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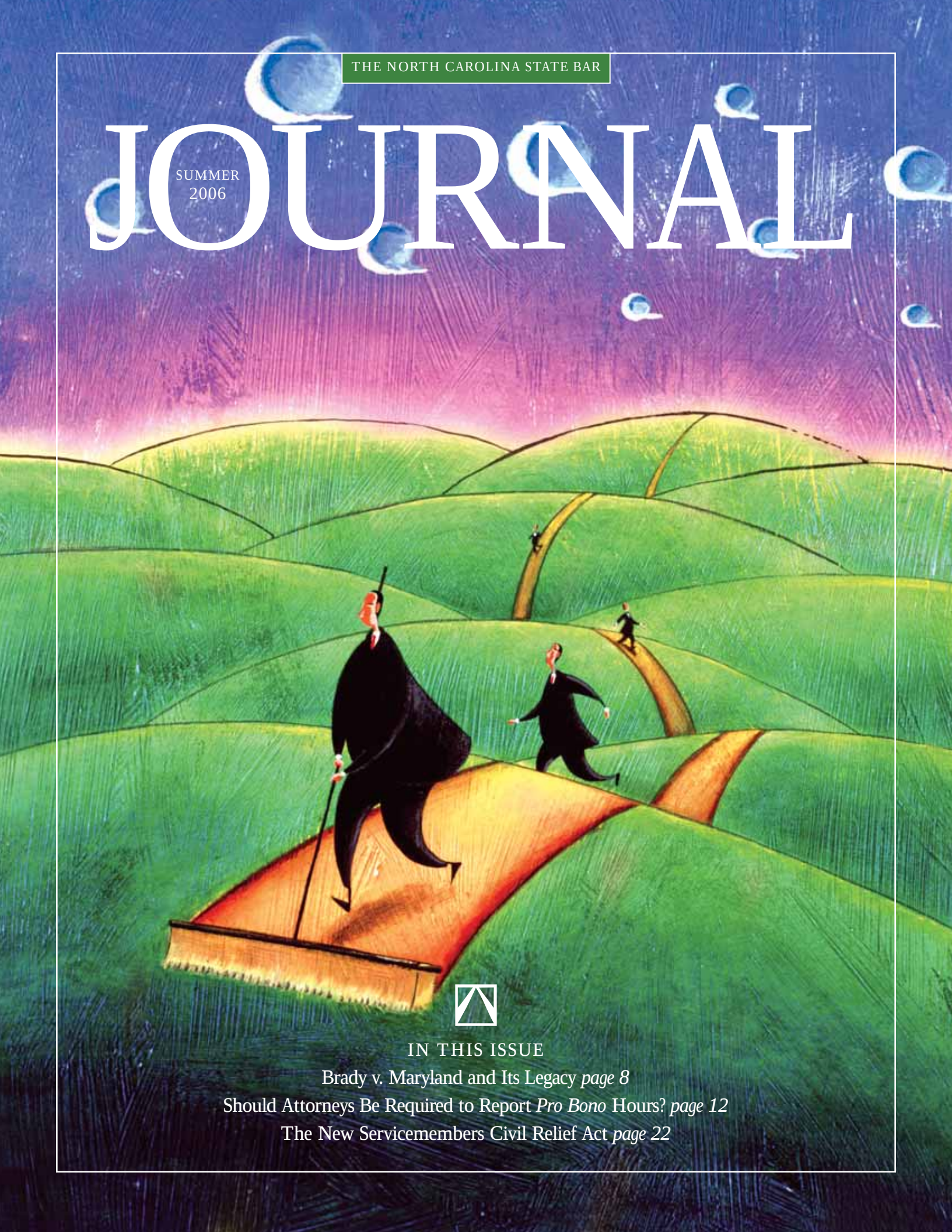
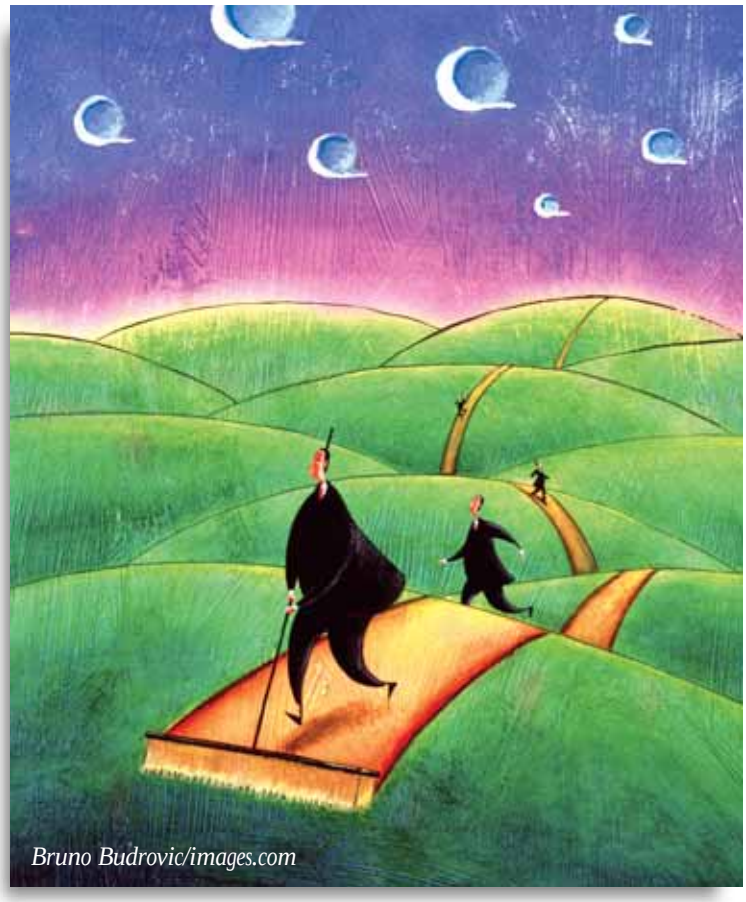


IN THIS ISSUE

Brady v. Maryland and Its Legacy—*Forging a Path for Disclosure*

By Maitri "Mike" Klinkosum and Brad Bannon

John Brady was 25 years old when he was arrested and charged with first-degree murder. He had bounced around from job to job and engaged in an affair with another man's wife, Nancy Boblit Magowan, and was dealing with the fact that she was pregnant with his child. On June 22, 1958, Brady gave Nancy a post-dated check for $35,000 and told her he would have that amount of money within the next two weeks.[1]



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Along with Nancy's brother, Donald Boblit, Brady and Nancy conspired to rob a bank. To pull off the robbery and make a clean getaway, the two decided, at Brady's suggestion, to steal a car from a mutual friend named William Brooks. Late on June 27, 1958, Brady and Boblit placed a log across the road near Brooks' home and waited for him to come home. When Brooks drove up to the log, he got out of the car to move it. At that point, either Brady or Boblit hit him over the head with a shotgun, placed him in the backseat, and took his wallet. Brady then drove to a secluded field where he and Boblit walked Brooks to a clearing at

the edge of the woods and one of the men strangled Brooks to death with a shirt.[2]

After their arrests, Brady and Boblit both gave several statements to law enforcement in which the facts changed from one statement to the next. However, Brady consistently denied the actual killing of Brooks and maintained that Boblit had strangled Brooks with a shirt. Boblit also gave a series of statements to the police and, in all but one of them, he claimed that Brady was the actual killer of Brooks.[3]

The key confession at the heart of *Brady v. Maryland*, was Boblit's fifth statement, which was taken on July 9, 1958. In that statement, Boblit admitted that he had hit Brooks on the head with a shotgun. He also stated that after they got back into the car, he (Boblit) had planned to shoot Brooks, but that Brady suggested strangulation instead. Boblit admitted that he strangled Brooks and that he and Brady had carried the body into the woods.[4]

The key issue in the prosecution would turn on the identity of the individual who actually strangled Brooks. While that question had little, if anything, to do with whether Brady and Boblit were guilty of first-degree murder, the question did have a potential impact on whether Brady or Boblit, or both, deserved the death penalty.[5]

Prior to Brady's trial, Brady's lawyer had asked the prosecutor for any confessions that either men had made. The prosecutor turned over all of Boblit's statements except the July 9, 1958 statement in which Boblit confessed to being the actual killer. Both Brady and Boblit were convicted, in separate trials, of first-degree murder and sentenced to death.[6]

A new lawyer for Brady read the transcript of Boblit's trial (during which the prosecution used the July 9, 1958 statement to convict Boblit), discovered the existence of the July 9, 1958 statement, which Brady's trial lawyer had never received, and filed a post-conviction motion requesting a new trial based on recently discovered evidence.[7] The trial court denied the motion, but the Maryland Court of Appeals reversed the decision and stated "the suppression or withholding by the state of material evidence exculpatory to an accused is a violation of due process."[8] The Maryland Court of Appeals refused to order a new trial on the issue of guilt, because the new evidence did not raise doubt as to that issue, but the court did order a new trial on the issue of whether Brady should receive the death penalty.[9]

After the Maryland Court of Appeals issued its ruling, Brady petitioned for *certiorari* to the United States Supreme Court. He sought a new trial on both guilt and punishment. The Supreme Court affirmed the ruling of the Maryland Court of Appeals and held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[10]

In so ruling, both the Maryland Court of Appeals and the United States Supreme Court found that the Due Process Clause of the 14th Amendment to the United States Constitution requires disclosure of exculpatory evidence. In so finding, the courts highlighted one of the touchstone constitutional principles which underlies our system of criminal justice in the United States: when the government seeks to deprive one of life or liberty, due process requires the prosecution, the very adversary which seeks to punish the accused, to provide the accused with the tools to defend themselves.

The History of *Brady v. Maryland*

To understand the seminal importance of *Brady v. Maryland*, one must understand the nature of exculpatory evidence and the Due Process Clause of the 14th Amendment to the United States Constitution. The Due Process Clause states that "No State…shall deprive any person of life, liberty, or property without due process of law."[11] In *Brady*, the Supreme Court invoked the Due Process Clause to hold "that the suppression of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[12]

Rendering its *Brady* decision in 1963, the Court relied on legal precedent dating back to 1935, tracing the prosecution's affirmative duty to disclose evidence favorable to a defendant back to early 20th century prohibitions against misrepresentation to the courts.[13] The Court defined exculpatory evidence as any evidence favorable to a defendant *and* material to the question of the defendant's guilt or the determination of a guilty defendant's punishment.[14] While the Court did not define "materiality" in its *Brady* decision, it would later hold that exculpatory evidence is "material" if there is a "reasonable probability" that disclosing it would have changed the outcome of the proceeding. In other words, a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome" of the trial.[15]

Since *Brady*, exculpatory evidence has, in fact, come to be known and referenced by criminal law practitioners as "*Brady* material." Also during that time, the United States Supreme Court continued to expand and clarify the definition of *Brady* material and the scope of the prosecution's duty to disclose it. For example, under the original holding in *Brady*,[16] the defense was still required to make specific pre-trial requests to prosecutors for exculpatory evidence. But then, in 1976, *United States v. Agurs*[17] reached the Supreme Court.

Linda Agurs was indicted for second-degree murder in the stabbing death of James Sewell, which occurred at a Northwest Washington, DC, motel on the afternoon of September 24, 1971. The prosecution's case centered on the allegation that Agurs was a prostitute, whom Sewell had encountered, and that the two went to the motel during the course of their encounter. During the trial, a motel employee testified that he had seen Sewell wearing a Bowie knife in a sheath when he and Agurs purchased the hotel room.[18]

The motel employee further testified that, a while later, he and two other employees heard a woman's screams from the room occupied by Agurs and Sewell. The employees forced their way into the room and found Agurs and Sewell struggling on the bed with Sewell's Bowie knife.[19] The prosecution further alleged, under the prostitution theory, that while Sewell was down the hall in the bathroom, Agurs rummaged through his clothes to steal more money, and Sewell caught her upon his return to the room. The prosecution alleged that when Sewell caught Agurs going through his clothes, Agurs grabbed the Bowie knife (which was among the clothes) and stabbed Sewell to death.[20]

Agurs unsuccessfully argued at trial that she acted in self-defense. About a month after she was convicted and sentenced, her attorney discovered that Sewell had a prior criminal record for assault and carrying dangerous weapons. The importance of that information was simple: Sewell's prior record evidenced his prior violent conduct, which could have helped Agurs support her defense theory of acting in self-defense.[21]

The prosecution had not disclosed

Sewell's prior offenses to Agurs' defense attorney. During the course of the post-conviction litigation concerning the non-disclosed evidence, the government argued that because the defense attorney had not specifically requested Sewell's prior record, the government was under no obligation to disclose it.[22]

The United States Supreme Court disagreed and held that, for *Brady* purposes, a defendant's failure to make a request of the government for favorable evidence does not relieve the government of the obligation to turn over exculpatory evidence. In other words, the prosecution must disclose exculpatory evidence *regardless* of whether the defense has requested it.

Impeachment Material Is Exculpatory Evidence

Another case that forged the path of current *Brady* jurisprudence was *Giglio v. United States*,[23] wherein the United States Supreme Court began to treat impeachment material as the legal equivalent of exculpatory material. "Impeachment evidence" is, of course, evidence that can be "used to undermine a witness's credibility."[24] In *Giglio*, the Supreme Court recognized the value of impeachment material to criminal defendants and to their juries when performing what is often the central role of a jury in a criminal trial: assessing the credibility of government witnesses.

In *Giglio*, the prosecution failed to disclose a promise for leniency made to a key prosecution witness in exchange for testimony against the defendant. The prosecution had promised the witness he would not be prosecuted for the same charge if he testified against Giglio before the grand jury and at trial. The Supreme Court held, as it had in *Napue v. Illinois*,[25] that when the reliability of a given witness may be determinative of guilt or innocence, the nondisclosure of evidence affecting the credibility of a witness falls within the *Brady* doctrine.[26] In so holding, the Court clarified and broadened the *Brady*[27] definition of "exculpatory evidence."

In *United States v. Bagley*,[28] the United States Supreme Court continued to legally equate impeachment evidence with exculpatory evidence for *Brady* purposes. In *Bagley*, the prosecution had failed to disclose impeachment evidence related to contracts between the prosecution and its trial witnesses whereby the government paid money to those witnesses based upon the information they provided to the prosecution.

In *Bagley*, the Supreme Court considered and rejected the reasoning of the lower court, which had drawn a distinction between impeachment evidence and exculpatory evidence and held that impeachment evidence was more important than exculpatory evidence. Citing *Giglio*,[29] the Supreme Court specifically "rejected any such distinction between impeachment evidence and exculpatory evidence" and reiterated that, when the reliability of a given witness may be determinative of guilt or innocence, the nondisclosure of evidence affecting the credibility of that witness falls within the *Brady* rules.[30]

The significance of *Bagley* in *Brady* jurisprudence is that, while *Giglio* found error in failing to disclose a *specific* type of *impeachment* evidence, *Bagley* generally and definitively held that *there is no distinction between "impeachment evidence" and "exculpatory evidence"* for *Brady* purposes.[31] Both types of evidence have equal footing within the law. One type is no more or less important than the other, and they are legally synonymous for purposes of defining the prosecution's duty to disclose *Brady* material and analyzing its failure to do so.

