Journal 7,4

“Assessable Costs” in Civil Actions—Has the Court of Appeals Overruled the Supreme Court and the Legislature?
By Joe E. Wall

John J. Parker’s Failed Quest for a Seat on the Supreme Court
By Elizabeth G. McCrodden

The Changing Face of Judicial Elections
By J. Christopher Heagarty

Retired Judges, Substitute Judges, and Civil Rule 63
By Thomas L. Fowler

A Story of Recovery: An Interview with Barry Nakell
By Michael J. Dayton

Transformational Lawyering: New Approaches to Expanding Our Choices in Law Practice
By J. Kim Wright

The Lawyer’s Myth: Reviving Ideals in the Legal Profession
A book review by G. S. Crihfield

An Interview with Our New President—James K. Dorsett III

The View from the Fifth Floor of the Justice Building (On a Clear Day)
By Thomas L. Fowler and Thomas P. Davis

“Assessable Costs” in Civil Actions—Has the Court of Appeals Overruled the Supreme Court and the Legislature?

By Joe E. Wall

The trial is over, and the jury has spoken. I lost. Now, my opponent has filed a motion requesting that various expenses be taxed against my client as “costs.” She wants my client to pay for two filing fees (she had taken a voluntary dismissal and later refiled)1; fees for service of process2; copies3; postage4; the cost of exhibits5; a bank’s fees for searching for and copying certain records6; deposition costs7, including her expert’s travel and preparation time8; and reimbursement for the fee that her client paid the mediator after our failed attempt at a mediated settlement9. The total amount requested is substantial—over $7,500.00. Losing the case was bad enough; am I now going to have to tell my client that he has to write another check for all of these costs?

I pull out the statute book to see what Article 7A has to say about what has now become an important topic to me—”assessable costs” in civil actions. A quick review of Article 7A gives me momentary relief. Right there it is in black & white. N.C.G.S. § 7A-320 says: “Costs are exclusive - The costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees.” Ah, I say to myself, “complete and exclusive;” let’s see what costs are set forth in Article 7A. My eyes settle on § 7A-305, entitled “Costs in civil actions,” and I read that the “complete and exclusive” list of assessable costs is limited by § 7A-305(d) to the following:

(1) Witness fees, jail fees, counsel fees, as provided by law;

(2) Fees for service of process, by mail, publication, or personal service;

(3) In an appeal, the cost of the transcript of testimony;

(4) Fees of interpreters;

(5) Premiums for surety bonds for prosecution (G.S. 1-109); and

(6) Fees of guardians ad litem, referees, receivers, and "similar court appointees," as provided by law.

I also note that § 6-20 states that "costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." That is a clear statement, I think, that the trial judge must exercise his or her discretion in deciding whether or not to assess the costs enumerated in § 7A-305(d). N.C.G.S. § 6-20 does not appear to authorize the judge to add any items to the list of assessable costs enumerated in § 7A-305(d). The General Assembly specifically defined what items could be assessed as costs in a civil action, and it limited the trial judge's discretion to deciding whether to allow those items to be taxed as costs (in whole or in part), after careful consideration of the particular facts and circumstances of each case. The statute does not purport to give the trial judge authority to define what is and what is not an assessable cost.

At this point, I am feeling pretty good about this "assessable costs" issue, but then reality sets in as I Shepardize § 7A-305 and learn that the court of appeals has expanded the list of assessable costs, and by doing so (could it possibly be?) overruled the Supreme Court and the General Assembly! I know what you are thinking—that's not possible. Well, read on, and see if you agree with me that the court of appeals has, in effect, overruled the Legislature and the Supreme Court by handing down decisions that expand the list of assessable costs in civil actions, despite prior Supreme Court rulings that appear to prohibit such action.

The Supreme Court's Teachings on "Assessable Costs"

A good place to start is to read what Justice Sharp had to say in City of Charlotte v. McNeely, 281 N.C. 684, 691 (1972):

In considering any question involving court costs the following principles are pertinent:

At common law neither party recovered costs in a civil action and each party paid his own witnesses. (Cite omitted.) Today in the State, "all costs are given in a court of law in virtue of some statute." (Cite omitted.) The simple but definitive statement of the rule is: "[C]osts in this State, are entirely creatures of legislation, and without this they do not exist." (Cites omitted.)

