course.

Favored targets of those who commit fraud over the telephone are the "very elderly," people in their eighties and nineties. People in their sixties and seventies are also targets, especially for those in the initial stages of Alzheimer's disease or other forms of cognitive decline who nevertheless still handle their day-to-day affairs and manage their own finances. At least half of the money pocketed by the fraudulent telemarketers comes from older citizens.³ This article describes how telephone con artists target North Carolina seniors, some of the con artist's favorite ploys and tactics, the vulnerabilities that they hope to exploit in their victims, and the efforts of law enforcement and others to stop them. It offers suggestions for North Carolina lawyers who encounter older citizens, including family members, who are being targeted.

Super-Victims

An 82-year-old Raleigh man visited our office-the Consumer Protection Division, North Carolina Department of Justice-in mid-January. He had lost \$80,000 through a series of fraudulent telemarketer calls last October and November. The calls were from Canada and that is where his money went. He was told that he needed to pay Canadian income taxes, then US customs duties, on a fictitious sweepstakes award of \$1,000,000. That same week, a man in Davidson County, also in his eighties, wired \$26,000 to Canada upon being told that he had won a \$250,000 sweepstakes prize but needed to pay taxes before the prize could be released. An elderly Alamance County woman sent \$23,000 the day before.

During this one week period in mid-January, the North Carolina Attorney General's telemarketing fraud investigator documented eight successful phone fraud "hits" on elderly citizens from the mountains to the coast. Individual losses ranged from \$1,600 to \$46,000, with total losses for the eight coming to \$143,000. Because elderly fraud victims seldom report their losses to authorities, it is certain that these eight incidents represent a small fraction of the losses which elderly North Carolinians suffered that week.

Canadian Con Artists

Conning large numbers of elderly consumers over the telephone is an industry that started in the southwestern United States. In fact, the North Carolina Attorney General and other civil and criminal law enforcement officials continue to bring cases against deceptive and fraudulent

telemarketing operations based in the US. Nevertheless, over the last seven years Canada has become a major hotbed for telephone fraud. Canadian authorities tell us that at any given moment there are over 50 different phone fraud call centers operating in the Montreal area, an equal number in the Vancouver area, and over twice that number in the metropolitan Toronto area. They defraud people as far away as Bangladesh and Nepal, but most of their money comes from elderly US citizens.⁴

Civil restraining orders, injunctions, and restitution decrees issued by US courts have little practical impact upon these Canadian fraud artists. Investigating, extraditing, and prosecuting them under criminal statutes is challenging for local prosecutors and law enforcement officials in the US. Procedures and problems attendant to cross-border criminal investigations and multi-jurisdictional court proceedings are time consuming and expensive. For these reasons, Canada has become home to a large network of telephone con artists.

Making matters worse, the con artists employ an assortment of subterfuges to make it difficult to prove their involvement in a fraudulent scheme. They change their company names and move their operations every few weeks. They employ multiple layers of agents and subcontractors who discreetly set up their call centers and mail drops, hire and pay their phone solicitors, provide lists of elderly victims to call, and process all of the operations' receipts. Many times the callers employ stolen cell phones or call from payphones or hotel rooms using stolen credit cards.

The scammers refine their detection avoidance techniques constantly. The newest technique for obtaining funds is to ask that victims go to a nearby MoneyGram outlet or to a Western Union terminal at their favorite grocery store and then wire the money. The funds often are re-routed and picked up in places like Kingston, Jamaica, Amman, Jordan, or Tel Aviv, Israel, then forwarded elsewhere. Just a couple of years ago, when the scammers asked victims to send certified checks to Canada via overnight courier, law enforcement had a 20-hour window in which to interrupt the transaction and recover the victims' funds. The new wire transfer technique has reduced that window of opportunity to about 15 minutes.

Local Heroes

Despite the problems just described, there have been victories in the fight against these forms of elder fraud. Assistant US Attorney Scott Wilkinson and FBI Special Agent Joan Fleming, both based in Raleigh, have extradited almost a dozen Montreal telemarketers to North Carolina and prosecuted them. The North Carolina Attorney General collaborates with the Federal Trade Commission, US Attorneys outside the state, and Canadian officials as they bring civil and criminal cases against these fraud groups.

Members of North Carolina's business community have also spotted and thwarted these fraud attempts. In recent years and on their own initiative, employees of banks, Federal Express, United Parcel Service, Western Union, and MoneyGram have stopped or reversed the transfer of elderly victims' funds to Canada. In 1996, Cynthia Turner, a Bank of America branch manager in Wilmington, suspected fraud and stopped payment on an 84-year-old customer's \$35,000 certified check as it was en route to Montreal con artists. During the one-week period mentioned above, a Chatham County MoneyGram employee, Sharon Allan, saved an 87-year-old woman's \$6,000, and a pair of employees at the Clyde Savings Bank in Asheville, Cindy Ruby and Nora Stephenson, interrupted a 90-year-old man's efforts to send \$2,000 north of the border. It is almost certain that the scammers would have struck those victims again had they not been thwarted by these concerned business people.

Cross-Border Collaboration

US and Canadian law enforcement officials recently increased their collaborative efforts to bring down these fraudulent operations. Strike forces comprised of officers from both nations have been established in Montreal, Vancouver, and, most recently, Toronto. The number of prosecutions and raids upon these operations in Canada has increased, as have the punishments meted out in Canadian courts. Extraditions to the US continue. Some of the scammers have begun transferring operations to Caribbean nations. Nevertheless, the problem in Canada remains huge and complex.

Thanks to a grant from the Bureau of Justice Assistance of the US Department of Justice,⁵ the North Carolina Attorney General employs a special telemarketing fraud investigator. One of the investigator's many duties is to network among the state, local, federal, and provincial law enforcement officials who are trying to fight telemarketing fraud. There is no central clearinghouse of North American law enforcement officials who plan, coordinate, or track criminal investigations involving telephone con artists. It is a bit of an art to locate a federal official in, say, Newark or San Diego who intends to prosecute a fraud ring in suburban Toronto whose victims include elderly North Carolinians. So is hooking up with a Royal Canadian Mounted Police Unit which is targeting a Vancouver "international lottery" scam which has defrauded seniors throughout the United States. The investigator accomplishes this through networking and by posting victimization reports and special alerts on a consumer fraud database known as Consumer Sentinel.⁶ Once he links up with those out-of-state officials, he aids their efforts by obtaining information and written declarations from North Carolina victims and, if necessary, making arrangements for their testimony at trial.

When a local North Carolina law enforcement official calls and describes a telephone fraud incident in his or her community, the telemarketing fraud investigator usually can tell which fraud group is involved and can link the local officer with US or Canadian investigators in the city from which the scammers are calling. He will work with the local officer to have a tape recording device placed on the elderly target's phone so that the scammer's voice can be captured once he or she calls back. And they always call back. The investigator then transmits copies of the tape recordings to his counterparts in Canada as well as to the Telemarketing Fraud Tape Repository in San Diego.⁷ Such recordings are invaluable to North American investigators as they attempt to identify suspects and prove their involvement in particular frauds.