Prosecutors Must Review Their Evidence for *Brady* Material

The rejection of any distinction between impeachment evidence and exculpatory evidence was further solidified in 1995 in *Kyles v. Whitley*.[32] In *Kyles*, the prosecution failed to turn over evidence related to multiple witness descriptions of the suspect which were inconsistent with one another, tape recordings and written statements of an informant which were inconsistent, a computer printout of automobile license numbers which indicated the defendant's car was not at the location where the informant had told police it was at the time of the crime, and evidence linking the informant to other crimes.

While reinforcing the *Bagley* holding, which "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes,"[33] the Court went further and found that the 14th Amendment[34] places a duty on the prosecutors "to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."[35]

Thus, *Kyles* expanded *Giglio's* focus on the prosecutor as "spokesman for the government"[36] and specifically imposed an affirmative duty on that spokesman to obtain and disclose all *Brady* material in the possession of anyone acting on behalf of the prosecution. In other words, the failure of prosecutors to provide *Brady* material to criminal defendants cannot be excused by the failure of prosecutors to learn or know about it, and that is true without regard to whether the ignorance was in good faith or bad faith. Thus, whether the prosecution's failure to disclose *Brady* material was based on the failure of exculpatory information in law enforcement files to make its way into the prosecution's office file, or simply based on a prosecutor's failure to read those entire files, *Kyles* held that it was *Brady* error nonetheless.[37]

The Systemic Nature of *Brady*-Related Prosecutorial Misconduct

The overriding problem in all *Brady*-related cases is prosecutorial government's failure to disclose evidence favorable to the criminal defendant, whether "impeachment" or "exculpatory," and it is a problem that continues in jurisdictions across the United States. In fact, the systemic nature of the problem is illustrated by the fact that the United States Supreme Court, which grants review in only the rarest of cases in which a petition for writ of certioriari is filed, has granted certiorari and rendered opinions in cases centering upon withheld *Brady* material in each decade following the year *Brady* was decided, 1963.

Brady violations are, by definition, violations of an individual citizen's 14th Amendment right to due process of law: the backbone of American criminal justice. Unfortunately, those violations have been so pervasive within the American criminal justice system that, as recently as February 2004, the United States Supreme Court once again found itself considering yet another case involving evidence withheld from the defense which would have impeached a prosecution witness. Addressing the *Brady* violation in that case, the Court eloquently summarized the issue in *Banks v. Dretke*:

> A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily we presume that public officials have properly discharged their official duties." We have several times under-

"Regardless of the facts of a particular case, when a Brady issue arrises, it encompasses the guiding precept of our system of criminal justice: the protection of the accused but presumed innocent citizen."

scored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations to refrain from improper methods to secure a conviction…plainly resting upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. The prudence of the careful prosecutor should not be discouraged.[38]

Of course, most prosecutors well deserve the "ordinary presumption" that they properly discharge the many legal and ethical duties of criminal prosecution, including the duty to disclose *Brady* material. Thus, it is important to note that the goal of educating the legal community and general public about *Brady*-related issues and violations is not to gratuitously attack a class of dedicated public servants. Indeed, as the United States Supreme Court stated in *Brady*,[39] the point of due process is not to punish the misdeeds of offending prosecutors, but to ensure that defendants have fair trials.

Brady did not create a "loophole" in 1963 that allows criminal defendants to walk free, and the cases that have, in the 40 years since, consistently reaffirmed its holding and further defined its scope, did not merely serve to widen a loophole. At most, *Brady* and its progeny require that convicted defendants be granted new, *fair* trials when exculpatory evidence was withheld from them before their previous, *unfair* trials.[40] Notably, in the *Brady* case itself, there was no chance that John Brady would walk free. The most he could hope for was to avoid the death penalty and receive a life sentence.[41] While Brady was not innocent of murder, he may well have been innocent of the degree of murder that called for the ultimate punishment of death. *Brady* simply held that the prosecution could not withhold evidence that might assist the jury in making either of those determinations.[42]

Regardless of the facts of a particular case, when a *Brady* issue arises, it encompasses the guiding precept of our system of criminal justice: the protection of the accused but presumed innocent citizen. "Innocence…is not a technicality to the criminal process. It is the main touchstone of the criminal process. The justice system must not only strive to convict the guilty, but also to acquit the innocent."[43] ■

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Brad Bannon is a member of the law firm Cheshire Parker Schneider Bryan & Vitale in Raleigh. He practices criminal defense in state and federal court and is on the Executive Committee of the Criminal Defense Section of the North Carolina Academy of Trial Lawyers. Bannon received his BA from the University of South Carolina in 1993 and his JD from Campbell University in 1997. Upon the nomination of the State Bar Council, he was appointed by Governor Easley last fall to serve a four-year term on the North Carolina Inmate Grievance Resolution Board.

Endnotes

1. Bibas, Stephanos, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence*, Criminal Procedure Stories, Carol S. Steiker, ed., Foundation Press (2006)
2. *Ibid*
3. *Ibid*
4. *Ibid*
5. *Ibid*
6. *Ibid*
7. *Ibid*
8. *Ibid*, citing 174 A.2d 167, 169 (Md. 1961)
9. *Ibid*
10. *Ibid*
11. US Constitution Amendment 14
12. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).
13. *Mooney v. Holohan*, 294 U.S. 103, 112, 79 L.Ed. 791, 55 S.Ct. 340 (1935); *Pyle v. Kansas*, 317 U.S. 213, 215-216, 87 L.Ed. 214, 63 S.Ct. 177 (1942); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).
14. *Brady v. Maryland*
15. *US v. Bagley*, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985) (*quoting Strickland v. Washington*, 466 U.S. 668, 694 (1984)
16. *Brady v. Maryland*
17. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976)
18. *Ibid*
19. *Ibid*
20. *Ibid*
21. *Ibid*
22. *Ibid*
23. *Giglio v. US*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)
24. *Black's Law Dictionary* (8th ed. 2004).
25. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)
26. *Giglio v. US*
27. *Brady v. Maryland*
28. *US v. Bagley*
29. *Giglio v. US*
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31. *US v. Bagley*
32. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)
33. *US v. Bagley*
34. United States Constitution, 14th Amendment
35. *Kyles v. Whitley*
36. *Giglio v. US*
37. *Ibid*
38. *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (citations omitted).
39. *Brady v. Maryland*
40. Bibas, Stephanos, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence*, Criminal Procedure Stories, Carol S. Steiker, ed., Foundation Press (2006)
41. *Ibid*
42. *Ibid*
43. *Ibid*

Should Attorneys Be Required to Report *Pro Bono* Hours?

By Alan W. Duncan, Reid C. "Cal" Adams Jr., and Murray C. "Tripp" Greason III

An issue that the council of the North Carolina State Bar may ultimatly be asked to consider is whether North Carolina's lawyers should be required to report annually the amount of *pro bono* service they have provided. Below are two points of view concerning this issue.

Against Mandatory Reporting

By Alan Duncan

Although Atticus Finch's most famous work is his appointed representation of Tom Robinson in the movie *To Kill a Mockingbird*, his little-discussed representation of Walter Cunningham is deserving of greater consideration. In the earliest scenes of the movie, we bear witness to Walter uncomfortably "paying" Atticus for his legal services in hickory nuts. After Walter leaves, Atticus asks his daughter, Scout, not to call him the next time Walter brings something for Atticus because it embarrasses Walter to be thanked. Scout tells us later that the Cunninghams "won't take nothin' from nobody." Nonetheless, we expect that Atticus' legal services will never be fully paid in hickory nuts. But, it probably was not money or hickory nuts that motivated Atticus to work for Walter, or for Tom Robinson. And, it most definitely was not the possibility of billing some *pro bono* hours that he could report to the State Bar that motivated Atticus. No, it was a much higher calling to which Atticus responded—to do the right thing.

The first definition of "*pro bono*" offered by *Black Law Dictionary* (6th ed.) is "for the good". *Pro bono* work—work for the good—exemplifies in many ways that noble character that distinguishes the law as a professional calling rather than a mere job or even a career. Noble character is not something discrete and finite to be checked-off a list of things to do. Rather, it is an ongoing, daily obligation of professional conduct. The value of *pro bono* work is not readily measurable in hours nor appropriately tracked through a mandatory reporting requirement. Instead of appropriately recognizing the nobility of *pro bono* work, such a reporting requirement cheapens it.

The reporting requirement will do little to

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advance our desire to encourage and develop a greater sense of professionalism in North Carolina lawyers. Certainly, it is possible that lawyers may be motivated by such a requirement to work a greater number of hours free of charge. Lawyers are on the whole a goal-oriented, over-achieving lot. If faced with a mandatory requirement to report the number of hours worked free of charge, it can be expected that some lawyers will try to ensure that they have something to report come year-end. However, simply working "free of charge" does not necessarily evidence professionalism. Providing free services is not entirely synonymous with working *pro bono* or for the good.

While we should applaud the provision of services to those who cannot afford them, it is really the sense of professional calling and obligation that we seek to foster and ingrain in all lawyers. In terms of professionalism, the reason that a lawyer provides such services is as important as the provision of the services. Is there a genuine desire to do the right thing or is it simply to meet a reporting requirement? The answer to that question matters to the future of our profession.

Just as the reporting requirement may encourage more free hours of legal services without developing a greater sense of professionalism, it follows that the reporting requirement may not generate meaningful information concerning the professionalism of the members of the North Carolina State Bar. While the report may indicate the amount of free services (measured only in hours) provided by North Carolina lawyers, it cannot be a reliable indicator of the professional character of the Bar.

If anything, a reporting requirement will provide an incomplete and likely underwhelming picture of the professional character of North Carolina lawyers. Specifically, this requirement is narrowly focused on the provision of free legal services. However, this is but one of the many ways that lawyers answer their professional calling to service. For example, many North Carolina lawyers serve our state through participation on the boards of charitable organizations, volunteering to help with the development of our youth, and by serving in elective office in local and state government. By focusing our spotlight on the provision of free legal services, we unnecessarily risk casting a shadow on or, worse yet, deterring participation in these and other equally important areas of public service, some of which are greatly in need of additional participation by members of our profession.

Professional character development of North Carolina lawyers should be a paramount concern for all lawyers. However, the imposition of a reporting requirement to artificially increase the number of hours of free legal services is far from the best way to foster professional character development. Instead, let us commit ourselves to mentoring and leading one another by example. Significant efforts at mentoring new members of our profession are needed, and that is a responsibility shared by each of us.

Indeed, professional character and recognition that his own conduct would serve as an example to others is what motivated Atticus Finch in *To Kill a Mockingbird*. When Atticus explains to Scout why he accepted representation of Tom Robinson, he tells her that he did so mainly because if he refused, he would not be able to hold his head up in town or tell Scout or her brother not to do something ever again. Atticus was not motivated by money or hickory nuts or a reporting requirement. He was moved by his professional training and moral compass to do the right thing. Like Atticus, let us be motivated by the desire to daily practice law and live in our communities in a way that exemplifies that noble character of our professional calling. Nothing less is called for and no amount of regulated reporting will inspire these necessary qualities in us. ■

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For Mandatory Reporting

By Cal Adams and Tripp Greason

Each attorney in North Carolina has an obligation to provide *pro bono* legal services to the disadvantaged citizens of North Carolina. Rule 0.1 of the Revised Rules of Professional Conduct of the North Carolina State Bar. The North Carolina Bar Association encourages its members to provide *pro bono* legal services to the poor. The question under consideration is whether attorneys should be required to report the number of *pro bono* hours they perform each year. This is not a discussion about whether *pro bono* should be required. In fact, the authors are not in favor of a requirement that attorneys perform *pro bono*. Rather, this article sets forth the rationale for North Carolina to take a leadership position and require its attorneys to report their *pro bono* work.

Situational Analysis

On November 3, 2005, Chief Justice I. Beverly Lake Jr. signed a Supreme Court Order which created the state's Equal Access to Justice Commission for the purpose of "expand[ing] access to civil legal representation for people of low income and modest means in North Carolina." (Order, at 1.) The question that flows from this touchstone of commission responsibility to every member of the State Bar and Bar Association is: "How can we help the commission meet its responsibilities and reach its goals?"

It is clear that the commission will not be able to close the gap between legal need and representation without an accurate, reliable, and predictable measurement of *pro bono* practice across our state, and that the simple, first step is to take the Bar's *pro bono* pulse by tailoring and implementing a mandatory annual *pro bono* reporting system.

"Mandatory reporting will increase *pro bono* participation and will enable the legal services community to measure *pro bono* performance so it will know where to devote its resources or intensify its efforts."

Properly Tailored *Pro Bono* Reporting: Accurate, Efficient, Economical, and Private

We can already hear Henny Penny telling Turkey-lurkey that "the sky is falling, and I must go and tell the king!" Requiring attorneys to report their *pro bono* hours would violate the constitutional rights to privacy and freedom from involuntary servitude! *Pro bono* reporting will be counterproductive because its true purpose is to shame lawyers into action! An onerous responsibility! The press will use this information to criticize the Bar!

A *pro bono* reporting system tailored to the requirements set forth in the Equal Justice Commission Order will present no such problems. Rather, such a reporting system will provide the commission with a simple mechanism for collecting the data it must have to carry out its responsibilities and meet its goals. It will enable Legal Aid of North Carolina to determine where it needs to devote its resources and where it should intensify its efforts to recruit *pro bono* attorneys. It will also make the legal communities throughout the state aware of how well they are doing in fulfilling their obligations to provide *pro bono* work.

Although increasing *pro bono* participation is not the rationale behind the proposed implementation of this reporting system, it is reasonable to project that the increases envisioned by the commission will occur sooner because of a synergy between the commission's efforts and the reporting system. In addition, the privacy concerns of certain lawyers regarding access to and use of reported information can be addressed by guaranteeing that only non-identifying information be shared with the commission for the purpose of tracking *pro bono* practice at the judicial district level.

In Favor of Mandatory *Pro Bono* Reporting

As the state of Florida has shown,[1] mandatory reporting systems have high response rates and provide an efficient, effective mechanism for the collection of reliable data necessary both to assess delivery of legal services to the poor and to design and implement successful *pro bono* programs. Moreover, mandatory reporting is strongly associated with an increase in delivery of *pro bono* services.[2]

For those of limited means, mandatory reporting promotes increased access to justice and the (civil) courts. For the individual lawyer, mandatory reporting can raise awareness of professional responsibility, the need for *pro bono* services, and opportunities to provide such service. This reporting system can also create positive peer pressure for lawyers to become involved or increase involvement in *pro bono*.