Since costs may be taxed solely on the basis of statutory authority, it follows a fortior that courts have no power to adjudge costs "against anyone on mere equitable or moral grounds." 20 C.J.S. Costs §§ 1, 2 (1940). Furthermore, even when allowed by statute, "[c]osts and expenses unnecessarily incurred by the prevailing party will not be taxed against the unsuccessful party. (Cites omitted.)

Justice Sharp went on to say that "[s]ince the right to tax costs did not exist at common law and costs are considered penal in their nature, '[s]tatutes relating to costs are strictly construed.'" Id. at 692, quoting 20 Am. Jur. 2d Costs § 6 (1965).

Make a mental note of the following points made by Justice Sharp:

a) Costs are entirely creatures of statute; and

b) Costs are penal in nature and statutes relating to costs must be strictly construed.

The Court of Appeals "Overrules" the Supreme Court and the Legislature on "Assessable Costs"

In Dixon, Odom & Co. v. Sledge, 59 N.C.App. 280 (1982), the court of appeals was confronted with the issue of whether or not deposition expenses could be charged as an assessable cost in a civil action. The court of appeals cited a legal encyclopedia10 as its sole justification for holding that deposition expenses could be considered as part of the "costs" (despite such expenses being admittedly absent from the statutory list of assessable costs), and that such expenses could be taxed as "costs" in the trial court's discretion. No mention was made of Judge Sharp's statements to the contrary in City of Charlotte v. McNeely (costs are creatures of statute, and being penal in nature such statutes must be strictly construed).

Predictably, the Dixon, Odom decision introduced uncertainty into the law regarding "assessable costs". Now that the statutory list of permissible "costs" had been altered by judicial action, what other expenses could a trial judge assess as costs? The court of appeals' decision in Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, disc. review denied, 313 N.C. 612, 330 S.E.2d 616 (1985), indicated that the court might limit the expansion to deposition costs. One of the issues in Wade v. Wade, was whether or not appraisal fees were taxable as costs in an equitable distribution case. The court of appeals vacated the trial judge's order taxing appraisal fees as costs, and the court cited the City of Charlotte decision as support for its statement that "[c]osts are awarded only pursuant to statutory authority." The court went on to say that the trial court may exercise its discretion under § 6-20 "only within the bounds of its statutory authority."11 The court acknowledged that its decision in Dixon, Odom expanded the list of assessable costs by allowing deposition expenses to be taxed as costs, but by citing the City of Charlotte decision the court appeared to be signaling a reluctance to allow any further expansion of the list by judicial action.

In more recent opinions, however, the court of appeals has been more receptive to efforts to expand the list of assessable costs by judicial action. The court's decision in Lewis v. Setty, 140 N.C.App. 536 (2000) is illustrative of the court's further departure from the dictates of Article 7A and Supreme Court precedent. Jackie Lewis filed a negligence action against Dr. Setty. Lewis took a voluntary dismissal on the eve of trial. Dr. Setty moved for an award of costs, including the price of a trial exhibit ($2,796.70), and the expense of medical record reviews by medical experts ($600.00, $1,600.00, and $1,000.00).

The court of appeals affirmed the trial court's order taxing the exhibit and medical review expenses as assessable costs, and it based its decision on an expansive interpretation of the meaning of § 6-2012 ("costs may be allowed or not, in the discretion of the court, unless otherwise provided by law"). The court emphasized the phrase "in the discretion of the court," but it misconstrued the meaning of the phrase.13 A more reasonable reading of the phrase is that it allows the trial judge to exercise discretion in allowing, in whole or in part, those costs enumerated in § 7A-305(d), not in going beyond the list of statutorily-approved costs based on the trial judge's exercise of discretion as to what may or may not be a "reasonable and necessary expense." As Justice Sharp stated in City of Charlotte v. McNeely, assessable costs are creatures of legislation, and since costs are penal in nature, such statutes must be strictly construed. The court of appeals has strayed by enlarging the list of assessable costs, in direct conflict with the language of N.C.G.S. § 7A-320 and in contradiction of earlier decisions of the Supreme Court.