Hear for Yourself

To hear one of these telephone con men attempting to defraud a North Carolina man, dial 919-716-6001 and select option #3. The person on the tape with the southern accent is the Attorney General's telemarketing fraud investigator, David C. Evers. He had just walked into the fraud target's living room and hooked up the recording device when the scammer called in pretending to be a US Customs agent in Champlain, New York. As you listen to the recording, please note the caller's insistence that the money be wired to Montreal, Canada.

What You Can Do to Help

Attorneys can do much to fight this insidious problem. You are positioned to spot the telltale signs of such frauds, or the victims or their families may detect the fraud themselves and consult with you. They will benefit greatly from your advice and insight about these scams.

If client confidentiality considerations do not preclude you from doing so, contact local law enforcement and the Consumer Protection Division of the Attorney General's Office (tel. 919-716-6000) as soon as the fraudulent activities are detected. Upon calling the Consumer Protection Division, tell the receptionist you wish to report an incident of "telemarketing fraud" or "fraud upon an elderly person." The call should be routed immediately to a member of the telemarketing fraud

prevention staff, who will appreciate as much information as you are at liberty to give. Information such as the scammers' call-back number, the names they used, or the time and location from which the victim wired off the funds will be invaluable to the staff and their counterparts north of the border.

Your counseling is important in these situations. If the elderly victim or target is your client, fellow parishioner, relative, or friend, the trust they place in you can combat the trust and confidence they place in the fraud artists. Should your client remain determined to send money to Canada, Jamaica, or Israel in order to collect a big prize, getting a member of the AG's staff on the phone line with you and the client might carry the day. Another technique is to have a three-way telephone conversation with your client and someone from the Canadian Telemarketing Fraud Task Force, Operation PhoneBusters in North Bay, Ontario. Their toll-free number is 1-888-495-8501. PhoneBusters personnel are very good at breaking down the illusion which causes some seniors to want to wire their savings off to Canada. Neither PhoneBusters nor the North Carolina Attorney General's staff will be offended if your client wishes not to be identified during such conversations.

Where Does All That Money Really Go?

To persuade the client that terminating communications with the callers is the right choice, you might advise them that no legitimate sweepstakes or prize contest requires the up-front payment of money before releasing the prize or award. It may help to say where the money really goes. Authorities have traced victims' funds to motorcycle gangs, car theft rings, drug operations, and third world rebel movements. In a television news story aired November 1st on WTVD-Channel 11 in Durham, Canadian authorities stated to reporter Jennifer Julian that some US victims' funds could be going to international terrorist cells.⁸ In a follow-up story three weeks later, Ms. Julian reported that the FBI had contacted her to confirm that they were investigating terrorist involvement.⁹

Reload and Attack Again

Perhaps the most important service you can provide is to convince a client who has lost money to these scam artists that they will call again. They will call again. It is called "the reload." Reloading enables them to collect a victim's entire life's savings. Once the con artists have secured \$2,000 in "taxes" on the bogus \$200,000 prize, they will call back and say, "I'm sorry, Mrs. Jones! You have won the \$1,000,000 Grand Prize rather than the second place award! Please forgive my mistake. You therefore need to send an additional \$8,000 so we can release the money to you!"

After a second or third successful hit the con artists will call back claiming to be US Customs officers: "We have your \$1,000,000 award right here but cannot release it until you wire \$30,000 in duties to a bonded customs agent in Montreal." Or, they might claim to be Montreal barristers: "I have sued the crooked sweepstakes company and have frozen their assets, including the \$1,000,000 prize you should have received last month. Should you wish to become my client and share in the court recovery, I will need a retainer of \$20,000 right away."

Mooch Lists-Get the Victim off Them Now

Some victims who are forewarned of these follow-up or "reload" frauds will not fall prey when the scammers call back. Others, unfortunately, will. They might believe you when you warn that the scammers will call back, but they fall right back into the scammers' spell the moment that next excited phone call comes in telling them how they can recoup all of the money they just lost. For this reason, your efforts to persuade the client to switch to an unlisted phone number and never put that number on any sweepstakes entry, international lottery mailing, or prize promotion will be

most important. The family needs to be convinced of this if they are the ones consulting you. The elderly person's number is being exchanged among con artists for large amounts of cash or drugs. The scammers refer to their lists of vulnerable older adults as "mooch lists."

The 82-year-old Raleigh man mentioned in the second paragraph of this article has been on these "mooch lists" for some time. In 1994, he was a victim of the first Canadian telemarketing groups to be sued by the North Carolina Attorney General, Darrin Lake and Laura Pierre, d/b/a Regent Distributors.¹⁰ Another who found her way onto these "mooch lists" was a retired school teacher in Buncombe County. From Christmas of 1994 to Easter of 1995, over two dozen scammers from four different states took her for at least \$87,000. The Attorney General's 1995 civil complaint involving just that one victim named so many different defendants that the case caption extended into the middle of the second page.¹¹

This Buncombe County victim was bright and articulate. She exhibited tendencies often seen in repeat victims of telemarketing fraud. She would acknowledge that those who had taken her money earlier were crooks, but she fervently believed the next caller when he promised to deliver a half-million dollars or claimed he would recover the millions she had been promised earlier. She was a prisoner in her own home, anxiously or excitedly awaiting the next important call. Her final words to our investigator were, "You people just leave me alone!"

What Are They Thinking?

What is happening in the minds of these victims? Asheville geriatrician Dr. Margaret Noel¹² offers an interesting explanation. She says that all of us experience cognitive decline as we grow older but we are also more susceptible to age related dementing illness that is very subtle in its onset. Roughly half of the population over 85 is estimated to have cognitive loss severe enough to impair their daily function, including their "better judgment."

The telephone con artists know this. That is why they seek out, target, and continuously call certain seniors. They tax their victims' impaired judgment with their favorite tool: excited phone messages about a big prize or recovered funds.

Professor Florence Soltys of the UNC Schools of Medicine and Social Work informs us of another vulnerability that is common among the very elderly: depression.¹³ The scammers will spend hours a day speaking with some elderly targets, learning and asking about their families and their life's histories. They cultivate close emotional bonds with the victims. This may explain why victims may forsake other important social and family activities in order to be at home for the next phone call. They truly believe that the customs agent or the Montreal barrister is a caring friend who wants very badly to get their fabulous prizes down to North Carolina.