For the Bar, the data collected in a mandatory reporting system can be used to recognize *pro bono* priorities and structure *pro bono* programs accordingly. In addition to enhancing its own image and increasing the level of public goodwill, the Bar can use this data to support the message to the business and legislative communities regarding their responsibility to fund legal services for the poor. The increased internal costs of implementation of a reporting system can be minimal.

Why Not Voluntary Reporting of *Pro Bono*?

As noted by the ABA, the main downside of voluntary *pro bono* reporting is that the voluntary nature of the system leads to low reporting rates. "The data collected is generally not comprehensive and therefore somewhat limited in value. If a state adopts voluntary reporting as a means of expanding *pro bono* and then gathers only a meager amount of data, increased participation as a result of the system would be virtually undetectable."[3] Moreover, voluntary reporting systems implemented around the country have not had high response rates.[4]

Recommendations

The North Carolina State Bar should require mandatory *pro bono* reporting, with the data being released to the public at the judicial district level. Mandatory reporting will increase *pro bono* participation and will enable the legal services community to measure *pro bono* performance so it will know where to devote its resources or intensify its efforts. ■

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Endnotes

1. "Florida's reporting system was implemented in 1993, over much opposition from the Florida State Bar. In 1997, the Florida Supreme Court affirmed its prior decision stating, "the mandatory reporting requirement is essential to guaranteeing that lawyers do their part to provide equal justice." The system elicited 90% response rates in 1997 and 1998, 87% in 1999 and 88% in 2000. To date, it, along with Florida's circuit court *pro bono* committee system has brought about significant increases in participation, the number of volunteer hours and monetary contributions. The committee system creates local responsibility for using the data acquired through reporting to develop specific plans and new projects as needed in each circuit." (*State* Pro Bono *Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding* Pro Bono, http://www.abanet.org/legalservices/probono/reportingguide.html (updated August 2002).)
2. *Id*. (Actual increase in delivery of legal services to the poor in Florida.)
3. *Id*.
4. "The response rates in the states with voluntary reporting systems are far lower than the high response rates seen in Florida under its mandatory system. Although actual *pro bono* participation could be high and simply unreported in the states with voluntary systems, that information is unknown and unknowable. Further, voluntary reporting systems could increase awareness of *pro bono* responsibility and the increased awareness could lead to increased participation. However, the large number of attorneys who choose not to report limits and conclusions that can be drawn." (*Id*.)

Effective Advocacy in Mediation

By G. Nicholas Herman

Effective advocacy in mediation requires an understanding of (1) how to prepare a pre-mediation submission to the mediator; (2) how to present your opening statement; and (3) what to do during the private caucuses. This article provides some suggestions about these matters so that you can be a more effective negotiator in the mediation process.


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Preparing a Pre-mediation Submission

A pre-mediation submission is designed to educate the mediator about the general nature of the dispute, to identify the issues to be resolved, and to set out the basic contentions of the parties. If your mediator does not prohibit you from making a pre-mediation submission, sending one to him or her will often be useful. Because the basic purpose of the submission is to give the mediator an overview of what the dispute is about, be brief and to the point.

For example, in a two or three page letter, set out in a non-argumentative tone:

(1) The basic facts of the case giving rise to the dispute, including the amount of any special damages;

(2) If a lawsuit has been filed, the basic legal claims, and defenses involved;

(3) If no lawsuit has been filed, the basic contentions of your client;

(4) The issues to be addressed;

(5) The status of prior negotiations and the latest settlement offers if mentioning them would be instructive to the mediator in understanding the dispute; and

(6) A concluding sentence that confirms the time and place of the upcoming mediation, along with an expression of your hope that the mediation might be successful in resolving the case.

Mediators don't want to read voluminous pre-mediation materials. If, before the medi-

ation, it is absolutely necessary for the mediator to understand certain matters contained in voluminous documents, summarize that information in an attachment to your letter submission. At the mediation, the mediator will have ample time to review any documents that may become the focal point of discussion.

Unless otherwise agreed between the parties, you should send a copy of your pre-mediation submission to opposing counsel. Because this means that opposing counsel's client will likely read the submission, be objective in your summary of the facts and contentions, and draft the submission in a way that does not unnecessarily escalate the dispute or otherwise impair the prospects for constructive negotiations. Even if it is agreed that your submission will be sent to the mediator *ex parte*, it should not be written in an excessively argumentative tone that will undermine your credibility with the mediator.

Making the Opening Statement

Many lawyers who are inexperienced in mediation unwittingly equate the process with a trial. For instance, many lawyers will deliver an opening statement at mediation that sounds much like a trial opening statement and closing argument wrapped into one: the facts are meticulously set out; the key points of law are explained; the facts are applied to the law; the other side's proof is attacked; and the presentation is concluded with a pronouncement that the lawyer's client must be the winner. The advocate then turns to the mediator, as if looking at a jury to say, "Please render a verdict in our favor."

This approach is inappropriate because it asks the mediator to do what he or she cannot do—decide the case and declare a winner and loser. Such an opening statement is entirely at odds with the mediator's role as an impartial facilitator of an agreement. Unlike a trial, where the outcome is a decision on the merits, in mediation the only outcome is an agreement or no agreement. In either case, neither side leaves the mediation with a verdict of victory or defeat.

Thus, the appropriate function of an opening statement in mediation is not to convince the mediator about which side should win or lose, but to motivate and convince the opposing party to enter into a satisfactory agreement. This means that the opening statement should present the facts, law, and themes of the controversy in a way that points to a possible resolution of the dispute and encourages the other party to seek the same. The content and tone of the opening statement should treat the other party with respect, avoid personal attacks, convey a willingness to fairly consider the other side's points of view so that it will fairly consider yours, avoid threats or ultimatums, and allow the other party to consider the case from the perspective of your client's real needs and interests—i.e., why he or she has taken a particular position and why a particular resolution is important to him or her. These elements of an effective opening statement should be incorporated in a presentation that otherwise addresses the strongest aspects of the case from your side, potential ways for settling the case, potential outcomes if the case went to trial, and the risks and costs of not reaching an agree-

ment.

For example, in a routine personal injury case, the opening statement for plaintiff's counsel might consist of the following:

(1) A summary of how the accident occurred;

(2) An explanation of the plaintiff's theory of liability (if liability is in issue);

(3) A summary of the plaintiff's course of medical treatment;

(4) A summary of the diagnosis and prognosis for the plaintiff's injuries;

(5) A summary of how the plaintiff's injuries have affected his or her life;

(6) An itemization of the plaintiff's special damages; and

(7) An expression of willingness to fairly consider all aspects of the case to the end that it might be resolved.

Defense counsel's opening statement might then consist of the following:

(1) An explanation of any additional facts about how the accident occurred;

(2) An explanation of the defendant's theory of liability (if liability is in issue);

(3) A summary of any time gaps in the plaintiff's medical treatment, and any medical treatment that appears to have been unnecessary;

(4) Any references in the medical reports to a pre-existing medical condition; or any ambiguities in the reports about diagnoses, the plaintiff's prognosis, or extent of injury;

(5) An itemization of any special damages that are unwarranted in the case;

(6) An expression of apology to the plaintiff or similar expression of regret about how the accident has affected the plaintiff; and

(7) An expression, like that of plaintiff's counsel, of a willingness to fairly consider all circumstances of the case with the hope that it might be settled.

The particular type of case involved, its gravity or complexity, and the dynamics of the parties must all—of course—be taken into account in deciding what would be most appropriate to say in the opening statement and how to present it. For example, in an appropriate case, consider the following:

- Having your client take part in the opening statement by explaining his or her injuries or how the accident happened;
- Using audiovisual aids such as models, charts, diagrams, photos, a video, a PowerPoint slide presentation, or a computerized simulation;
- Displaying potential trial exhibits;
- Providing all participants with a notebook of documents to refer to during the opening statement or for other use during the mediation;
- Suggesting an appropriate agenda for the mediation, or outlining the parameters of a potential settlement;
- Acknowledging certain strengths in the case of the opposing party, but pointing out that there are two sides to the story and that the risks and costs of litigation for both sides warrant a reasoned effort to try to resolve the case by agreement;
- Making an initial offer and explaining the reasons behind the offer;
- Suggesting that at the conclusion of the opening statements, both sides engage in a free-flowing, uninhibited discussion about the dispute and possible ways to resolve it before engaging in the private caucuses;
- Establishing a reasonable deadline for completing the mediation session.

Using the Private Caucuses

In most cases, the private caucuses are the most important part of the mediation process. Here, the mediator obtains information; generates and discusses potential solutions; assesses, selects, and communicates specific proposals; works to create movement in the negotiations; and helps the parties reach and finalize an agreement. To advocate effectively during the private caucuses, you must actively participate in all these functions and assist the mediator's efforts. In this regard, consider the following:

1. Don't try to manipulate the mediator. Trying to manipulate the mediator through misrepresentation or disingenuous tactics (such as bluffing, making escalating or false demands, or reversing position, and the like) is a bad idea for three reasons.

First, most mediators are trained to recognize manipulation attempts and can usually spot them immediately. Asking the mediator to threaten or play hardball with the other side is likely to be futile because mediators are heavily schooled in cooperative and principled problem-solving negotiation.

Second, although the mediator cannot resolve the case in your favor or compel the other party to settle on your terms, you want him or her to respect you as a credible advocate who has assessed the case realistically and is making reasonable proposals for settlement. Even mediators who have a stringent "facilitative" philosophy about mediation—those who refuse to give any sort of case evaluation—are constantly assessing the extent to which a party's interests, objectives, analyses, and settlement proposals are reasonable and realistic. Thus, your credibility on these matters will affect how fervently the mediator encourages the other side to seriously consider your offers.

Third, trying to manipulate the mediator will impair his or her ability to move the negotiations along in helping the other party understand and accommodate your client's interests and objectives. The techniques mediators use to facilitate productive negotiations can be effective with the other side only if you are candid with the mediator.

2. Help the mediator obtain information. If your client is articulate, credible, likable, and persuasive, let him or her participate actively in the caucuses and respond freely to the mediator's questions. If your client is angry or distraught about the events giving rise to the dispute, he or she might even express these feelings directly. The mediator will often respond favorably to your client's "humanity" and likeability and may even mention his or her credibility when meeting with the other side.

On the other hand, if your client is reticent or uncomfortable about participating actively in the private caucuses, intercede and respond yourself to the mediator's questions and comments. Don't hesitate to volunteer all pertinent information to help the mediator understand the dispute and potential pathways to a resolution.

The mediator will often ask why your client has taken a particular position or thinks a specific objective is important. In asking these questions, he or she is usually trying to assess the possibility of nonmonetary solutions to the dispute; for even if the case appears to be solely about money, a settlement might still include some nonmonetary commitments. For example, some clients might be willing to settle for a smaller sum if the wrongdoer agrees to take specific steps to prevent similar harm in the future.

You can use the private caucuses not only

to give information, but also to obtain it as well. Tell the mediator what you need to know from the other side and explain why this information is essential. Often, the mediator will ask for this information from the other side without mentioning that the request came from you.

3. Discuss the case's strengths and weaknesses. Private caucusing is a safe opportunity to recognize reality. Each case has strengths and weaknesses, and understanding both is critical to making a sound decision about settling or going to trial.

Candor in discussing the weaknesses of your case is often useful for three reasons. First, it enhances your credibility with the mediator. Second, a weakness' relevance depends not only on the extent to which it in fact hurts your case, but more importantly on the extent to which the other side *perceives* that it hurts your case. A candid discussion with the mediator may reveal that you either underestimated or overestimated weaknesses, which may cause you to adjust your negotiating strategy.

Third, when you acknowledge certain weaknesses, you can also explain how they pale in contrast to your case's strengths and why your opponent's perception of any weaknesses in your case is overblown. These are points a mediator may emphasize to the other side.

When your case's weaknesses are not readily apparent to the other party, you may not want to volunteer them initially. Wait until the mediator's questions or comments confront the subject. This way, you can hedge against unnecessarily revealing weaknesses, while keeping them in the back of your mind when you consider whether to make a concession at a crucial time during the negotiations.

4. Specify what information is confidential. The mediator has free reign to share with the other party anything you have said during your private caucuses that you have not specified is confidential. This does not mean he or she will reveal everything. Mediators tend to be selective about sharing information. Whether and how much they share depends on how much they believe it will advance the negotiations. However, because of the mediator's general license to share, before the mediator leaves your private session, remind him or her of what information you expect will be kept confidential.

5. Listen to the mediator's cues and clues. Good mediators are good wordsmiths. They may use questions to indicate their views about the case and to hint at what the other side might consider an acceptable resolution. For example, consider a mediator who asks: "Are you aware of any six-figure jury verdicts for this type of case?;" "Do you think the other side would perceive your offer as fair?;" or "What would you say if the other side offered to do X?" Although the mediator may ask these questions solely to obtain information, depending on the question's context, they may actually mean: "The value you have placed on the case is way out of line;" "Your offer is unreasonable and unrealistic;" and "The other side has told me they are willing to do X, but you must give them something in return."

Thus, carefully consider the context of the mediator's questions and comments during your private caucuses. Mediators often use rhetorical questions to indicate their general assessment of the case, the viability of your settlement proposals, and what the other side is thinking. Being attuned to these cues and clues may help you significantly in your negotiation.

6. Invite the mediator's perspectives about the case. Unless the parties have expressly agreed on "evaluative" mediation (in which the mediator is free to comment on the merits of the case and how it might be resolved), the mediator will almost never directly express a view about the case's value or how it should be settled. This is consistent with his or her role as an impartial facilitator of an agreement that only the parties should fashion and own.

This does not mean, however, that a mediator will be flatly unresponsive when you ask for help resolving the case. It is entirely legitimate for you to invite the mediator to offer his or her general impressions of your and your opponent's analysis of the case, its value, and possible solutions. The mediator's perspective—precisely because it is neutral—is often integral to helping the parties reach an agreement.

Whether the mediator is willing to respond substantively about these matters will largely depend on whether he or she thinks you are genuinely asking for assistance in understanding the views of the other side to assess the prospects for a resolution, or whether you are asking the mediator's "personal opinion" about the merits of the case or how to resolve it. For example, if you ask, "What do you think a jury would do in this case?" or "How do you think we can settle this case?," many mediators will respond, "What do you think?" On the other hand, you may get more direct responses if you ask, "How can we best think through this aspect of the dispute?," "What might we do to accommodate the other side about X?," or "I wonder, is there anything more we should be thinking about to resolve this case?" Even if the response is still, "Well, what do you think?," discussing these matters will encourage the mediator to be more forthcoming with his or her thoughts about the case.