Where Does this Leave Us in Our Efforts to Understand the Law on "Costs"

Decisions of the court of appeals that redefine what are, and what are not, assessable costs have, by judicial action, enlarged the list of assessable costs. In the face of restrictive statutory language defining "assessable costs" in civil actions, the court of appeals has on occasion misconstrued N.C.G.S. § 6-20 and, in effect, amended N.C.G.S. § 7A-305(d) to modify what the General Assembly stated was a "complete and exclusive" list of assessable costs. In doing so, the court of appeals has jettisoned the Supreme Court's earlier teaching that costs must be statutorily based, and that the statutes defining expenses that may be taxed as costs are to be strictly construed.

Where Do We Go from Here?

The Supreme Court has not spoken in recent years on the issue of what costs may be taxed as "assessable costs." In the absence of guidance from our highest court, the court of appeals has gone its own way in deciding "costs" issues. In the near future, the Supreme Court should accept an appeal that involves a dispute over costs that have been taxed against a party despite such costs not being listed in § 7A-305(d). In deciding that appeal, the Supreme Court should reaffirm the principles that Judge Sharp so clearly set forth in City of Charlotte v. McNeely.14

You'll have to excuse me now; I have to go to the hearing on my opponent's motion for costs. I know that she will be quoting from several court of appeals cases to bolster her claim that her client is entitled to thousands of dollars for the lengthy list of items that she claims are assessable costs because they were "reasonable and necessary," even though they are not listed in § 7A-305(d). Where's the aspirin! This whole thing is giving me a headache!

Joe E. Wall is a partner in the Raleigh law firm of Jordan Price Wall Gray Jones & Carlton, PLLC. He can be contacted by phone at (919) 828-2501; by fax at (919) 834-8447; and by e-mail at jwall@jordanprice.com. Your comments regarding this article, whether pro or con, would be welcome.

This article originally appeared in the January 2002 edition of the Campbell Law Observer.

Endnotes

1. The second filing fee is an assessable cost, but not the first filing fee. See Muse v. Eckberg, 139 N.C.App. 446 (2000), and N.C.R. Civ. P. 41(d).

2. The answer regarding the service fees should be the same as for the filing fees.

3. "Photocopying" is not listed as an assessable cost under NCGS § 7A-305. See Sealey v. Grine, 115 N.C.App. 343 (1994).

4. Postage for service of process by certified mail is a listed assessable cost.

5. Although the cost of a defense exhibit was allowed as an assessable cost in Lewis v. Setty, 140 N.C.App. 536, 537 S.E.2d 505 (2000), "exhibits" are not listed under NCGS § 7A-305 as assessable cost items.

6. This item should be disallowed. See Sara Lee Corp. v. Carter, 129 N.C.App. 464, 500 S.E.2d 732, reversed on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999).

7. By court decision, deposition expenses are assessable costs. See Dixon, Odom & Co. v. Sledge, 59 N.C.App. 280 (1982) and Sealey v. Grine, 115 N.C.App 343 (1994). Such costs are not, however, listed in NCGS § 7A-305.

8. An expert's expenses for traveling to a deposition was approved as an assessable cost in

Sealey v. Grine, 115 N.C.App. 343 (1994). Muse v Eckberg, 139 N.C.App. 446 (2000) holds that costs must be “directly” related to a deposition in order to be assessable (preparation time was not “directly related”).

9. In Sara Lee Corp. v. Carter, 129 N.C.App. 464, 500 S.E.2d 732, reversed on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999), the court of appeals construed the language of NCGS § 7A-305 to include as an assessable cost the fee of a court-appointed mediator. The NC Supreme Court reversed the decision on other grounds and did not address the issue of whether or not the trial judge properly taxed the mediator’s fee as an assessable cost.

10. 20 Am. Jur. 2d Costs § 56 (1965).

11. Wade v. Wade, 72 N.C. App. 372, 384, 325 S.E.2d 260, disc. review denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

12. This questionable statutory construction is carried forward from the decision in Dixon, Odom & Co. v. Sledge, 59 N.C.App. 280 (1982).

13. This court of appeals panel apparently disregarded the restrictive language of the Wade v. Wade opinion, referred to earlier in this article.

14. My argument is that the court of appeals has exceeded its authority in allowing several “non-listed” expenses to be taxed as costs in civil actions. This article does not address whether or not such expenses (deposition and trial exhibit expenses, for example) “should” be listed, assessable costs. As stated by Justice Sharp in City of Charlotte v. McNeely, 281 N.C. 684 (1972), that is a decision that can properly be made only by the General Assembly.