You May Be the Only Avenue of Escape

Another psychological ploy of these con artists is something we refer to as "blocking the exits." They will deliberately cultivate a degree of paranoia in hopes that their elderly target will never mention the calls or money transfers to anyone. As a respected professional with a duty to hold clients' comments in confidence, you might be the elderly victim's only exit from the con artists' elaborate trap.

To isolate victims from friends and community, the scammer will warn them not to say anything until the prize money is safely in the bank ("for your personal security, of course.") They give similar admonitions against conferring with family ("They'll think you are foolish and use it as an excuse to take away your check book!") or a government agency ("They will just try and seize your prize and levy taxes on it!"). The false barrister might even warn the victim not to consult

with you, as your "ignorance of Canadian law will only cause confusion and delays." Although the elderly fraud victim might not reveal ongoing conversations with the phony sweepstakes official or barrister, he or she will bring to your attention the earlier losses. Because of the intense embarrassment they feel over these earlier losses, you could be the only member of the community with whom these elderly victims share their experiences.

Conclusion

Many of us have older clients, loved ones, or friends who can find themselves ensnared in the con artists' web of fraud and emotional manipulation. Described briefly in the sidebars on previous pages are some telltale signs of telephone fraud against the elderly plus some of the current scams. If you encounter some of these situations, your main goal should be to prevent revictimization. Be as patient, as compassionate, and as creative as you can be knowing that you could be the victim's best hope as the only person in whom he or she will confide. If the situation has been brought to your attention by the family of an elderly fraud victim, the same goals and suggestions apply. In addition to understanding the basics of telemarketing fraud, the family also needs to be advised to respond to the loved one's experiences with calmness and compassion. The embarrassment, hurt, or confusion the victims feel does not need to be compounded by the shocked or intemperate responses of their adult children. These victims are simply caught between a sophisticated, persistent, multi-billion dollar fraud industry and the harsh realities of the aging process.

David N. Kirkman is the assistant attorney general, Consumer Protection Division, for the North Carolina Department of Justice.

Endnotes

1. See Public Law 103-297, August 16, 1994; Congressional findings in creating Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. 6101 et seq.
2. In North Carolina, the attorney general sues under the Telephonic Seller Registration and Bonding Act, N.C. Gen. Stat. 66-260 et seq., and the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. 75-1.1 et seq. The latter is modeled after the statute enforced by the FTC in deceptive telemarketing cases, 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a). In addition, both the North Carolina Attorney General and the FTC bring civil actions in federal court pursuant to the Federal Trade Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310, which was authorized by Congress in the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1995, 15 U.S.C. 6101 et seq.
3. Testimony of Federal Trade Commission Chairman Robert Pitofsky before the Senate Subcommittee on Commerce, Justice, State, and the Judiciary, February 5, 1998.
4. Presentation to the Telemarketing Fraud Enforcement Training Conference, (Sponsors: Nat. Assoc. of Attorneys General, American Prosecutors Research Inst., Nat. White Collar Crime Ctr., AARP), Durham, NC, June 12, 2001, by Detective Staff Sergeant Barry Elliott, Ontario Provincial Police; D.S.S. Elliott heads Canada's Telemarketing Fraud Prevention Task Force, Operation Phone Busters in North Bay, Ontario.
5. US Dept of Justice Office of Justice Programs Grant #1999-LS-VX-0004.
6. Consumer Sentinel is an international multi-agency project whose leading partners include the Federal Trade Commission, the National Association of Attorneys General, Canada's Operation PhoneBusters, the Better Business Bureau, the National Consumer League, and the Australian

and Consumer Commission. Hundreds of law enforcement agencies subscribe to it. The public can access limited information on Consumer Sentinel and submit fraud complaints via the Federal Trade Commission's website, www.ftc.gov.

7. The Tape Repository, established in 1995, is funded by the US Department of Justice, the Federal Bureau of Investigation, and the National Association of Attorneys General.

8. A printed version of this news story has been posted on the Web at http://abclocal.go.com/wtvd/features/110101_TS_terroristmoneylaundering.html

9. A printed version of this follow-up story has been posted on the Web at http://abclocal.go.com/wtvd/features/112901_TS_canadiancon.html

10. State ex rel. Easley v. Regent Distributors, et al. (94 CVS 12268; Wake County Superior Court). This was one of the first legal actions against Canadian telemarketers to be brought by a state attorney general. Victims were told that they had won a large prize but needed to purchase \$600 worth of calendars to "qualify for the prize."

11. State ex rel. Easley v. White Associates et al. (95 CVS 3684; Wake County Superior Court). The North Carolina Attorney General recovered only 25% of the victim's funds, but that recovery still ranks as one of the largest for an individual telephone fraud victim in this state.

12. Margaret A. Noel, M.D., Medical Director, Memory Assessment Clinic and Eldercare Resource Center, Inc., Asheville, NC; telephone interview August 22, 1995.

13. Speech by Florence Gray Soltys, Associate Professor, Schools of Medicine and Social Work, Univ. of NC at Chapel Hill, to the North Carolina Senior Consumer Fraud Task Force, Raleigh NC, June 8, 2000.

Popular Telephone Frauds Targeting Seniors *(Listed according to severity)*

International Lotteries (Vancouver, Ontario)

Callers claim they will enroll you in the best overseas lottery opportunity each week. Your credit card or checking account will be charged regularly for this service. The scammers will pay out small sums from time to time just to keep you interested. They may collect \$10-100/week from you for months, but they are not enrolling you in any lotteries. Occasionally they offer you a special opportunity on a "sure bet" lottery package for only \$5000-10,000.

California Sweepstakes (California)

(Targets lower income seniors) Caller advises that you have won a sweepstakes in California. He needs your bank account number to ensure that you pay California taxes on the award after you receive it. Your bank account is debited \$200 to \$400 the following day. Unauthorized debits may occur several more times during the ensuing weeks.

Credit Card or Identity Theft Insurance (US and Canada)

Callers claim they will protect you from identity theft and from thieves who might steal your credit card numbers using the Internet and then run up huge debts in your name. They state that you could be liable for hundreds of thousands of dollars if you do not purchase this protection for \$200-\$600.

International Do-Not-Call Registry (Quebec)

For \$200-600 you can be listed in an international do-not-call registry which will stop all unwanted telemarketer calls. Offered as an add-on to the preceding service. (Quebec)

"You Have Won a Cadillac!" (Ontario)

Caller informs you that you have won a Cadillac plus \$50,000 to \$100,000 in cash. You must pay insurance (or transportation costs) in the amount of \$2,000 to \$4,000 to receive the car.

Louis Whitehead, Sweepstakes Official (Metro Atlanta)

This name is used by a scammer who calls from payphones and claims to be with the magazine sweepstakes promotion currently airing commercials on TV. Claims that the prize patrol will drive right past your house if you do not wire him \$600 to \$6000 to cover taxes.