If the mediator appears willing to help push the parties toward an agreement, you may be more direct in soliciting his or her views. For example, you might ask, "What is your sense of how a jury might react to X fact, Y theory, or Z theme?" or "How can we encourage the other side to consider X?" You might otherwise try to elicit a response by musing, "I'm having difficulty seeing how a jury would react to the fact that . . . " or "I'm having trouble coming up with something else to offer… I wonder what more we can do."

In sum, when inviting the mediator's perspectives about the case, word your requests carefully so the mediator does not feel that his or her responses could be perceived as taking sides. Explain to the mediator that your questions are motivated by a genuine desire to assess the relative strengths and weaknesses of the case and possible ways to resolve it.

7. Don't disclose your bottom line up front. It is usually unwise in the initial caucuses to tell the mediator your bottom line position for an acceptable settlement. There are four reasons for this.

First, the opposing party may have evaluated the case differently than you think and might be willing to settle on terms much more favorable to your client than you anticipated. Second, during the caucusing process, you might learn critical information that will cause you to change your bottom line. Third, by giving the mediator your minimum acceptable settlement, you lose significant control over the negotiating process because the mediator may be reluctant to press for concessions from the other side that are better than your bottom line.

Finally, you may put the mediator in the awkward position—if not the troubling ethi-

cal dilemma—of how to respond candidly if your opponent asks whether you have any further flexibility if the party asking the question is about to make a final offer that is less (for plaintiffs) or more (for defendants) than what would be acceptable to the other side. Here, the mediator's dilemma is whether to disclose to the plaintiff that more money is available from the defendant, or whether to disclose to the defendant that the plaintiff is willing to accept less than the defendant's bottom line.

It is also unwise to reveal to the mediator that your client will not, in any event, take the case to trial. For example, in a low-speed-collision case, a plaintiff might decide at the outset not to go through the delay, expense, and inconvenience of litigation, but merely seek to use mediation to obtain a more favorable settlement from that initially offered by the defendant's insurance carrier. A mediator who knows that this is the plaintiff's only goal may be less likely to push the defendant toward a higher settlement offer.

8. Make reasonable settlement offers with sound support. As in any negotiation, making offers that are arbitrary or unreasonable may insult the other side, impair your credibility, and unnecessarily result in a deadlock of the mediation.

Whenever you make an offer or counteroffer, try to give the mediator specific reasons for your proposal so he or she may convey them to your opponent. If possible, incorporate something the other side wants, or explain why your proposal would benefit the other side. This will help the mediator explain that your proposal is rational and not simply an auction-like bid.

9. Confer alone with the mediator and opposing counsel, if necessary. Sometimes both clients may be so emotionally distraught that their irrationality will obstruct the mediation process. In these circumstances, you and opposing counsel might choose to meet with the mediator, without the clients, to discuss the problem.

It is best to suggest this to the mediator outside the presence of your client, such as during a break. If you decide to meet privately, explain to your client (or have the mediator explain) that the mediator wants a private meeting with counsel to discuss how to get the negotiations back on track. Assure your client that nothing will be decided about settling the case without his or her full knowledge and consent. After the meeting, either you or the mediator should summarize for your client what you discussed and what suggestions arose.

10. Suggest mediator problem-solving techniques that may help forge an agreement. Mediators invariably employ a variety of problem-solving techniques to help the parties reach an agreement. Quite often, the mediator will use these techniques *sua sponte*, without any express prompting from the parties. However, if you believe that one or more of these techniques may be particularly helpful in forging a satisfactory agreement, suggest them to the mediator. For example, in an appropriate case, you might suggest:

- A payment in kind instead of in money;
- A structured settlement or payment in installments;
- Payment of a portion of the settlement to a mutually acceptable charity or other public-interest organization;
- A future business arrangement or relationship;
- A change in an employee's title or work status in lieu of, or in exchange for, a smaller pay increase;
- An undertaking to take certain corrective action to prevent the recurrence of the type of accident or injury that occurred in the case;
- A substitution of goods;
- An apology for what happened;
- A confidentiality clause in the agreement;
- A provision to abide by the recommendation of a suitable third party who has special expertise in the matter in dispute;
- That the mediator present a proposal to the other side as if it were his or her own idea;
- That the mediator make a proposal conditional without communicating a commitment on your part (e.g., "If I can get the other side to do X, will you do Y?");
- That the mediator present a particular proposal at a certain time during the mediation process when the proposal will have the greatest impact;
- That counsel for the parties phone another lawyer or a law professor they respect to render an opinion about the relative merits of a novel or controversial legal theory;
- That the mediation be temporarily adjourned so that the parties might reconsider their positions or try to come up with new proposals;
- That the mediator provide the other side with a particular rationale for changing position that allows that party to save face;
- That the parties recess the private caucuses and reconvene in joint session to discuss the case.

11. Be patient with the mediation process and take time to privately confer with your client. A principal advantage of mediation over traditional inter-lawyer negotiations is that it provides a "process" through which the clients have an opportunity to be directly involved in resolving their dispute; and for many clients, the very *process* of how they go about resolving their differences is important to them. Working through this process takes time, and therefore you must be patient with it even though hours may pass before the mediation begins to "get to the point" of substantive negotiations over specific terms of a potential agreement. If you hurry the process, you may defeat its fundamental purpose.

In addition, after each private caucus with the mediator, take the time to confer privately with your client. As appropriate, discuss the matters raised during the caucus and consider your "next move." If during a caucusing session you or your client want to talk privately (e.g., to decide what counteroffer you want the mediator to present to the other side), don't hesitate to temporarily recess the session to confer. Above all, remember that even though you and your client have established a game plan for the mediation, you should use all that you learn during the process to modify that plan as circumstances warrant. Indeed, this modification may be as significant as entirely changing what your client earlier thought was an appropriate bottom line. ■

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The New Servicemembers Civil Relief Act

BY MARK E. SULLIVAN

On December 19, 2003, President Bush signed into law the Servicemembers Civil Relief Act (SCRA), a complete revision of the statute known as The Soldiers' and Sailors' Civil Relief Act, or SSCRA. With North Carolina having the third largest military population in the country, this Act is "must reading" for attorneys throughout the state.

Even for lawyers with no military base nearby, this federal statute is important. There are about 150,000 National Guard and Reserve personnel at present who have been called up to active duty, and about 40% of the armed forces serving in Iraq are Reserve/Guard servicemembers. These Reserve Component (RC) military members come from the big cities and small towns of America, and lawyers need to know their way around the basic federal statute that protects those on active duty. Although previously there was limited coverage by the SSCRA for Guard members, the new Act extends protections to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the president or the secretary of defense. 50 U.S.C. App. § 511(2)(A)(ii).

Replacing the SSCRA

Up until the passage of the SCRA, the basic protections of the SSCRA for the servicemember (SM) included:

1. Postponement of civil court hearings when military duties materially affected the ability of an SM to prepare for or be present for civil litigation;
2. Reducing the interest rate to 6% on pre service loans and obligations;
3. Barring eviction of an SM's family for nonpayment of rent without a court order

"With North Carolina having the third largest military population in the country, this Act is 'must reading' for attorneys throughout the state."

for monthly rent of $1,200 or less;

4. Termination of a pre service residential lease; and

5. Allowing SMs to maintain their state of residence for tax purposes despite military reassignment to other states.

The SSCRA, enacted in 1940 and updated after the Gulf War in 1991, was still largely unchanged as of 2003. Congress wrote the SCRA to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA, and to update the SSCRA to reflect new developments in American life since 1940. Since many of the Act's provisions are particularly useful (and potentially dangerous) in domestic litigation, the family law attorney should have a good working knowledge of them. Here's an overview of what the SCRA does.

Stays and Delays

The SCRA expands the application of an SM's right to stay court hearings to include administrative hearings. Previously only civil courts were included, and this caused problems in cases involving administrative child support determinations as well as other agency determinations which impacted servicemembers. Criminal matters are still excluded. 50 U.S.C. App. § 511-512. There are several provisions regarding the ability of a court or administrative agency to enter an order staying, or delaying, proceedings. This is one of the central points in the SSCRA and now in the SCRA—the granting of a continuance which halts legal proceedings.

In a case where the SM lacks notice of the proceedings, the SCRA requires a court or administrative agency to grant a stay (or continuance) of at least 90 days when the defendant is in military service and -

- the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant's absence, or
- with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

In a situation where the military member has notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon the request of the SM, so long as the application for a stay includes two things. The first is a letter or other communication that 1) states the manner in which current military duty requirements materially affect the SM's ability to appear, and 2) gives a date when the SM will be available to appear. The second is a letter or other communication from the SM's commanding officer stating that 1) the SM's current military duty prevents appearance, and 2) that military leave is not now authorized for the SM. 50 U.S.C. App. § 522. Of course, these two communications may be consolidated into one if it is from the SM's commander.

Family Law Sidebar

Pause for a moment to think through the potential impact of this stay provision on the family lawyer and his or her client. How would this affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida? How are you going to get the child back when mom's lawyer interposes a stay request to stop the litigation dead in its tracks? If mom has executed a Family Care Plan (FCP), which is required by military regulations, leaving custody with the maternal grandmother, will that document—executed by mom, approved by her commanding officer, and accompanied by a custodial power of attorney—displace or overcome a court order transferring custody to dad? Can the court even enter such a custody order given the stay and default provisions of the SCRA? To see how the battle is being joined in this area, take a look at *Lenser v. McGowan*, 2004 Ark. LEXIS 490 (upholding the judge's grant of custody to the mother when the mobilized father requested a stay of proceedings to keep physical custody with his own mother) and *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005) (reversing a judge's order that stayed the mother's custody petition when father was mobilized and had given custody via his FCP to his mother).

On another front, think about support. How does this stay provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve? When she leaves behind her "day job," her pay stops and so does the monthly wage garnishment for support of their children. How can dad get the garnishment restarted while she's in uniform on active duty? Will the reduction in pay result in less child support? Or will her reduced cost of living in the military (how much does it cost to live in a tent outside Bagram Air Base in Afghanistan?) have the opposite result? How can dad move the case forward to establish a new garnishment when he cannot locate her, he might not be able to serve her (if he *can* locate her), and she probably will have a bullet-proof motion for stay of proceedings if dad ever gets the case to court?

Additional Stays

An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

Once again, give this some thought. What is the attorney supposed to do—tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom, and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way?

And, by the way, who pays for this? There is no provision for compensation in the SCRA. How would *you* respond if her honor beckons you to the bench next

Monday and says, "Counselor, I am appointing you as the attorney for Sergeant Sandra Blake, the absent defendant in this case. I understand that she's in the Army, or maybe the Army Reserve or National Guard. Whatever. Please report back to the court in two weeks and be ready to try this case."?

Dangers and Defaults

Does a stay request expose an SM to any risks? The SCRA states that an application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c) eliminates the previous concern that a stay motion would constitute a general appearance, exposing the SM to the jurisdiction of the court. This new provision makes it clear that a stay request "does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense."

Can you obtain a default judgment against an SM? Broadly construing "default judgment" as any adverse order or ruling against the SM's interest, the SCRA clarifies how to proceed in a case where the other side seeks a default judgment (that is, one in which the SM has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine if the defendant is in military service.

A default judgment may not be lawfully entered against an SM in his or her absence unless the court follows the procedures set out in the SCRA. When the SM *has not made an appearance*, 50 U.S.C. App. § 521 governs. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the plaintiff), the movant must file an affidavit stating "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." Criminal penalties are provided for filing a knowingly false affidavit. 50 U.S.C. App. § 521(c).

When the court is considering the entry of a default judgment or order, one tool that is specifically recognized by the SCRA is the posting of a bond. If the court cannot determine whether the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmovant later be found to be an SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside). 50 U.S.C. App. § 521(b)(3).

When the filed affidavit states that the party against whom the default order or judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent SM.

> If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

50 U.S.C. App. § 521(b)(2).

If the court fails to appoint an attorney then the judgment or decree is voidable.

Attorney for "The Absent"

The role of the appointed attorney is to "represent the defendant." The statute does not say what happens if the SM is, in fact, the plaintiff in a particular domestic case, but undoubtedly this wording is careless drafting. Particularly in domestic cases, it is as likely that the SM would be the plaintiff as the defendant, the petitioner as the respondent, and default decrees are sought against both sides, not just defendants.

The statute does not say what tasks are to be undertaken by the appointed attorney, but the probable duties are to protect the interests of the absent member, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. Counsel for the SM should always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the client's participation.

The statute also leaves one in the dark about the limitations of the appointed attorney. Her actions may not waive any defense of the SM or bind the SM. What is she supposed to do? How can she operate effectively before the court with these restrictions? Can she, for example, stipulate to the income of her client or of the other party? Can she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the Act could mean that she must contest everything, object whenever possible, and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

Default Protections

If a default decree is entered against an SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments entered against them without their knowledge and without a chance to defend themselves. The SCRA allows a member who has not received notice of the proceeding to move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order. In addition, the default judgment must have been entered when the member was on active duty in military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g). Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment. 50 U.S.C. App. 521(h).

To prevail in a motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service. In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial effort and resources in opening default judgments in cases where servicemembers have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly

delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

Interest Rates

The Act clarifies the rules on the 6% interest rate cap on pre service loans and obligations by specifying that interest in excess of 6% per year must be forgiven. 50 U.S.C. App. § 527(a)(2). The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of 6% is merely deferred.

It also specifies that an SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of the 6% with a resulting decrease in the amount of periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected his or her ability to pay. 50 U.S.C. App. § 527(c).

Leases, Liens, and More

The SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is $1200 or less. 50 U.S.C. App. § 531(a) modifies the eviction protection section by barring evictions from premises occupied by SMs for which the monthly rent does not exceed $2,400 for the year 2003. The new Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2006 monthly rent ceiling is $2,615.16.

A substantial change is found in 50 U.S.C. App. § 534. Previously the statute allowed a servicemember to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents. It did not provide help for the SM on active duty who is required to move due to military orders. The SCRA remedies these problems. Under the old statute, a lease covering property used for dwelling, professional, business, agricultural or similar purposes could be terminated by an SM if two conditions were met:

a. The lease/rental agreement was signed before the member entered active duty; and

b. The leased premises have been occupied for the above purposes by the member or his or her dependents.

The new Act still applies to leases entered into prior to entry on active duty. It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a "permanent change of station" (PCS) or a deployment for a period of 90 days or more.

It also adds a new provision allowing the termination of automobile leases (for business or personal use) by SMs and their dependents. Pre service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more. 50 U.S.C. App. § 535.

Conclusion

The family law attorney, perhaps even more than the general practitioner, needs to know and understand the SCRA for those occasions when a military member is one of the parties to the litigation. Mobilizations and deployments affect mothers and fathers, wives and husbands, and separated partners who are in the Reserves, on active duty, and in the National Guard. They will have an impact on income, visitation, family expenses, custodial care for children, mortgage foreclosures, garnishments, and many other domestic issues.

The best source of quick information on the SCRA is "A Judge's Guide to the Servicemembers Civil Relief Act," found at the website of the Military Committee of the ABA Family Law Section, www.abanet.org/family/military. An extended treatment of the SCRA and family law issues may be found in Sullivan, "Family Law and the Servicemembers Civil Relief Act," "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," Divorce Litigation, Vol.16/ Number 3, March 2004. Also see Sullivan, "The Servicemembers Civil Relief Act: A Guide for Family Law Attorneys," in Brown and Morgan, 2005 Family Law Update, pp. 23-54 (Aspen Publishers 2005). The Army JAG School's SCRA guide will be published and posted on-line shortly, taking the place of the SSCRA guide which is presently available (and still quite useful in understanding and interpreting the statute). This can be found at the school's website, www.jagcnet.army.mil/tjaglcs. Click on TJAGLCS Publications, then scroll down to Legal Assistance, and then look for the publication, which is JA 260. ■

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Electing Judges and the Impact on Judicial Independence

By The Honorable Randall T. Shepard

Judicial Independence

The United States Supreme Court nominees' confirmation hearings have brought judicial independence to the forefront of hot topics in the media and on Capitol Hill. The spotlight focuses on where the nominees stand on the most controversial and partisan issues of the day including abortion, gay rights, and physician-assisted suicide. Disclosure of a nominee's position on substantive law is a serious threat to judicial independence. Justice Sandra Day O'Connor observed that when a candidate expresses a viewpoint on a contentious issue, the candidate may have prejudged future cases, at least in appearance, and possibly in reality.[1]

Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law. "Although all judges do not reason alike or necessarily reach the same decision, decisions should be based on determinations of the evidence and the law, not on public opinion polls, personal whim, prejudice or fear, or interference from the legislative or the executive branches or private citizens or groups."[2] Judges must resist outside influence to maintain the uncompromised impartiality their offices require, including the pressure to disclose their views on substantive issues during a judicial selection process.

Although the threats to judicial independence in the federal judiciary are widely publicized, tougher judicial independence issues arise in state courts, especially in states with judicial elections.

Judicial Elections in State Courts

Thirty-nine states hold elections for some or all judicial offices. Nationally, 87% of all state judges face an election.[3] In these states, when there is an outcry over a judge's ruling, judicial elections become the most costly and contentious. In the 2004 judicial elections, $24.4 million was spent on television advertisements, over twice as much than the $10.6 million spent in the 2000 election cycle.[4] Businesses, lawyers, political parties, and special interest groups spent millions of dollars donating to judicial election campaigns and financing their own advertising to support and attack candidates.[5]

The underlying, ulterior motive behind the clamor is often driven by the aim to replace the incumbent judge with a more politically preferable candidate in the new election.[6] In short, judicial elections are progressively looking more like elections in the executive and legislative branches.

But judges are different than other elected officials and if a state has judicial elections, then the elections should reflect that difference.

> Legislative and executive officials serve in representative capacities. They are agents of the people: their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves….
>
> Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. "[I]t is the business of judges to be indifferent to popularity."[7] They must strive to do what is legally right, all the more so when the result is not the one "the home crowd" wants.[8] Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public.[9]

Judicial elections present a dilemma for candidates because their desire to say things that might win votes clashes with their duty to

ensure due process.[10] Judicial candidates are guided in all states by canons of judicial conduct, including limits placed on a judge's ability to sit on a case if the judge "decides" the case during a campaign as well as limitations placed on the political activities of judges.

However, in recent years litigants have challenged these canons. For example, in *Republican Party of Minnesota v. White*, decided in 2002, the United States Supreme Court held that the portion of Canon 5(A) (3) (d) (i) (2000) of the Minnesota Code of Judicial Conduct, providing that a "candidate for a judicial office, including an incumbent judge" shall not "announce his or her views on disputed legal or political issues," violated the First Amendment. In response to the United States Supreme Court decision in *White*, the American Bar Association amended its Model Code of Judicial Conduct.[11]

Most recently, in August 2005, the 8th Circuit Court of Appeals ruled in the remand of *Republican Party of Minnesota v. White* that judicial candidates may attend political party conventions, seek political party endorsement, and personally solicit campaign funds as long as the candidate does not know the identity of the donor. The court held that limiting political activity is a violation of free speech.[12]

Since the first *White* decision, judicial candidates have been receiving more questionnaires than ever before from special interest groups asking them to reveal views on hot-button issues such as, "Have you ever cast a public vote relating to reproductive rights?" and "Do you support the death penalty?"[13] Although many candidates decide against filling out these questionnaires to preserve their ability to sit on cases with disputed issues if they should win, the special interest groups let voters know who refused to respond to their questions. For example, the Christian Coalition of Georgia issued questionnaires to two Georgia Supreme Court candidates. "Challenger Grant Brantley filled out the group's survey, but incumbent Justice Leah Sears refused to respond." In its direct mail, the Coalition indicated "No Response" from Justice Sears and then attacked her for concurring in a decision striking down Georgia's sodomy law."[14]

To Speak or Not to Speak

As the judicial election waters muddy with lawsuits, injunctions, pressure from outside groups, and changes in judicial codes of conduct, how can candidates work to preserve judicial independence?

The positive news is that there are efforts to reform judicial elections and guidance for candidates to help shield them from political pressures:

■ *Judicial Campaign Conduct Committees:* The National Ad Hoc Advisory Committee on Judicial Campaign Conduct, coordinated by the National Center for State Courts, has produced *Effective Judicial Campaign Conduct Committees: A How-To Handbook* with support from the Law and Society Program of the Open Society Institute. The Handbook is a step-by-step guide for those with an interest in establishing a committee that will:

1. Educate judges and judicial candidates about ethical campaign conduct;

2. Encourage and support appropriate campaign conduct, and work to deter inappropriate conduct;

3. Publicly criticize inappropriate campaign conduct that cannot be otherwise resolved; and

4. Protect the public interest in having a fair and impartial judiciary.

Additionally, the Ad Hoc Advisory Committee's website is a clearinghouse for the by-laws, mission statements, public statements, and other materials prepared by various judicial campaign conduct committees. The Ad Hoc Committee is also available to offer specific advice on the organization, procedures, and operations of judicial campaign conduct committees.[15]

■ *Voter Guides:* Nonpartisan voter guides distributed to the voting public generally contain biographical and professional information about candidates. A Justice at State Campaign poll showed that "more than 67% of Americans surveyed said that receiving a nonpartisan voter guide containing background information on judicial candidates would make them more likely to vote in judicial elections."[16]

■ Merit Selection: Merit selection and retention elections are practiced by several states. In merit selection, the executive branch nominates a candidate who is confirmed by the legislative branch. In the Missouri Plan, adopted by 16 states with four other states using a hybrid of contested elections and the Missouri Plan, a commission screens candidates and recommends a short list to the executive branch. When selected, the nominee must stand for reelection after the first term of service.[17]

Judicial leadership is perhaps the most important and effective reform. This strategy turns on judges speaking out and educating the public on the importance of judicial independence. "Public outreach efforts promote judicial independence, because they enable citizens to evaluate critical attacks on judges and to value judicial independence." Judges and lawyers must be community educators reaching out to the public, the media, and the executive and legislative branches of government to preserve the independence of the judiciary. ■

Randall T. Shepard, chief justice of Indiana, is chair of the National Center for State Courts Board of Directors and president of the Conference of Chief Justices. Chief Justice Shepard is recognized as a national leader in state courts issues, such as protecting judicial independence, improving judicial selection, and revising the judicial model code.

The National Center for State Courts, headquartered in Williamsburg, VA, is a non-profit court reform organization dedicated to improving the administration of justice by providing leadership and service to the state courts. For more information on judicial independence and judicial elections, visit the National Center for State Courts' website at www.ncsconline.org.

Endnotes

1. Randall T. Shepard, *Telephone Justice, Pandering, and Judges Who Speak Out of School*, 29 Fordham Urb. L.J. 811, 816 (2002).

2. Shirley S. Abrahamson, *Judicial Independence as a Campaign Platform*, Bench & Bar of Minnesota, Vol. 61, No. 10 (November 2004).

3. Eleven states have appointment systems without any type of judicial election. Call to Action: Statement of the National Summit on Improving Judicial Selection, Expanded with Commentary, The National Center for State Courts 2002, www.ncsconline.org/D_research.

4. Deborah Goldberg, Sarah Samis, Edwin Bender, Rachel Weiss, and Jesse Rutlege (Ed.), *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point" - and How to Keep our Courts Fair and Impartial*, at vii. Washington, D.C.: Justice at Stake Campaign, 2004.

5. *Id*.

6. *See* Sheila Kaplan & Zoë Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11. ("The campaign fundraising scandal has drawn new attention to the way moneyed interests buy political favors in Washington. But far from the nation's capital, many of these same doors operate unchecked in a venue that may prove more disturbing than the Lincoln bedroom:

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The Many Hats of a District Court Judge

By Joseph E. Turner


Sandra Dionisi/images.com

A district court judge has many roles.

In Criminal Cases

District court judges must:
Decide who is guilty, who is not;
Try to decide who is truthful, who is not;
Decide who should stay in jail, who should not;
Decide what punishment should be exacted in the name of society upon a fellow citizen and human being.

These decisions must be made in accordance with our constitutions, laws, and rules
without regard to who is before us,
without regard to who represents them,
without regard to what victims, witnesses, families, friends, pressure groups, or "society" want us to do.

These are not easy matters to decide—*but they are only a part of the job.*

In Family Law Cases

District court judges must:
Decide what is in the best interest of a child they do not know;
Decide who is the better parent between two people who are usually doing their best and love their child dearly;
Divide the accumulation of property between two parties who shared everything "until death do us part" and now want nothing to do with each other;
Decide who should bear the financial burdens and how to spread limited income across two households where once there was one.

These decisions must be made in accordance with our constitutions, laws, and rules
without regard to who is before us,
without regard to who represents them,
oftentimes when, outside of their marital relationship, the parties are good, decent, hard-working, God-fearing people and citizens.

These are not easy matters to decide—*but they are only a part of the job.*

In Juvenile Law Cases

District court judges must:
Decide whether to pluck a child up out of his home and place that child somewhere else—whether for his or her protection or punishment;
Determine whether a young girl should be able to abort the birth of a baby growing inside her without telling her parents or the father;
Decide to declare a minor an adult capable of living independent of his or her parents;
Determine whether a parent has forfeited *for all time* the right to be a parent to their child, no matter how much they may love the child they helped create.

These decisions must be made in accordance with our constitutions, laws and rules
without regard to who is before us,
without regard to who represents them,
without regard to what the juvenile, the parent, our families, friends, or "society" want us to do.

These are not easy matters to decide—*but they are only a part of the job.*

Within the System of Justice

District court judges are administrators:
Charged with efficient use of time, space, resources, and people;
Charged with moving cases, completing dockets, writing and signing orders and judgments, being tough on crime, and keeping the jails from being over-crowded;
Charged with herding cats—attorneys, litigants, witnesses, and appropriate court personnel—to the same place, at the same time, so cases can be heard;
Charged with creating, enforcing, and bending rules in order to see that hearings are accomplished fairly, openly, expeditiously, and judiciously.
District court judges are examples, arbiters, and evaluators of civility, decorum, integrity, and dependability.

District court judges are but one part of a larger machine that can only work if there is equal work and responsibility from all the other parts
The DA and defense attorney,
The plaintiff's and defendant's lawyer,
The community corrections officer and juvenile court counselor, the clerk, bailiff, law enforcement officers, and other associated court agencies.
These actions must be done in accordance with our constitutions, laws, and rules,
without regard to who is before us,
without regard to personal relationships,

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Promoting Democracy and the Rule of Law in Iraq

By Gill P. Beck

In January 2005, I was deployed as part of the United States Army Reserve to Camp Victory, Baghdad, Iraq, in the ancient land of Mesopotamia, often referred to as the "Cradle of Civilization," between the Tigris and Euphrates Rivers. I served as the staff judge advocate for Task Force 134 (Detainee Operations), Multi-National Forces-Iraq (MNF-I) from January to June 2005. As staff judge advocate, I supervised and directed a 45-person staff of judge advocates, paralegals, interpreters, and security personnel in the prosecution of terrorists in the Central Criminal Court of Iraq (CCCI), in reviewing detainees for release under the procedures of the Combined Review and Release Board (CRRB), and in providing legal advice to Major General (MG) Brandenburg, the commanding general of Task Force 134, on a wide variety of detainee legal issues. Working closely with Iraqi judges, prosecutors, and government officials, I saw on a daily basis courageous efforts to establish democracy and the rule of law in Iraq. What I saw gave me a deeper understanding of the nature of democracy, the importance of the rule of law, and renewed optimism for the future.

Colonel Gill P. Beck (center) at the Central Criminal Court of Iraq with Lieutenant Colonel Gary Nunn (right) and Major J. Ed Christiansen (left).

Promoting Democracy in Iraq

In January 2005, I witnessed the Iraqi people participate in the election of the Iraqi Transitional Government. For the Iraqi people, whose history traces back thousands of years to the Sumarian, Babylonian, and Assyrian civilizations, this was their first opportunity to vote in free elections, and they did so in large numbers, far exceeding voter turnouts on a percentage basis in Western nations despite terrorists attacks on the voting sites. Shortly after the election, MG Brandenburg and I met with the deputy prime minister and other Iraqi government officials who, with great pride, spoke of the courage of the Iraqi people in the face of terrorism. Reports of mortar attacks and suicide bombers attacking voting sites were frequent, but in each case the Iraqi people, following the attack, would return to the voting lines. Reports were received of suicide bombers who, while attempting to disrupt the voting lines, were tackled by brave Iraqi citizens who refused to be intimidated by terrorists. In one report, a mother standing in line with her child was injured and her child killed, yet the mother, recognizing that she could do nothing more for her child, and with her dead child in her arms, refused to leave until she had voted.

These events underscored the courage and determination of the Iraqi people in their efforts to establish democracy in their country. As I tried to understand what I was observing, thoughts came to mind of what American patriots must have felt as they risked all in order to establish a democracy in this country. The courage of the Iraqi people in voting seemed to draw from the same basic human yearning for freedom that motivated Patrick Henry to declare "Give me liberty or give me death" and that motivated other American patriots to risk all to establish a democracy in this country.

I observed that after decades of tyranny, the January 2005 election awoke in the Iraqis a renewed spirit of freedom and hope. Voting embodied and symbolized that freedom. The Iraqi people with whom I spoke recounted with pride their sense of fulfillment in voting in a free election for the first time. Many viewed it as an act of defiance of Saddam Hussein and his repressive regime, and there were frequent remarks that a person had a duty to vote and by doing so symbolically paid Saddam Hussein back for years of tyranny. I heard many Iraqis say voting was stabbing a dagger in Saddam Hussein's heart. Regardless of their motivation, Iraqis proudly displayed their purple ink-stained fingers as a badge of courage, to demonstrate that they had participated in the elections that would establish their country's future.