British Bond Scam (Quebec)

Caller informs you that you have won a life-interest in a bond issued by a British bank. Monthly income received from the bond will come to \$2,000 to \$3,000. Bond will be registered in Canada so that it will not be taxed in the US. You must wire \$2500 to have it registered in your name.

Montreal Barrister/Canadian Lottery Scam (Quebec)

Caller claims to be an official with, or barrister representing, the Canadian Lottery. You have won second place prize in a large sweepstakes, \$300,000 to \$500,000, and must forward \$30,000 to cover Canadian taxes before prize can be released from company escrow or attorney trust account. If you pay, you can receive a "reload" call informing you that you have actually won first place and need to send more.

Customs Officer (Quebec, Ontario)

Caller claims your prize is in his customs warehouse. You must wire \$20,000 to \$30,000 to a "bonded customs agent" to cover customs duties before the prize can be released.

12 Signs an Elderly Person May Have Been Targeted

1. Frequent visits to the person's home from overnight courier services.
2. Phone bills showing a sudden, unexplained increase in long distance calls to Canada, Jamaica.
3. Several colorful mailings in the home re international lotteries.
4. Numerous cheap prizes in the home (e.g., plastic cameras, gold-plated jewelry and watches, vacation certificates, small television sets).
5. Questions about Canada, foreign taxes, wire transfers, "barristers," customs duties, registering bonds overseas.
6. Checking and credit card accounts showing sudden increases in transactions with wire services, numerous unexplained debits or charges from out of state, purchases of money orders or counter checks in large amounts.
7. Wire transfer receipts showing large sums going to metro Atlanta, upstate New York, Florida, California, Canada, the Middle East or the Caribbean.
8. Unexpected or unexplained borrowing patterns.
9. A sudden reluctance to be away from home or to have visitors in the home.
10. Visits to wire transfer outlets by a person who normally does not use such services.
11. Unexpected secretiveness or defensiveness regarding any of the above.
12. Social withdrawal, depression, anxiety which cannot be attributed to other events or conditions, together with any of the above.

Disorder in the Court—An Interview with Virginia Circuit Judge Martin Clark, Author of *The Many Aspects of Mobile Home Living*

By Michael J. Dayton

If North Carolina Superior Court Judge Evers Wheeling were real, he'd be hauled before the Judicial Standards Commission faster than you can say Code of Conduct.

Talk about your balanced diet—he drinks beer for breakfast and smokes dope for lunch. A lover of irony, Judge Wheeling ties his cheating wife, naked, to an exit sign in the town of Climax. Extraordinarily careful when collecting court costs, Judge Wheeling strip-searches an attractive woman who offers a \$25,000 bribe. He wants to make sure she's not wearing a wire.

Is this any way to run a courtroom?

Luckily, Judge Wheeling is the fictional creation of Martin Clark, a real-life Circuit Court judge in Patrick County, Virginia. Clark's debut novel, *The Many Aspects of Mobile Home Living*, recently climbed onto several bestseller lists and was also named a New York Times Notable Book of the Year for 2000.

Called an "illegal thriller" by one reviewer, *Mobile Home Living* follows Judge Wheeling's misadventures from one hangover to the next. A resident of Norton, North Carolina, Judge Wheeling encounters a mysterious car saleswoman, Ruth Esther, who offers the good judge a substantial bribe to let her dim-witted brother off on charges of cocaine possession. With his professional and personal life stuck in a deep, red-clay rut, Judge Wheeling goes on the take and is eventually drawn into a cross-country search for a stolen fortune.

Judge Wheeling recruits a colorful cast of characters for help, including pot-head brother Pascal, who lives the high life and low life in a doublewide, surrounded by "fatalistic dope smokers who've made giving up an art form." We also meet Pauletta, a militant African American attorney from West Virginia who suspects Judge Wheeling may be racist and sexist—and promptly becomes his love interest. Of course there's Ruth Esther, whose tears, which are literally white, have the ability to substantially lower the odds in the Virginia lottery.

Judge Clark is currently wrapping up a second novel that revolves around an art crime. That book has already been sold, he said, and should be available in nine months. But Clark said he has no plans to quit his day job. In a recent interview, Clark talked about how he juggles two careers. He also offered advice for all those lawyers and judges who dream about writing the great American novel.

Dayton: Judge, let's get right to the main character in your book. He's a North Carolina judge who drives drunk.

Clark: Yeah.

Dayton: He smokes dope

Clark: Yep.

Dayton: He ties his wife, naked, to a sign.

Clark: Yep.

Dayton: He takes a bribe to let a criminal defendant go free.

Clark: He does that, but of course he was debating whether or not to do it. But as Jimmy Carter once said, he certainly sinned in his heart.

Dayton: Judge, we've got to ask-is your character based on any real-life judge down here in North Carolina? If so, there are a couple agencies we need to contact.

Clark: (laughs). No, he's not. In fact, when I'm in North Carolina, especially around the Winston-Salem and Greensboro area, where I've done book signings, a number of judges have shown up and reminded me that they are elected. I'm always emphatic that the character is cut from whole cloth. I promise you it's all fiction. I used to practice in North Carolina from time to time because Patrick County is a border community. When I did practice in North Carolina, I found the judiciary very solid and very honest. But people ask me all the time if the character is me.

Dayton: Okay, we'll bite. Is that character based on you?

Clark: All fiction is a little bit autobiographical, and all biography is a little bit fiction.

Dayton: Fair enough, but again, is this character you?

Clark: (laughs). The character is definitely not me. I live in a really small town, Stuart. I think we have about 800 people. My county, Patrick, has about 18,000 people. I've lived here most of my life and people know me and see me every day. They know I'm not impaired or drunk or using drugs or tying my wife to a sign.

Dayton: Given your profession, did you feel uncomfortable casting your main character with those kinds of questionable habits and morals?

Clark: Again, it's fiction. The plot driving the story is often set in the courtroom, but the bigger message in the book is one of faith and equilibrium and redemption. So I don't mind telling a byzantine tale to get to my theme.

Dayton: What role did your experience on the bench play in writing your book?

Clark: There's no particular character or case that is translated verbatim into my book from my work. But what I can do because of my job is get a really good feel for courtroom scenes. If you're a lawyer and you read the book, there's going to be a scene or line or some vibe in there that you've seen. It's easy for me to write that, and it's easy for me to get it correct because that's what I do.

Dayton: In your mind, which is harder, sitting behind the bench or sitting behind the typewriter?

Clark: (laughs). For me, sitting behind the bench is harder because I like writing. It's my hobby. I enjoy it. I like fly fishing, and I like writing. But it took me two decades to get my book published. I got tons of rejection letters -some of them mean-spirited. Some folks disliked the book so much that they made the extra effort not to send a form letter. I occasionally read some of them at my book signings. A lot of lawyers want to be writers, and everywhere I go I'll meet a lawyer who has written a book. I tell them to stick with it. After two decades of struggles, the book I couldn't give

away is a bestseller. I tell people it's persistence, luck, and timing.