I also saw, in the Iraqi embrace of democracy, part of a worldwide democratic trend that over the past 100 years has seen democracy as a form of government outdistance other forms of government, so that now democracies have emerged in 119 countries, comprising 62% of all of the countries of the world.[1] The Iraqi people have seen the liberating effect of democracy and have embraced it fully. They have said "yes" to democracy through their actions in voting in the face of great personal threats of terrorism. Now, as never before, I understand that we in America are blessed with a great democracy, and that the democratic trend strikes a universal chord because its trust is in people—not kings, dictators, or tyrants—to determine the course of their future. I also understand that voting expresses and symbolizes human freedom.

Promoting Rule of Law in Iraq

Following the elections, I saw that democracy or "rule of the people" from its Greek root, as wonderful as it is, must be buttressed with the rule of law. "Rule of law" is a broad, encompassing concept that has been expressed in various ways in our country. Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), wrote that American government would cease to be "a government of laws, and not of men," if its "laws furnished no remedy for the violation of a vested legal right." Frequently in our history it has been observed that the law holds all people accountable, or as President Theodore Roosevelt said, "No man is above the law and no man below it . . . ."[2] Rule of law involves many legal themes including: (1) the law must be understandable so that it may guide people's behavior, (2) the law should be the supreme and apply to all persons, and (3) courts should be available to enforce the law and provide fair procedures.[3]

I found that Iraqi lawyers, judges, and government officials are equally dedicated to the principles of rule of law. These attorneys, whose civil law heritage differs markedly from our common law heritage, view the law and the legal profession as noble callings. They trace with pride Iraqi's legal heritage, and when rule of law is mentioned, they point to 1792 BC to 1750 BC, when Hammurabi ruled Babylon, an area in modern day Al Hillah, south of Baghdad. Hammurabi promulgated a Code of Laws for his kingdom, an important step in the development of the rule of law, when for the first time laws were put in writing in a systematic fashion and made available for the public. In the preface to the laws, Hammurabi wrote that promulgating the law will "bring about the rule of righteousness in the land, destroy the wicked and the evil-doers, so that the strong should not harm the weak . . . and enlighten the land, to further the well-being of mankind."[4]

For Iraqi lawyers and judges, Hammurabi and the rule of law is a reality that was interrupted by the reign of Saddam Hussein, who elevated himself above the law. In one meeting with a large group of judges, I heard repeated examples of how Saddam Hussein and his sons had disregarded the law and used it for their own personal advantage. Towards that end, Saddam Hussein established the Baghdad Revolutionary Court, and special temporary courts under his control, from which no appeals were allowed,[5] and he and his sons intimidated the judiciary. Iraqi judges told me of family members who had been

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"On a daily basis I saw brave Iraqi judges demonstrating their commitment to the rule of law even at great personal risk for themselves and their families."

killed at the direction of Saddam Hussein in disregard of the law. One judge told me of being approached by Uday Hussein and told to enter a judgment of conviction for a group of ten prostitutes. The judge had indicated that the law required a trial, and the response from Uday Hussein was that no trial was necessary because the women had already been executed. This Iraqi judge, at great risk to himself and his family, refused to the enter the judgment of conviction and paid for it dearly. In doing so, that judge demonstrated that the concept of rule of law—that the law is supreme and that courts must enforce the law through fair procedures—was a reality that Iraqi jurists would not disregard regardless of the consequences.

In January 2005, several Iraqi judges were assassinated or the subjects of assassination attempts by terrorists. The terrorists in targeting the judges understood the central role that the rule of law plays in a society. The terrorists hoped to undermine the rule of law and replace it with chaos. Despite their attempts, the Iraqi judges were not deterred, but strengthened in their commitment to bring the rule of law to Iraq. On a daily basis, I saw brave Iraqi judges demonstrate their commitment to the rule of law even at great personal risk for themselves and their families.

Through the terrorists acts, and what they sought to destroy—judges, lawyers, police, and government officials—I understood better what the rule of law means. I understood that the rule of law unifies a society. The terrorists in Iraq are somewhat like the Shakespearean character "Dick the Butcher" who, as part of the gang of Jack Cade, when talking about overthrowing the monarchy, said "The first thing we do, let's kill all the lawyers."[6] The terrorists in Iraq, like Dick the Butcher, know that the rule of law provides the fabric that holds society together and that destroying the lawyers and judges tears apart the fabric of society. Despite being in the "cross-hairs" of the terrorists, the Iraqi judges and lawyers continued to re-establish the rule of law in Iraq. Their courage and commitment was inspiring and demonstrated to me the integral role of attorneys, judges, and the law to a society's proper functioning.

Promotion of the rule of law in Iraq also requires improvement of police and investigative techniques. Historically, the Iraqi police relied on confessions, which too often were coerced. As a result, the Iraqi courts developed safeguards to counter the problem of unreliable, coerced confessions. Those procedures included requiring special formalities for out-of-court confessions, including a special affirmation of truthfulness, a thumbprint, and other formalities. An out-of-court confession that did satisfy those formalities was given minimal weight, if any. Additionally, a two witness procedural rule was applied to prove criminal conduct. In preparing evidence for presentation to Iraqi prosecutors, military judge advocates and American law enforcement personnel worked to facilitate the Iraqi legal system's movement from a confession-based to a forensic-based system, with greater reliance on explosive residue and fingerprint evidence.

This transition, however, was not easy because it required retraining of almost the entire Iraqi police force. One American police trainer relayed a story about a training session in which an Iraqi police trainee had skillfully obtained a confession from an individual believed to have attacked American soldiers. The American law enforcement instructor told the trainee that the job was not complete until the paperwork was finished; that it was necessary to prepare a written report of the confession, and to put the confession in the proper form so that the Iraqi court would accept it into evidence. The trainee did not respond. The trainer repeated the instruction, and again the trainee did nothing. The American advisor then asked why the trainee was not preparing the written records of the confession. Another Iraqi trainee interjected, "He can't read or write," to which an American advisor aptly commented, "But he sure knows how to get a confession." Despite these challenges, every day, more and more Iraqi police officers are being trained and are assuming their role in combatting terrorism.

Saddam Hussein recognized the central importance of rule of law in Iraq's future when facing imminent defeat in 2003. He directed that the prison doors be opened, freeing tens of thousands of murderers and other criminals into cities throughout Iraq. What ensued was to be expected. Courthouses were ransacked, and court and police records destroyed. In the years that followed it was not unusual to take a detainee, captured for firing a rocket propelled grenade or setting off an improvised explosive device designed to kill American soldiers, to Iraqi court and have a judge recognize the individual as a convicted criminal from years before. Since his release, however, the criminal had changed his form of criminal activity from theft or murder to attacking American soldiers and Marines in terrorist-funded operations.

In 2003 the Central Criminal Court of Iraq (CCCI) was established to promote rule of law in Iraq. Mindful of the admonition of T.E. Lawrence (Lawrence of Arabia), who successfully led Arabic military forces against the Turkish forces in the Middle East in the early part of the Twentieth Century, that it is "better the Arabs do it tolerably than you do it with your own hands,"[7] the CCCI was composed of Iraqi prosecutors, panels of three Iraqi judges, and Iraqi defense counsel. Instead of trying to impose a common law, accusatorial prosecution system, the CCCI applied the Iraqi civil law and inquisitorial prosecutorial model. Pre-Saddam Hussein Iraqi criminal procedures and substantive law were used. American military prosecutors assisted in coordinating the appearance of witnesses, marshaling evidence, and assisting the Iraqi judges as directed, but left the administration of justice to the Iraqis.

The wisdom of allowing the Iraqis to run their own judicial system to deal with terrorists was readily apparent as they demonstrated repeatedly that they could better handle administration of justice in Iraq than Americans could. For example, in dealing with Jihadists—the foreign fighters who have entered Iraq from Saudi Arabia, Syria, and other countries to wage the holy war—the Iraqi prosecutors and judges had the ability to sift through purported explanations of defendants with special skill. Often detainees, when

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asked why they were in the city in which they were captured, such as Fallujeh, they would provide a false excuse, such as to attend school or to meet with a group of people. The Iraqi judges could pick up on accents and determine whether the individual was truly from Fallujeh or elsewhere. As I learned later, the written form of Arabic is understandable throughout the Arabic world, but the spoken Arabic differs markedly from place to place. Repeatedly, the Iraqi judges, through skillful questioning and a keen ear for dialects, were able to obtain admissions from defendants that in fact they were from Syria, Saudi Arabia, or other countries and that they were in Iraq to wage Jihad.

The CCCI, while initially resisted because the Iraqi judicial system had historically relied on provincial courts, was soon endorsed by the Iraqi government and judiciary. The CCCI became a "federal" court system that was needed in the effort to restore rule of law in Iraq. Because of instability in portions of the Sunni Triangle, it became extremely difficult for the courts to work in those areas. I learned of a striking example of that one day while meeting with the chief judge of the CCCI. He recessed our meeting so that he could speak with a lady who had arrived in court with her two children. She was dressed completely in black, in a long black dress with long sleeves called a dishdasheh, with a scarf-like cover called a hejab, and was crying profusely as she explained what had happened to her husband. After the meeting, the chief judge explained to me that terrorists had believed the lady's husband was supporting the Iraqi interim government, and decided to make an example of him. The terrorists had, in broad daylight, killed the lady's husband, cutting off his limbs, and distributing his arms and legs throughout the neighborhood as a warning to others not to work with the new government. Despite public knowledge of this, the local police, prosecutor, and court were not going forward with this case because they had been intimidated by the terrorists. The chief judge explained to me that this is why it is necessary to have a CCCI, a federal court, which is not intimidated by the terrorists, and can ensure that the rule of law is a reality throughout Iraq.

Too often, all we see of Iraq is what is on the national news—attacks on civilians, police, and the new Iraqi government. After days and days of such reports, one might become convinced that things are going badly. While it is true that Iraq remains a dangerous place, on a daily basis hundreds of Iraqi attorneys, judges, and government officials are establishing the rule of law in Iraq. These Iraqi attorneys, who daily risk their lives, and often work for less than $100.00 per month, provide an inspiring example of government and public service attorneys working to make the rule of law a reality in their country. I asked one attorney, who was fluent in English, why he worked as a government attorney in Iraq when he could have made an incredible amount of money working for an international law firm. His response was that he wanted to be part of the establishment of a democratic government in his country. He knew that he could make considerable money doing other work, but this was his chance, the chance of his generation, to do something of lasting value for his country. This attorney represents what is happening all over Iraq, as attorneys and government officials are working diligently at establishing the rule of law in a democratic nation. They hope that one day their descendants will look back at them the way Americans look back with reverence at the framers of the Constitution.

This Iraqi attorney, like many other Iraqi attorneys I met, share with attorneys in North Carolina a belief that the law is a noble calling, that attorneys serve the people, and that the aim of the law is justice. They see the law as providing a framework of rules, adaptable through the democratic process, that allow people freedom while providing them security and allowing them to achieve their best selves. That, however, is not to say that there are no differences. One Iraqi judge, after being introduced to a US Attorney from Iowa with an especially distinguished resume, asked, "Your accomplishments are quite impressive; you are obviously a very important man. How many wives do you have?" When the US attorney responded with "one," the Iraqi judge replied, "That will not do for a man of your stature." Despite cultural differences, Iraqi and American attorneys share an abiding commitment to the rule of law.

Conclusion

Today, Iraqi attorneys are once again embracing the rich Iraqi legal tradition, turning away from the aberration of the decades of repression under Saddam Hussein, to establish democracy and re-establish the rule of law in Iraq. It was indeed an honor to work with those talented and service-oriented Iraqi attorneys and judges who are committed to public service and making their country, to quote President John Adams, "a government of laws, not men."[8] My assignment in Iraq taught me that attorneys in Iraq share with attorneys in this country a dedication to the rule of law and a professional commitment to place service to their country above personal gain and personal safety. My experience in Iraq reaffirmed that attorneys, whether in the United States or in Iraq, are indeed part of a noble calling. ■

Gill Beck is an assistant United States Attorney in the Middle District of North Carolina and a colonel in the United States Army Reserve assigned as commander of the 12th Legal Support Organization, which provides legal support to Army Reserve units in North and South Carolina. The opinions in this article are the author's and not those of the United States Department of Justice or United States Army.

Endnotes

1. Fareed Zakaria, *The Future of Freedom* p. 13 (W.W. Norton & Co. New York 2004).
2. Theodore Roosevelt, Annual Message, 1903 in *The Speaker's Book of Quotations*, ed. Henry O. Dormann (Ballantine Books 2000).
3. *See* Richard Fallon, "The Rule of Law as a Concept in Constitutional Discourse," 97 Column. L. Rev. 1, 4 (Jan. 1997).
4. Hammurabi's Code
5. John Keegan, *The Iraqi War*, p. 52 (Alfred A. Knopf, New York)(2004).
6. Shakespeare, Henry VI, part 2.
7. T.E. Lawrence, *The Twenty-Seven Articles of T.E. Lawrence*, published in The Arab Bulletin, Aug. 20, 1917.
8. *The Works of John Adams*, ed. Charles Francis Adams, vol 4, p. 106 (1851).

The View from the Vault

By Thomas P. Davis

The North Carolina Supreme Court Library is open weekdays from 8:30 a.m. to 4:30 p.m., except on state holidays. See the Library's website for its current access policy (www.aoc.state.nc.us/www/public/html/sc_library.htm). During the renovation of the Justice Building the Library is located in the old Wachovia Building, Banking Level, at 227 Fayetteville Street. The following annotated list selects essays published in 2005 which may be of interest to the profession. These essays appeared in law reviews, bar association newsletters, legal newspapers, legal bulletins, and this bar journal. The selections were compiled by North Carolina Supreme Court Librarian Thomas P. Davis.

I. Essays Published in 2005 Relating to North Carolina Law

Recent Legislation

Jim Lore, Dolph Sumner, Hank Patterson, Victor Farah & Leto Copeley, *2005 Amendments to the Workers' Compensation Act*, 19 The Course and the Scope 1 (December 2005)

Chris Burti, *Electronic Recording/Notary Act Adopted*, 26 Campbell Law Observer 1 (October 2005): "North Carolina has adopted its version of the Uniform Real Property Electronic Recording Act." The amendments have an impact on Chapter 47, but "the most significant changes come in the sections that effect a major rewrite of Chapter 10B, which regulates Notaries." "Sections 1, 2, 10, and 13 of this act are effective when they become law (probably August 2005, *Ed.*). The remainder of the act becomes effective December 1, 2005, and applies to notarial acts and applications for notary commissions and recommissions made on or after that date."

Maitri Klinkosum & Brad Bannon, *Advocating for Those Left Behind: The Need for Discovery Reform in Non-capital Post-conviction Cases*, Trial Briefs 8 (February 2005): "On October 1, 2004, the new pre-trial discovery laws for felony criminal cases went into effect. By enacting the new discovery rules in criminal cases, the North Carolina General Assembly recognized the problems of evidence being withheld in violation of *Brady v. Maryland* . ..."

Jerry Hartzell, *North Carolina Observations on Federal Jurisdiction under the New Class Action Act*, 10 North Carolina State Bar Journal 12 (Fall 2005): The author notes that "the new Act could affect North Carolina more than most other states: the 'certified question' procedures that the Act's supporters claim will allow states' highest courts to retain an element of control over the meaning of their state's laws is unavailable in North Carolina."

Joan G. Brannon, *2005 Legislation Affecting Small Claims Actions and Other Non-Criminal Functions of Magistrates*, *in* Administration of Justice Bulletin, no. 2005/07 (November 2005)

John Rubin, *2005 Legislation Affecting Criminal Law and Procedure*, Administration of Justice Bulletin no. 2005/08 (December 2005): Includes a lengthy discussion of the "*Blakely* bill."

Janet Mason, *2005 Legislation: Juvenile Law*, Juvenile Law Bulletin no. 2005/02 (November 2005)

Judge Ripley E. Rand, *Highlights and Outline of the New Criminal Discovery Rules for North Carolina*, 24 The True Bill 1 (March 2005)

Procedure /Evidence

Jessica Smith, *Pleas and Plea Negotiations in*

North Carolina Superior Court, *in* 2005/03 ADMINISTRATION OF JUSTICE BULLETIN (July 2005): "In 2002-03, a total of 2,887 superior court criminal cases were disposed of by jury trial. In that same period, 69,649 cases were disposed of by guilty plea." "This bulletin summarizes the constitutional, statutory, and case law regarding pleas and plea negotiations in superior court."

J. Phillip Griffin & Billy Sanders, *The Constitution and Fairness in Criminal Sentencing*, 10 THE CONSTITUTIONALIST 1 (June 2005): "This article traces the history of the line of cases culminating in the *Booker* decision and discusses the impact of this and other decisions on North Carolina sentencing law and policy."

Kenneth S. Broun, *Scientific Evidence in North Carolina after Howerton – A Presumption of Admissibility?*, 10 N.C. STATE BAR JOURNAL 8 (Spring 2005): "One of the things that makes a prediction about the future application of the principles set forth in *Howerton* especially difficult is that a reading of *Howerton* side-by-side with *Daubert* shows very little difference between the fundamental legal premises upon which the two cases are based. A fair conclusion is that the Court in *Howerton* was not rejecting the *Daubert* opinion, but rather the *Daubert* culture that has arisen in the federal courts since that case. The Court took pains to make sure that the North Carolina courts were not bound by federal precedent in dealing with issues involving scientific or technical evidence. The tests may be the same but trial court judges were warned against applying the rigorous standards for admissions currently being applied in the federal system."

William A. Woodruff, *The Admissibility of Expert Testimony in North Carolina after* Howerton*: Reconciling the Ruling with the Rules of Evidence*, 28 CAMPBELL LAW REVIEW 1 (2005): While the *Howerton* decision removed all doubt as to whether North Carolina adopted *Daubert's* substantive standard, it did not address how the North Carolina test for admitting expert testimony fits within the broader context of the North Carolina Rules of Evidence. *Howerton* also failed to explain how substantially identical language in the governing rules and the same criteria of admissibility, i.e. reliability, could produce such a different test. As a result, trial judges and lawyers are left to apply *Howerton* to future cases without fully understanding the substantive and procedural foundation for the rule. The resulting ad hoc development of the law in this vital area will likely breed confusion and inconsistent results. This article will attempt to reconcile the reasoning in *Howerton* with the rules of evidence and explain the procedural and substantive differences between the federal approach under *Daubert* and the North Carolina test applied in *Howerton*. It will also suggest a change to the procedure courts use to determine admissibility of expert testimony that will be more consistent with the rules of evidence and the concerns of the court in *Howerton*.

Mark Canepa, *Making Your Way Through the Minefield of Expert Witness Selection in Malpractice Cases in North Carolina*, 10 THE NORTH CAROLINA STATE BAR JOURNAL 6 (Winter 2005): The author surveys the cases that deal with the definition of "same or similar communities" in malpractice actions pursuant to N.C. GEN. STAT. sec. 90-21.12. This survey covers *Pitts v. Nash Day Hospital, Inc.*, 605 S.E.2d 154 (N.C. App. 2004); *Barham v. J. Hawk MD, et al*, 165 N.C. App. 708 (2004); *Coffman v. Roberson*, 153 N.C. App. 618 (2002); *Smith v. Whitmer*, 159 N.C. App. 192 (2003); *Bak v. Cumberland County Hospital System, Inc.*, 165 N.C. App. 904 (unpublished); and other cases.

Alan D. Woodlief, *An Introduction to the North Carolina Pattern Jury Instructions*, 10 NORTH CAROLINA STATE BAR JOURNAL (Summer 2005)

Miscellaneous

Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century*, 83 NORTH CAROLINA LAW REVIEW 1427 (2005)

Gregory L. Shelton, *The Economic Loss Rule in North Carolina: Time to Wake the Sleeping Giant*, 10 NORTH CAROLINA STATE BAR JOURNAL 27 (Fall 2005): The author argues that *Land v. Tall House Building Co*, 165 N.C. App. 880 (2004) "practically invites North Carolina lawyers and courts to exercise the full potential of the economic loss rule" and that we "should accept the invitation." As the author notes, a federal district court has read *Land* much more narrowly in *Ellis-Don Const., Inc. v. HKS, Inc.*, 353 F.Supp.2d 603 (M.D.N.C. 2004). In *Ellis-Don* Judge Bullock writes:

> As noted, North Carolina's economic loss rule bars claims in tort for purely economic losses in the sale of goods covered by contract law, including the UCC. It does not limit tort actions that arise in the absence of a contract, nor is there any indication that the courts of North Carolina have expanded the rule beyond its traditional role in products liability cases. ... CRZ cites some broad statements of the economic loss rule that proclaim that "the economic loss doctrine prohibits recovery for economic loss in tort," *Land v. Tall House Bldg. Co.*, 602 S.E.2d 1, 4 (N.C. App. 2004), and depends on such broad characterizations of the rule to argue that the cause of action recognized in *Davidson* is no longer valid in North Carolina. Such statements are made, however, in cases deciding issues of products liability in which the transaction giving rise to the dispute was governed by the law of contracts. Furthermore, all of the cases cited within such cases also address issues of products liability arising under contracts for the sale of goods. ... That does not mean...that the doctrine has expanded to preclude all claims in tort for economic damages in the absence of a contract, or, more narrowly, outside the products liability context.

Id. at 606-07. Of Judge Bullock's analysis, Mr. Shelton says that "North Carolina courts should ignore this dicta and continue to extend the reach of the economic loss rule."

Shea Riggsbee Denning, *Public School Funding in the Summer of 2005:* North Carolina School Boards Association v. Moore, *in* 108 LOCAL GOVERNMENT LAW BULLETIN (November 2005)

Joseph W. Goodman, Leandro v. State *and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina*, 83 NORTH CAROLINA LAW REVIEW 1507 (2005)

Seth Warren Whitaker, *State Redistricting Law:* Stephenson v. Bartlett *and the Judicial Promotion of Electoral Competition*, 91 VIRGINIA LAW REVIEW 203 (2005): "In *Stephenson I*, the court reached a completely unexpected resolution to a lawsuit over the

state's legislative redistricting plans by fashioning a set of judicially created redistricting criteria. In *Stephenson II*, the court provided further information about just how stringent it intended the criteria devised in *Stephenson I* to be and gave a glimpse of the very narrow range of discretion remaining for the North Carolina General Assembly in legislative redistricting. A careful analysis of the results of these two cases suggests that other states may be able to use their own state constitutions to reform the redistricting process—by creating limitations on legislative choices in redistricting that reduce the role of partisan politics—if they are willing to embrace the sort of judicial activism that characterizes the *Stephenson* rulings. To date, no other state has been as aggressive as North Carolina; however, the problems which appear to have motivated the *Stephenson* court are hardly unique to that state."

Jon Heyl & Allyson Labban, *Breach of Contract Claims Under Chapter 75*, 15 ANTITRUST NEWS 1 (March 2005) & 27 NOTES BEARING INTEREST 7 (September 2005): "The commercial disputes for which Chapter 75 claims are made include cases of breach of contract. These breach of contract cases test the scope of Chapter 75, requiring the courts to answer the question of when a breach of contract is 'unfair and deceptive' conduct." "This article reviews the history of Chapter 75 and pertinent state and federal cases in an effort to divine general guidelines that practitioners may use when evaluating a breach of contract claim under chapter 75."

Mary Wright, *A Comparative Analysis of Selected North Carolina Contractual Provisions*, 27 NORTH CAROLINA CENTRAL LAW JOURNAL 23 (2004): "This article will examine selected North Carolina contractual doctrines and statutory provisions in relation to their relevant counterparts in other jurisdictions. Particular emphasis will be placed on those doctrinal and statutory applications that depart from the majority or prevailing view. Additionally, the article will focus on the significance of developments in the law in areas where the status of a particular doctrine is uncertain as a result of conflicting case law and interpretation."

Diane M. Juffras, *Independent Contractor or Employee? The Legal Distinction and its Consequences*, 32 PUBLIC EMPLOYMENT LAW 1 (May 2005)

Michael Schadewald, *State Courts Continue to Grapple with the* Geoffrey *Issue*, 24 JOURNAL OF STATE TAXATION 19 (Summer 2005): This discussion of *Geoffrey* and related state court decisions summarizes and quotes from *A&F Trademark Inc. v. Tolson*, 167 N.C. App. 150 (2004).

Jurisprudence

Logan Sawyer III, *Constitutional Theory in Practice: Originalism in* Brown v. Board of Education, 11 THE CONSTITUTIONALIST 1 (September 2005): This "brief examination of the landmark case, *Brown v. Board of Education*, and the academic debate over a well-known constitutional theory, originalism, shows how constitutional theory can offer practical tools to practicing lawyers."

J. Michael McGuinness, *The Rising Tide of North Carolina Constitutional Protection in the New Millennium*, 27 CAMPBELL LAW REVIEW 223 (2005)

Court Administration/History/Trends

Laura Langer & Teena Wilhelm, *The Ideology of State Supreme Court Chief Justices*, 89 JUDICATURE 78 (September-October 2005): With a score of 0 as most ideologically conservative and a score of 100 as most liberal, Chief Justice Lake has achieved a score of 49.81, according to these authors. Not only do the authors think they can measure empirically the ideology of the 50 chief justices, they are bold enough to extend the gloss to associate judges of the various supreme courts. Comparing the Chiefs to their brethren, the authors say:

> Another observation from these data is that variation exists in the degree of similarity between chief justice ideology and the average ideology of all justices on the state supreme court. . . . North Carolina, Tennessee, California, Iowa, and New Mexico have chief justices on the court in 2005 who are almost indistinguishable from the average associate justice.

Katherine White, *Deliberate N.C. Supreme Court Accelerates Pace on Matters of Taxation and Education*, 21 NORTH CAROLINA INSIGHT 90 (March 2005): "In its first 175 years of existence (1819-1994), the North Carolina Supreme Court moved slowly in its legal interpretations, not making wholesale changes as other states' courts had, and taking few steps that altered the way business is done." "What a difference a decade makes. In the last 10 years, the Supreme Court has reversed a 100-year string of its own cases, has revamped how the state's public schools operate, and has ordered the refund of taxes to tens of thousands of citizens." "It is not unusual for state courts to decide matters of public policy." "What is unusual is the breadth of recent decisions and their impact on citizens and industry." "Beyond the legal arguments, the constitutional issues with which the Court has wrestled have affected areas usually addressed by the executive branch and the General Assembly—taxes and education. This incursion into areas traditionally left to the two other branches of government is not an ordinary occurrence."

Paul C. Ridgeway, *Practice Before the North Carolina Business Court*, TRIAL BRIEFS 5 (October 2005): Mr. Ridgeway outlines the history of this specialized court, and notes its recent expansion to Mecklenburg County under Special Superior Court Judge Albert Diaz, and possible expansion to Wake County under Special Superior Court Judge John Jolly.

Danny G. Moody, ed., *Society News: Newsletter of the North Carolina Supreme Court Historical Society* (Fall 2005): This new publication includes a message for the Society President, Franklin Freeman; an announcement of the planned presentation of the Ruffin Jr. portrait; a description of the presentation of the Taylor portrait; a feature about the Supreme Court holding court in the Chowan County Courthouse; a story about the renovation of the Justice Building... and more.

II. Essays Published in 2005 of General Interest

Judicial Process

Judge Richard M. Markus, *A Better Standard for Reviewing Discretion*, 2004 UTAH LAW REVIEW 1279: According to this former chief judge of the Ohio Court of Appeals, "Too often, appellate court standards of review for discretionary decisions simply report the appellate panel's personal chagrin

with the trial court's action, its indifference to the trial court's resolution of the issue, or its unwillingness to do anything about it. As a result, they give little direction to the trial judge who seeks to exercise discretion properly, or to the next appellate panel that tries to review it rationally. This article suggests another approach, which may facilitate efforts by both trial and appellate courts to accomplish their respective duties consistently and reliably." The judge suggests that, "Before according deference to a trial court's discretion, the appellate court should confirm that: (1) the governing principle authorizes discretion for that type of decision, instead of a consistently applied rule of law; the underlying facts on which the trial court relied authorized it to make a choice; (2) the court's choice fell within an acceptable range; (3) the court did not consider improper facts in determining its ability to choose or in making its choice; (4) the court did not refuse to consider proper factors in determining its ability to choose or in making that choice; and (5) the court did not weigh those factors irrationally in determining its ability to cho[o]se or to make that choice."

G. Edward White, *Historicizing Judicial Scrutiny*, 57 SOUTH CAROLINA LAW REVIEW (2005): "[T]here has been very little discussion among commentators—and most of that attenuated—about how or why the Court's scrutiny levels jurisprudence emerged. .... [T]here have been few efforts to analyze the scrutiny levels practice as a historical phenomenon. This seems all the more striking because for a time span of 150 years, in which the Court rendered numerous decisions reviewing the acts of legislatures on constitutional grounds, it made a quite different set of scrutiny level choices from the sets it has employed since the 1930s."

Honorable Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 BROOKLYN LAW REVIEW 727 (2005): The judge describes the practice in the Second Circuit in using decretal language (that part of the appellate opinion that states what a court of appeals is ordering).

Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WILLIAM & MARY BILL OF RIGHTS JOURNAL 1241 (April 2005): "On its own terms, rejecting legislative history, without saying more, makes little sense. Text cannot be understood absent a context. Rejecting legislative history simply eliminates one possible interpretive context, without identifying some other context to fill the interpretive void. Thus, the textualist account is incomplete." "Rejecting legislative history also fails the test of consistency with constitutional government. While Justice Scalia offers bicameralism and presentment as the constitutional measuring stick, he follows his logic only half way—he accepts the text produced by that process, but not the context. This separation of text and context cannot be justified. Because legislative history reflects the context of bicameralism and presentment, it provides the constitutionally preferred context for determining statutory meaning."

Michael Abramoqicz & Maxwell Stearns, *Defining Dicta*, 57 STANFORD LAW REVIEW 953 (2005): "After critiquing the most influential definitions of holding and dicta, we offer and defend our own: A holding consists of those propositions along the chosen decisional path or paths of reasoning that are actually decided, are based upon the facts of the case, and lead to the judgment. A proposition in a case that is not holding is dicta." The authors identify the article, Michael C. Dorf, *Dicta and Article III*, 142 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1997 (1994), as "the only major law review article in the past 50 years exclusively focused on offering a broad theoretical treatment of the distinction between holding and dicta."

Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 NORTH CAROLINA LAW REVIEW 847 (2005): "The article begins by arguing that the rise of unnecessary [federal] constitutional rulings is both part of a larger trend toward judicial supremacy and the result of pressures specific to each of the areas in which the Court has authorized such rulings. It then considers whether the Court's embrace of unnecessary constitutional rulings ...can be squared with Article III's ban on advisory opinions..."

Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUPREME COURT ECONOMIC REVIEW 115 (2004): The article presents an originalist defense of the institution of judicial review. "With this approach to originalist interpretation (and its limits) in mind, the overwhelming majority of courts and scholars are correct, I submit, to accept the historical legitimacy of judicial review. Judicial nullification of unconstitutional laws in not only consistent with the frame provided by original meaning, it is expressly authorized by the text and is entirely justified on originalist grounds."

Eugene Kontorovich, *Disrespecting the 'Opinions of Mankind': International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 265 (Spring 2005): "The invocation of 'decent respect' to suggest that American courts should defer to or even consider foreign views is in effect a misquotation. Its force depends entirely on lifting the words from their context—on ignoring the second half of the clause from which the words are taken. The Declaration [of Independence] in no way suggests that 'decent respect to the opinions of mankind' requires following those opinions. Rather, all that decent respect 'requires' of us is that we *explain* our actions to the world—that the colonists '*declare* the causes which impel them to the separation.' ... Thus, 'decent respect' is not about *importing* foreign opinion but rather about exporting our views to an interested foreign audience, in the form of a Declaration."

SYMPOSIUM: TO WHAT EXTENT SHOULD THE INTERPRETATION AND APPLICATION OF PROVISIONS OF THE U.S. CONSTITUTION BE INFORMED BY RULINGS OF FOREIGN AND INTERNATIONAL TRIBUNALS, 26 UNIVERSITY OF HAWAII LAW REVIEW (Summer 2004)

SYMPOSIUM: DUAL ENFORCEMENT OF CONSTITUTIONAL NORMS, 46 WILLIAM AND MARY LAW REVIEW (February 2005): This issue includes remarks by Chief Justice Rehnquist, and such articles as James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, and Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?* Beyond its theoretical interest, this SYMPOSIUM is of some note because it cites decisions of the North Carolina Supreme Court. In Williams' article, for example, footnote 81 cites *State v. Spivey*, 579 S.E.2d 251, 254 (N.C. 2003), and footnote 143 quotes *State v. Jackson*, 503 S.E.2d 101, 103 (N.C. 1998).

PANEL DISCUSSION: CITATION OF UNPUBLISHED OPINIONS: THE APPELLATE

JUDGES SPEAK, 74 FORDHAM LAW REVIEW 1 (2005)

Criminal Procedure

Benjamin E. Rosenberg, *The Analysis of Defective Indictments After* United States v. Cotton, 41 CRIMINAL LAW BULLETIN 463 (September-October 2005): "Courts' strong inclinations to find defects in indictments harmless so long as the defendants had notice of the crimes with which they were charged has led to a decline in the significance of indictments, and an evisceration of the grand jury's role as a body that stands between the prosecutor and the defendant; among the people most strongly affected by the decline are those who are acquitted at trial, for such people suffer a significant harm by virtue of the defective indictment, and yet have no remedy ..."

Katharine A. Ferguson, *The Clash of* Ring v. Arizona *and* Teague v. Lane*: An Illustration of the Inapplicability of Modern Habeas Retroactivity Jurisprudence in the Capital Sentencing Context*, 85 BOSTON UNIVERSITY LAW REVIEW 1017 (2005)

Allen D. Boyer, *The Trial of Sir Walter Ralegh: The Law of Treason, The Trial of Treason, and the Origins of the Confrontation Clause*, 74 MISSISSIPPI LAW JOURNAL 869 (2005): "Very recently, in *Crawford v. Washington*, the United States Supreme Court demonstrated that *Sir Walter Ralegh's Case* is not merely a bleak episode of legal history, but rather that it remains a vital legal precedent, one from which a redeeming lesson may be drawn." The author presents newly discovered materials "which allow us to understand the prosecution's argument."

Judicial Conduct

Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 THE UNIVERSITY OF KANSAS LAW REVIEW 531 (2005): This article "describes how judicial disqualification operates in a procedural vacuum that has prevented the disqualification laws from protecting judicial integrity." "[T]he absence of the traditional adjudicatory procedures in recusal law undermines the reputation of the judiciary." The author then "suggests reforms that would incorporate the traditional forms of adjudication into the recusal process."

SYMPOSIUM: RECUSAL ON APPEAL, 7 THE JOURNAL OF APPELLATE PRACTICE AND PROCESS (Spring 2005): This issue includes M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*; Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*; and Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*.

Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct: A Progress Report*, 44 THE JUDGES' JOURNAL 7 (Winter 2005): "Perhaps the most significant change in the revision is the decision to restructure the canons into rules." "The rules-based format gives guidance on which actions are enforceable—and thus would subject the judge to discipline if violated—and which are not. In general, the commission has chosen to move hortatory language to the commentary sections. This change illustrates a broader debate on the appropriate role of judicial conduct codes in general. Some commentators look to codes to provide a set of enforceable rules for disciplinary purposes. Others believe that judicial codes of ethics should contain aspirational principles as well as enforceable rules."

SYMPOSIUM, JUDICIAL PROFESSIONALISM IN A NEW ERA OF JUDICIAL SELECTION, 56 MERCER LAW REVIEW (2005)

Miscellaneous

Adriaan Lanni, *'Verdict Most Just': The Modes of Classical Athenian Justice*, 16 YALE JOURNAL OF LAW & THE HUMANITIES 277 (2004): "In my view, the Athenian legal system was more complex than is generally thought. The Athenians made a conscious decision to reject the rule of law in most cases, and they did so because they thought giving juries unlimited discretion to reach verdicts based on the particular circumstances of each case was the most just way to resolve disputes. But in other cases, such as commercial suits, where the practical importance of more predictable results was high, the Athenians did have rules of admissibility and relevance that limited jury discretion. The Athenian legal system struck a balance between following rules and doing justice that is altogether different from that which may be seen in the pages, for example, of the *Federal Reporter*. Classical Athens thus provides a valuable case study of a legal system that favored equity and discretion over the strict application of generalized rules. But it managed to do so in a way that did not destroy predictability and legal certainty in the parts of the system where they were necessary."

Jack Penchoff, *Compacts Are Contracts*, 48 Statenews 22 (August 2005): "The purposes of [state] compacts have evolved since 1783 as the governing of states has grown more complex. Between 1783 and 1920, only 36 compacts were enacted, and most of those settled boundary disputes. Over the past 85 years, however, states have enacted more than 160 compacts."

Teresa L. Conaway, Carol L. Mutz & Joann M. Ross, *Survey: Jury Nullification: A Selective, Annotated Bibliography*, 39 VALPARAISO UNIVERSITY LAW REVIEW 393 (2004) ■

Notice of Availability of Competitive Grant Funds for Calendar Year 2007

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 2007. A Request for Proposals (RFP) and other information pertaining to the LSC grants competition is available at www.ain.lsc.gov. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. Information on this is included in Appendix-A of the RFP. Applicants must file a Notice of Intent to Compete (NIC) in order to participate in the competitive grants process. The NIC will be available from the RFP. Please refer to www.ain.lsc.gov for filing dates and submission requirements. Please e-mail inquiries pertaining to the LSC competitive grants process to competition@lsc.gov.

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Danielle M. Walther
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Candace Tanelle Walton
Charlotte, NC
Damian John Ward
Buies Creek, NC
Danielle Marie Ward
Holly Springs, NC
Latia Linda Ward
High Point, NC
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Apex, NC
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Kehinde Abena Watford
Durham, NC
Shan-Tika Ty-East Watkins
Durham, NC
Bradley D. Watson
Fairborn, OH
Ryan Michael Watson
Tallahassee, FL
Lena Watts-Robinson
Gastonia, NC
Myra Kathryn Price Weare
Raleigh, NC
Joel Ray Weaver
Palm Harbor, FL
Monica Eileen Webb
Durham, NC
Robert Michael Weddington
Grundy, VA
Clare Marie Bobbitt Weddle
Durham, NC
David Charles Weiss
Carrboro, NC
Aaron Bader Wellman
Carrboro, NC
Jennifer Elizabeth Wells
Raleigh, NC
Brian Richard Weyhrich
Carrboro, NC
Anna Elisabeth Wheeler
Lillington, NC
Cybil Janine White
Chapel Hill, NC
James Arthur White
Huntersville, NC
W. Bryan White
Taylorsville, NC
William Durham White
Chapel Hill, NC
Joshua D. Whitlock
Williamsburg, VA
William J. Wickward
Durham, NC
Jeffrey Bruce Widdison
Durham, NC
Gordon Jules Wikle
Durham, NC
Alton R. Williams
Raleigh, NC
Andrea Lee Davis Williams
Forest City, NC
April D. Williams
Raleigh, NC
Barry Lamont Williams
Raleigh, NC
Heather J. Williams
Winston-Salem, NC
Jeremy Christopher Williams
Wilmington, NC
Jillian Elise Williams
Durham, NC
LaDonna M. Williams
Winston-Salem, NC
Lutrell Trumane Williams
Durham, NC
Syrena Nicolle Williams
Durham, NC
Renee M. Williamson
Atkinson, NC
Leila Williford
Ferndale, MI
Lindsay Elizabeth Willis
Bethlehem, GA
Jennifer York Wilson
Greensboro, NC
Jonathan James Wilson
Columbia, SC
Marcus Minter Wilson
Chapel Hill, NC
Megan Jane Wilson
Knoxville, TN
Cami Marie Winarchick
Winston-Salem, NC
William Chad Winebarger
Knoxville, TN
Nickole C. Winnett
Durham, NC
Anna Tycin Wood
Durham, NC
Seth Matthew Woodall
Eden, NC
Christopher Jason Woodyard
Matthews, NC
Tommie Renae Wright-Kearney
Durham, NC
Chad Erik Wunsch
Chapel Hill, NC
Chandra E. Wymer
Carle Place, NY
Tiffany Anise Yancey
Durham, NC
Tracy Y. Yanger
Charlotte, NC
Scott Manning Yarbrough
Charlotte, NC
Patrick Steven Yates
Waynesville, NC
Patrick James Yingling
Charlotte, NC
David Inchol Yoon
Durham, NC
Jae Hong Yoon
St. Louis, MO
Stephen Michael Yoost
Columbus, OH
Paula Janelle Yost
Charlotte, NC
Aaron D. Young
Carrboro, NC
Allison J. Young
Chapel Hill, NC
Cheryl Young
Emerald Isle, NC
Robert Nelson Young
Fuquay-Varina, NC
Sarah Grace Zambon
Chapel Hill, NC
Theresa Marie Zamecnik
Mantua, OH
Peter D. Zellmer
Winston-Salem, NC
Jeffrey Dean Zentner
Nashville, TN
Amanda S. Zimmer
Winston-Salem, NC
Emily D. Zimmer
Cambridge, MA
Kimberly Easter Zirkle
Salisbury, NC

The Many Hats (cont.)

societal pressures, or selfish concern.

These are not easy to accomplish—*but they are only a part of the job.*

Within Our Constitutional System of Government

District court judges must:

Decide when the police powers of the state have overflowed their bounds;

Decide what the legislature meant when they inartfully drafted a new law;

Decide what the appellate courts really meant when they said what they said;

Decide what our constitutional rights mean in the day-to-day world in which we live.

(Nearly as many fundamental constitutional rights come into consideration in a one-hour DWI trial as do in a two-week murder trial. The district court judge must decide these issues in minutes, alone, often without briefs, AND often must do so several times a day, for several days a week.)

These are not easy decisions to make—*but they are only a part of the job.*

Within Our Society

District court judges:

Are looked to as leaders, as experts, as exemplary citizens;

Are expected to serve on boards and committees;

Share their knowledge and experience with others to develop meaningful programs and policies in areas tangential to the courts;

Inspire obedience and respect for the law;

Improvise, theorize, and legitimize the administration of the criminal justice, juvenile justice, and civil justice systems;

Learn the law, teach the law, understand the law, and apply the law;

All the while

Maintaining their families, being spouses, parents, and children,

Enjoying recreational pursuits,

Maintaining health, and

Nurturing relationships with family, friends, and God.

These are not easy matters—*but they are only a part of the job.*

All of these things are part of the job of being a district court judge. A judge must be able to do *all of these jobs* and be willing to shift between them *at any time*. AND they must be done with patience, courtesy, legitimate analysis, understanding, intuitiveness, empathy, application of life's experience, common sense, compassion, flexibility, decisiveness, and, sometimes, courage. They must be done alone, without rancor, vengeance, prejudice, or fear; without bias, sympathy, or fear of public clamor.

To find the best person to perform the job of district court judge, who is better able to consider all of these various parts of the job and person? Is it some appointing authority or the general voter at the polls?

To decide whether a particular district court judge should retain his office, who is better able to consider all of these various parts of the job and the person? Is it some independent agency report on performance and characteristics in a voter guide, or a competitor's letters to the editor, and editorials and advertisements in the newspapers?

To attract the best person to the job of district court judge, do we want the job sought by young lawyers to improve their visibility or standard of living, or by experienced lawyers who relish the challenge? Do we count on the apparent prestige of the position, or should we pay a reasonable salary?

These are issues in which the Bar has a vital interest. Both as individual voters and as a body, lawyers should make their feelings known to their legislators. If not lawyers, who will? ■

Joseph Turner is the chief district court judge for the 18th Judicial District.