Dayton: It's a bestseller?

Clark: Yes, it was on Amazon's fiction and literature best-selling list for 14 weeks. The hardback is in its sixth printing. It was a New York Times notable book for the year 2000. It was a book of the month club selection. It's being translated into French, and has been bought in the UK and the movie rights have been sold. People sometimes ask what it's like to have this happen overnight, but it was two decades for me.

Dayton: Since you've brought it up, tell us which career pays better-judge or author?

Clark: (laughs). I didn't know it would, but I've made a whole lot more money from the book. Of course, you never know how long it will last. And the reason I'll be keeping my day job is that I gave all the money to my church. I didn't think it was going to be but \$5,000 when I promised.

Dayton: That doesn't sound like a promise you can go back on.

Clark: No, that's not a contract you want to cut the margins on.

Dayton: Tell us about your writing schedule. Where and when do you write?

Clark: I write almost exclusively in the mornings. I get up at 6 a.m. and try to write a page a day or two pages a day. I write until 7:30 a.m. and then come into work. I also write on weekends and holidays.

Dayton: Is the writing process similar to the job on the bench?

Clark: There's not much overlap. You need the same kind of verbal and writing skills if you're writing opinions. But being on the bench is very disciplined and structured. You have parameters and statutes and case law and stay within those boundaries. In fiction writing, on the other hand, you hope you don't get stuck in boundaries and cliches. It's more like a freefall. So they're very different.

Dayton: A good lawyer would plot out his or her trial strategy on a big case. Is that how you approach a novel?

Clark: I've never done an outline, but that varies among people. I remember Tom Wolfe saying when he wrote *A Man In Full*, "I got sidetracked and it took eight years because I deviated from the first rule-I didn't do an outline, and I started to meander." But I've also heard people say you should never do an outline when writing fiction, that it will box you in. It's organic and should evolve as you go. So I do not know whether it's advisable to do one. When I sat down to write this book, I had 90 percent of the plot in my head. I think it's advisable to have a beginning and end and middle when you start, otherwise you end up with a mess.

Dayton: Do you need to do any research when you're doing a novel?

Clark: Sure, there's a lot and not in the areas that people might find amusing. I didn't stay drunk for two weeks. For this book I spent a lot of time researching the world of stamps. In my new book, I've spent a lot of time with an FBI woman who heads the art theft division. She has a Ph.D. in art history and a masters degree in museum science. She has been helping with the technical

aspects of the FBI's structure and how they go about solving art crimes.

Dayton: In your job as a judge, you get to pass judgment on folks. How was it when the shoe was on the other foot and you had critical reviews come back to you?

Clark: Some people say they don't read the reviews. But I read every single one. I delighted in the good ones, and the bad ones hurt my feelings. I read a couple reviews that were not favorable, but that I thought were fair. If I had to do over, I might change things a little bit. But I also saw some that were horrible screeds, most notably one from a New York law journal. It's one I carry to book readings. It started out: "Even though it's only June, I can safely say this is easily the worst book of 2000." It ended by suggesting I was a fraud and not a judge. The review was all about me, and not about the book. The review said that anyone with my mindset should not be sitting on the bench. She accused me of being racist. That's preposterous. The book is about racial harmony, with a white Southern judge ending up with a black lawyer who is his intellectual opposite. So many people like that are concerned about what's on your lips, not what's in your heart, and that's an irritating thing to me.

Dayton: Would you say people who come before you in the courtroom know you better if they've read your book?

Clark: I really don't think so. We have a fairly small bar, and most people have known me for a very long time. As the old saying goes, simple consistency is the hobgoblin of a small mind. I try to be real consistent in what I do. That doesn't give me any real insight into me, other than I like to write fiction and have a good imagination.

Michael J. Dayton is a 1995 honors graduate of the North Carolina Central School of Law. He has worked in the publishing industry for 30 years as a writer and editor for various magazines and newspapers and is currently editor-in-chief of North Carolina Lawyers Weekly and South Carolina Lawyers Weekly. He can be reached by e-mail at mdayton@nc.lawyersweekly.com.

Summer Reading List

By Nicki Leone

Summer reading can go several ways. On the one hand, it brings to mind sandy paperbacks stuffed into beach bags along with magazines and suntan lotion. Bookstores and supermarket racks are filled with fast and fun novels that have lots of action, but require little concentration. On the other hand, the summer months are one of the few periods when people actually have time to read, where leisure time is an accepted part of the day. So just as many people look for that weightier novel they have been putting off, or that book that they finally have time to savor.

There is nothing wrong with either direction-there is a place at everyone's literary table for a well rounded meal and a helping of pure brain candy. This summer there are plenty of both to choose from. Consider this column a mild admonition to eat your vegetables before you dive into the junk food.

For Dinner

Dreaming Water

By Gail Tsukiyama

St. martin's Press, \$23.95

The acclaimed author of *Women of Silk* and *The Samurai's Garden* returns with yet another quietly beautiful and moving story that explores her favorite themes of family relationships and strong friendships. *Dreaming Water* is the story of Hana and her mother, Cate. Hana suffers from a rare disease that makes a person age prematurely-at 38 she looks like an 80-year-old woman. Her mother cares for Hana as the disease progresses, while still grieving over the death of her husband, Max. As the two women settle into a quiet existence, they are more aware of the past than the present or their apparently non-existent future.

Crashing into this ordered life comes Laura, a beautiful and successful friend whom Hana had pushed out of her life as she became ill. Laura has asked many times to come and visit with her two daughters, and Hana has always refused. After one final denial, Laura decides to come anyway-and Cate and Hana are suddenly confronted with a new, loud, vivacious, and energetic world.

Tsukiyama writes with courage and compassion about the ties of friendship and family in the face of suffering. She also continues to explore her other favorite theme of multicultural heritage (Cate is an Italian American, and her husband Max was Japanese-American). The result is a deceptively simple story that will make a lasting impression.

Gould's Book of Fish: A Novel in Twelve Fish

By Richard Flanagan,

Grove Press, \$27.50

One of the most unusual and beautiful books to be released this year, *Gould's Book of Fish* is a story based on a historical person, William Buelow Gould, a thief and forger and artist sentenced to life imprisonment on the island of what is now Tasmania. Gould's paintings and drawings of fish and exotic sea creatures were taken by a prison doctor named Lempriere to ensure his place in the Royal Society. But when Lempriere suddenly dies, Gould hides his book of paintings and they are lost, then found, then lost again only to resurface in modern day with Gould's cryptic and

mysterious notes.

Flanagan, whose last novel *The Death of a River Guide* won high acclaim, takes the reader and Gould through a magical and bizarre landscape. It is not your usual historical novel, but more of a romp through the tensions between scientific pursuits and artistic drive.

The production of the book is exquisite as well. Each chapter is written in different color inks, reflecting the materials that Gould had on hand at the time he wrote, and each chapter contains beautiful, full-color reproductions of his taxonomical paintings.

Verbena

By Nanci Kincaid

Algonquin Books of Chapel Hill, \$24.95

A beautiful slice of small town life comes alive in the eyes of Verbena Martin Eckert McHale ("Bena") a spunky young woman who is trying to live down her past in the form of two worthless ex husbands. When her first husband dies in a car wreck, Bena is left with five children, a mortgage, and questions about the girl who was in the car with him, not to mention her discovery of a marijuana farm in the back forty. But Bena is an indomitable spirit, and despite her grief and her troubles, she has an inherent optimism and faith in the future.

That faith seems justified when she meets Lucky McHale, a handsome, funny, and tender guy who seems sent from heaven to heal her heart. Bena doesn't wait, she marries him, only to have Lucky disappear into thin air.

Kincaid, who has received high acclaim for her earlier books *Balls* and *Pretending the Bed is a Raft*, gives us a lovely story full of heartbreak and hope. *Verbena Martin Eckert McHale* is one of those courageous and sassy characters that the reader can't help wishing were their older sister.

For Dessert

Outcast

By Jose LaTour

Perennial Books, \$12.95

Elliot Steil is a down and out English teacher in Havana who has not been endearing himself to the reigning party or the Castro regime. That his father was American makes him suspect, and his lack of party fervor, or complicity in petty party politics has cost him any hope of advancement. He lives in a kind of limbo, until one day a stranger offers him a once-in-a-lifetime chance to escape and flee to Miami. Steil jumps at the opportunity, only to find that his rescuer has another agenda when he is suddenly shoved overboard halfway between Cuba and America.

Incredibly, he survives the ordeal and becomes one refugee among thousands of others in the Cuban population of Miami, where he begins a hunt for his would-be killer, and finds a trail of corruption that leads down the gritty streets and back into the past when his father was stationed in Cuba.

Outcast is an atmospheric novel in the best noir tradition that brings the mysterious world of Cuba and Cuban-American culture into focus in a way that is rarely seen in this country.

City of Bones

By Michael Connelly

Little Brown and Company, \$25.95

Harry Bosch, the dark and haunted LAPD detective of Connelly's earlier novels is back with a vengeance! When a doctor walking his dog in the woods comes across the bones of a child, Harry is assigned to the case. He discovers the bones belong to a 12-year-old boy who went missing over 20 years earlier, and it becomes Bosch's mission in life to see justice done for the forgotten child. It is a cold, cold case, made even colder by a number of inexplicable bureaucratic roadblocks, and as his investigation takes him closer and closer to a few political heavyweights, he finds himself in a professional crises. The powers that be would prefer that he let sleeping bones lie, but Bosch's own troubled past won't let him abandon the case.

Connelly has a gift for writing his major and minor characters equally well, which makes for a well-rounded and compelling story. *City of Bones* is also rife with forensic detail and investigative procedure, which he uses with a deft hand to build the suspense without ever slowing down the pace of the story. The book is yet another example of why Michael Connelly has won (and deserved to win) nearly every major literary award offered for crime fiction.

The Interrogation

By Thomas Cook

Bantam Books, \$23.95

Thomas Cook has been called "perhaps the best American writer of crime fiction currently practicing" by the Droid Review, and his latest novel, *The Interrogation*, is another example of why people think so. In this latest edge-of-your-seat suspense thriller, Albert Jay Smalls stands accused of a horrific crime, but there is no evidence linking him to the scene, and no witnesses placing him in the area. The cops are sure he is hiding something, but in less than 12 hours, they will be forced to release him despite their certainty that he has killed and will kill again. They have one final interrogation in which to pull some information out of Smalls that will link him to the crime and give them an excuse to keep him off the streets.

It is a search that will reach into the very darkest corners of the mind of Albert Jay Smalls, and uncover secrets buried in a desolate seaside town. As the clock ticks, three different policemen continue a desperate search to discover the truth of what really happened one rainy autumn afternoon in 1952.

It is a story where the boundaries between pursuer and prey become blurred, where "truth" is a relative entity, and where no one is completely guilty-or innocent. By deliberately limiting the story to a 12 hour time period, Cook has infused the narrative with a kind of breathless urgency that is only occasionally relieved by the odd flashback. Don't start this one late at night, or you won't get any sleep.

Nicki Leone is the book buyer and manager of Bristol Books, an independent bookstore in Wilmington, NC. Her book reviews can be read in Encore Magazine, Hear Say, and Capturing the Spirit of the Carolinas. She is also the on-air book commentator for WHQR Public Radio at 91.3 FM in Southeastern North Carolina. Her commentaries and book reviews can be read on the Bristol Books website at www.bristolbooks.com.

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

By Thomas P. Davis and Thomas L. Fowler

The North Carolina Supreme Court Library is open for public use weekdays from 8:30 a.m. to 5:00 p.m., except on state holidays. The Library is located on the fifth floor of the Justice Building, 2 East Morgan Street, Raleigh, North Carolina.

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

Hugh Stevens, *New Legislation Resolves Court Access Dilemma*, 7 THE CONSTITUTIONALIST 1 (Jan. 2002): New legislation, codified at N.C.G.S. sec. 1-72.1, has created a "special procedure for asserting a constitutional right of access to a civil court proceeding or record in North Carolina." "This new procedure is intended to solve a problem that was created by the North Carolina Supreme Court's decision in *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, petition for rehearing denied, 351 N.C. 123 (1999)." The author feels that "judges and lawyers would have been better served by a simple amendment to Rule 24," but that "an imperfect procedure is infinitely preferable to none"

FTC Letter Challenges N.C. Closing Practice, 23 REAL PROPERTY 1 (Apr. 2002): The Ethics Committee of the NC State Bar has been asked by the Federal Trade Commission and the US Department of Justice "to reconsider two recent opinions that govern the role of attorneys in residential real estate closings." The FTC/DOJ has objected that 2001 FEO 4 and 2001 FEO 8 may increase costs and inconvenience to the consumer, and has voiced additional concerns about how 2001 FEO 4 may harm consumers who seek to refinance their homes. "NC State Bar President Jerry Parnell has appointed an ad hoc committee to consider the concerns outlined in the letter."

Ann McColl, Leandro: Constitutional Adequacy in Education and Standards-Based Reforms, 32 SCH. L. BULL. 1 (Summer 2001): The article examines the three superior court rulings that give the first concrete dimensions to the state constitutional right to a "sound basic education" as recognized in *Leandro v. State*, 346 N.C. 336 (1997).

Hank Patterson & R. James Lore, *Ongoing Disability Compensation Following Maximum Medical Improvement*, 15 COURSE & SCOPE 1 (Mar. 2002): The authors suggest that revisiting *Whitley v. Columbia Lumber Manufacturing Co.*, 318 N.C. 89 (1986), as was suggested in the prior issue of this newsletter, is an unnecessary and inappropriate response to conflicting decisions regarding the consequences of an injured employee's reaching maximum medical improvement. They point out that *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200 (1996), cannot be reconciled with *Saums v. Raleigh Community Hospital*, 346 N.C. 760 (1997) or *Saunders v. Edenton Ob/Gyn Center*, 352 N.C. 136 (2000), and that "Franklin also conflicts with provisions of the Workers' Compensation Act as amended by the Reform Act." They conclude that "[i]nstead of reversing *Whitley* . . . the courts should reject *Franklin*. An alternative approach would be to construe 'maximum medical improvement' to include a vocational component"

Joe Wall, "Assessable Costs' in Civil Actions," 23 CAMPBELL LAW OBSERVER 1 (Jan. 2002): In recent opinions, the "Court of Appeals has been more receptive to efforts to expand the list of assessable costs by judicial action. The court's decision in *Lewis v. Setty*, 140 N.C. App. 536 (2000) is illustrative of the court's further departure from the dictates of Article 7A and Supreme Court precedent."

Hank Van Hoy, *The Judicial Branch: The Impending Financial Crisis*, NORTH CAROLINA LAWYER (Mar./Apr. 2002): "These men [Chief Justice I. Beverly Lake, Judge Robert Hobgood,

Chief Justice Burley Mitchell, Judge Tom Ross] are lawyers of outstanding reputation, known for their clear thinking and careful analysis. They are not burdened by any reputation for exaggeration or overstatement. They are democrats and republicans with different perspectives and points of view, but they are in complete accord on this issue. Therefore, I suggest we take it as fact that the crisis is real and the dire consequences they forecast are likely to occur if the General Assembly does not fulfill its obligation to adequately fund the judicial branch. . . . I submit every lawyer in this state has an obligation to become knowledgeable about this crisis and a solemn duty to contact directly their legislators"

Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67 (2001): While canvassing troublesome areas governing permissible closing argument, the author discusses "the use of inferences, exhibits, demonstrative evidence, jury instructions, and analogies to underscore that proper argument surrounds admissible evidence." The article cites *State v. Braxton*, 352 N.C. 158 (2000), and a few older North Carolina decisions, but apparently went to press before the filing of *State v. Jones*, 355 N.C. 117 (2002), and *State v. Mann*, No. 362A97 (N.C. Apr. 5, 2002).

Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate after Williams v. Taylor?*, 2001 WISC. L. REV. 1493 (2001): In light of the 1996 Antiterrorism and Effective Death Penalty Act, and *Williams v. Taylor*, 529 U.S. 362 (2000), this article explores how federal habeas courts should defer to state courts on pure issues of federal law. "In applying the new standard, must the federal habeas court review the state court's actual legal analysis; or must it review only the state court's ultimate conclusion that the petitioner is not entitled to relief, regardless of how the state court interpreted and applied federal law in reaching that conclusion?" The author argues that section 2254(d)(1) "bars federal habeas relief only when the actual reasoning articulated by the state court passes muster under the admittedly deferential standard of review."

Joelle Anne Moreno, *Beyond the Polemic Against Junk Science: Navigating the Oceans that Divide Science and Law with Justice Breyer at the Helm*, 81 B.U. L. REV. 1033 (2001): "This Article offers a specific response to Justice Breyer's charge that judges 'must aim for decisions that, roughly speaking, approximately reflect the scientific 'state of the art.'" The author presents "a new interpretation of *Kumho* positing that the *Daubert* admissibility test has been significantly altered by Justice Breyer to place the exploration of scientific validity squarely in the context of a relevance inquiry."

Special Issue on Problem Solving Courts, 41 JUDGES' JOURNAL (Winter 2002): This special issue includes short articles on drug courts, teen courts, and a "reentry court" for parolees, as well as essays on a community justice center, and a public defender's view of problem solving courts.

Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002): "The legislative and judicial branches thus appear to be locked in an interpretive battle. The legislature has a clear incentive to value ambiguity because it facilitates compromise. The judiciary has crafted an array of interpretive rules designed to extract consistent meaning from intentionally ambiguous statutory utterances. There is debate, however, over the strength of the judiciary's incentive to apply rigorously its own interpretive technology." . . . "To the extent that the legislative and judicial branches share a de facto preference for some level of ambiguity, it follows that careful efforts to craft and rigorously apply consistent principles of statutory interpretation . . . are doomed to failure if they impart too much precision. . . . The broadest implication of this view is that much of the debate over statutory construction may be intellectually interesting but pragmatically irrelevant"

Paul D. Carrington & H. Jefferson Powell, *The Right to Self-Government After Bush v. Gore*, DUKE UNIV. SCHOOL OF LAW, PUBLIC LAW & LEGAL THEORY WORKING PAPER SERIES, No. 26, Dec. 2001: This article is published electronically on the Legal Electronic Document Archive at <http://www.law.duke.edu/pub/selfgov/>. This form of publication avoids the long delay associated with law review distribution, and allows for reader comment on the article and the topic.

John Steele, *Attorney Internet Ethics*, 22 CAL. LAWYER 51 (April 2002): What are the potential abuses and problems of internet-based legal practice? This short article quickly canvasses the field, focusing lightly on the issues of attorney-client relationship, limited representations, conflicts of interest, confidentiality, multi-jurisdictional practice, advertising, and referrals and fee splitting. Although written for the California practitioner, it points the reader to the ABA Model Rules of Professional Conduct, as well as to broader coverage by Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).

Alex Glashausser, *Citation and Representation*, 55 VAND. L. REV. 59 (2002): "A war is raging in the legal citation field. Arbitrary changes in the Bluebook from one edition to the next have incited a populist rebellion in the form of the Association of Legal Writing Directors' ALWD Citation Manual. This Article traces the causes of the conflict and assesses its likely outcomes."

Kenneth F. Ripple, *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 N.Y.U. ANN. SURV. AMER. L. 429 (2000): This federal appellate judge and professor of law at Notre Dame "examines the various roles that law reviews play traditionally in the intellectual life of a judge and suggests, with respect to each, certain improvements in the judge-law review relationship designed both to enhance the effectiveness of the law review as an intellectual companion and to avoid ethical pitfalls that can corrupt the intellectual integrity of both the judge and the law review."

II. Jurisprudence Beyond Our Borders 2

People v. Neville, 737 N.Y.S.2d 251 (Just. Ct. 2002): New York's "Cell Phone Law" provides that "no person shall operate a motor vehicle upon a public highway using a mobile telephone to engage in a call while such vehicle is in motion." The court held that the statute was not vague or overbroad, and that the law was reasonable in its intentions. The court noted: "From the mid 1990's onward, the ubiquitous presence of the wireless telephone, or "cell phone" has spread throughout the country, and it appears most visible in the various metropolitan areas. With roughly 80 million cell phone users, there has been an increase in the number of motor vehicle accidents, some fatal, that resulted from the use of these hand-held phones, where "the operator maintains less than full-time attention to the operation of said motor vehicle." ... As a general rule, the police powers of the government concern the delicate balancing act between the regulating authority of the state and the rights of the individuals whose freedoms as a result may be somewhat curtailed. ... It is the opinion of this court that a law prohibiting the use of hand held cell phones satisfies the state's interest in protecting the health, safety, and welfare of its citizens and a proper use of its police power. The legislative intent sets forth the need to protect its citizens from the numerous motor vehicle accidents and serious physical injuries that result from the use of hand held cell phones."

Sanders v. Acclaim Entertainment, Inc., 188 F. Supp 2d. 1264 (D. Colo. 2002): Survivors of teacher who was shot and killed in the Columbine school shooting spree sued video game makers and movie producers and distributors alleging that violent movie and video games caused the shootings. In the aftermath of the Columbine massacre, it was learned, plaintiffs' alleged, that Harris and Klebold were avid, fanatical, and excessive consumers of violent video games and consumers of movies containing obscenity, pornography, sexual violence, and/or violence. One movie the pair viewed was "The Basketball Diaries" in which a student massacres his classmates

with a shotgun. According to Plaintiffs, "but for the actions of the Video Game Defendants and the Movie Defendants, in conjunction with the acts of the other defendants herein, the multiple killings at Columbine High School would not have occurred." The trial court dismissed the action holding that: (1) defendants owed no duty of care to shooting spree victim; (2) students' intentional violent acts were not foreseeable and were the superseding cause of teacher's death; and (3) movie and games were protected under the First Amendment. The court noted: "[T]he Video Game and Movie Defendants ... had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers. ... Nor, for that matter, did the Video Game and Movie Defendants have any reason to believe that a shooting spree was a likely or probable consequence of exposure to their movie or video games. At most, based on Plaintiffs' allegations that children who witness acts of violence and/or who are interactively involved with creating violence or violent images often act more violently themselves and sometimes recreate the violence, ... these Defendants might have speculated that their motion picture or video games had the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals. A speculative possibility, however, is not enough to create a legal duty." And further: "Given the First Amendment values at stake, the magnitude of the burden that Plaintiffs seek to impose on the Video Game and Movie Defendants is daunting. Furthermore, the practical consequences of such liability are unworkable. Plaintiffs would essentially obligate these Defendants, indeed all speakers, to anticipate and prevent the idiosyncratic, violent reactions of unidentified, vulnerable individuals to their creative works. ... The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally fragile" individual would be to refrain from selling it at all."

Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007 (9th Cir. 2002): Plaintiff filed an action to prevent Costa Rican defendant from using certain trademarks on an internet web site. Plaintiff's use of conventional methods of service on defendant were unsuccessful because defendant's web site gave only an e-mail address. Plaintiff moved for alternate service of process under Rule 4(f)(3), which authorizes service "by other means not prohibited by international agreement as may be directed by the court." The trial court authorized service of process by e-mail. The Ninth Circuit Court of Appeals upheld the trial court, holding that such e-mail process service violated neither the Federal Rules of Civil Procedure nor the US Constitution. The court noted that although federal plaintiffs may not use e-mail service as a routine matter, e-mail was a means "reasonably calculated to apprise [defendant] of the pendency of the lawsuit, and the Constitution requires nothing more."

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002): State prisoner, convicted of rape, brought a Section 1983 action against state, asserting a due process right of access to DNA evidence. The U.S. District Court granted summary judgment for prisoner, and state appealed. The Court of Appeals held that: (1) a Section 1983 action was not the proper manner for prisoner to present his claim of a fundamental due process right to prove his innocence by retesting the DNA evidence using technology that was unavailable at the time of his trial; (2) his sole remedy was to petition for a writ of habeas corpus; (3) he had no due process right, under *Brady v. Maryland*, of access to DNA evidence that he contended might provide a basis for him to prove his innocence; and (4) even considered as a petition for a writ of habeas corpus, the action had to be dismissed as a successive petition brought without leave of court. The court noted: "Harvey would have this court fashion a substantive right to post-conviction DNA testing out of whole cloth or the vague contours of the Due Process Clause. We are asked to declare a general constitutional right for every inmate to continually challenge a valid conviction based on whatever technological advances may have occurred since his conviction became final. ... [W]e acknowledge that finality is not a value that trumps all others. In some circumstances newly discovered evidence may warrant a new trial. ... But there is no newly discovered evidence in this case. Instead, Harvey seeks to subject existing biological evidence to new DNA testing. This evidence was already subjected to DNA testing using the best technology available at the time Harvey's conviction

became final. Establishing a constitutional due process right under Section 1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state. This we cannot do. ... In holding that Harvey has failed to state a claim under Section 1983, we do not declare that criminal defendants should not be allowed to avail themselves of advances in technology. Rather, our decision reflects the core democratic ideal that if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right. Permitting Harvey's Section 1983 claim to proceed would improperly short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right."

Jones v. State, 64 S.W.3d 728 (Ark. 2002): A juvenile was adjudicated delinquent for the offense of terroristic threatening. This charge was based on the juvenile having written a rap song which he gave to a classmate (Arnold) in which he threatened to kill the classmate and her family. On appeal, the Supreme Court discussed the "fighting words" and the "true threat" exceptions to the First Amendment's protection for expressive speech. The Court held that the "fighting words" exception did not apply to the rap song, but that, as a matter of first impression, juvenile's rap song constituted a "true threat" to the classmate, and so was not entitled to First Amendment protections. The Court stated that the test was whether a reasonable person in the victim's position would have taken the rap song as a true threat. Applying this test, the Court noted that: Arnold's reaction to Jones's letter was immediate and unequivocal-within minutes of receiving it, she asked permission to leave the classroom and proceeded to the principal's office where she reported the incident. She was intensely frightened and upset, and she told the police officer that she believed Jones was capable of carrying out the threat because he had a criminal record and knew where her family lived. Jones' threat was not conditional. The lyrics which Jones composed indicated that he was mad at Arnold, and he placed no conditions on his intended conduct. Jones communicated the threat directly to Arnold by handing the note to her.

Endnotes

1. A more comprehensive list of recent articles of interest is also accessible on the world wide web from the homepage of the North Carolina Supreme Court Library, at <http://www.aoc.state.nc.us/www/copyright/library/libpers.htm>
2. These are recent cases from other jurisdictions that address issues of possible interest to NC attorneys.