John J. Parker's Failed Quest for a Seat on the Supreme Court
By Elizabeth G. McCrodden

Upon the death in 1930 of Edward T. Sanford, associate justice of the US Supreme Court and a southerner, President Herbert Hoover turned to the South and, on March 21, 1930, submitted to the US Senate for confirmation the name of Judge John J. Parker. Most political observers believed that Parker, a North Carolina Republican and acting chief judge of the Fourth Circuit Court of Appeals, was a natural replacement for Sanford and that he would receive strong support from the Senate.1

Less than two months later, on May 7, 1930, however, the Senate rejected Parker in a vote of 41 to 39, with 16 abstentions. The period was one of frenetic political activity in which several significant forces converged to spell Parker's defeat. Organized labor found objectionable Judge Parker's opinion in the 1927 case of United Mine Workers of America v. The Red Jacket Consolidated Coal and Coke Co.2 (the Red Jacket case). In this case, Judge Parker, writing for a panel of three judges, upheld an injunction issued by a federal district court judge against the United Mine Workers, prohibiting union interference in the operation of certain West Virginia coal mines. Unconvinced by the argument advanced by Parker and his supporters that the opinion was simple adherence to Supreme Court precedent, several senators, led by Senators William E. Borah, Republican of Idaho, and Robert F. Wagner, Democrat of New York, voted against Parker's confirmation on the basis of labor's opposition.

A second source of opposition was the fledgling civil rights movement, led by the National Association for the Advancement of Colored People (NAACP). The NAACP based its opposition on a 1920 speech that Parker had made in his campaign as the Republican candidate for governor of North Carolina. That speech contained the following statement:

The Republican Party in North Carolina has accepted the [disfranchisement3] amendment in the spirit in which it was passed and the negro has so accepted it. I have attended every state convention since 1908 and I have never seen a negro delegate in any convention that I attended. The negro as a class does not desire to enter politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not reached the stage in his development when he can share the burdens and responsibilities of government. This being true, and every intelligent man in North Carolina knows that it is true, the attempt of certain petty Democratic politicians to inject the race issue into every campaign is most reprehensible. I say it deliberately, there is no more dangerous or contemptible enemy of the state than men who for personal or political advantage will attempt to kindle the flame of racial prejudice or hatred.4

Upon Hoover's nomination of Parker, the speech came to the attention of Walter White, acting secretary of the NAACP, who promptly sent Parker a telegram requesting that Parker explain his position. Parker's immediate response was to do nothing, reflecting an underestimation of the NAACP and the role that the race issue would eventually play in the confirmation process.

In his book, "The NAACP Comes of Age": The Defeat of John J. Parker,5 Kenneth W. Goings studied and credited the role racial politics played in Parker's defeat. The record indeed supports the view that labor and the NAACP and their supporters were prime operatives in the effort to defeat Parker. Nevertheless, Goings' book gave little attention to the reason ten southern senators, although Democrats, abandoned a fellow southerner.

This paper revisits the roles of the NAACP and labor in Parker's defeat and also explores a third force affecting the final vote: simple partisan politics—why did some southern senators, in the end, vote against Parker whose racial attitudes reflected their own biases?

John Johnston Parker

Parker was born in Union County, North Carolina, in 1885. He was a bright student, graduating as a member of Phi Beta Kappa from the University of North Carolina, where he also received his law degree. In 1908, the same year he joined David Stern in the practice of law in Greensboro, he broke with family tradition and joined the Republican party. Various reasons have been given for this decision, which was not popular among friends who believed he had political potential. According to Burris, his biographer, Parker was an independent spirit who, as a young man, admired the Republican Presidents McKinley and Theodore Roosevelt.6 In an oversimplification of differences between Republican and Democratic politics, Burris reports also that Parker's decision demonstrated his concurrence with Republican policies that emphasized economics as the way for working people to improve themselves and that de-emphasized government regulation in business matters.7 That Parker was joining more than a party with an economic philosophy and was entangling himself in Republican ambivalence toward blacks and politics was, if not then, to become dramatically apparent later.

Parker became an active, ambitious Republican, running for office three times, each time unsuccessfully. In 1910, at the age of 25, he ran for US Congress in the Seventh Congressional District. Six years later, in 1916, Parker was on the campaign trail again, this time as the Republican candidate for attorney general. Finally, in 1920, the North Carolina Republican Party nominated him for governor. It was during this campaign that Parker was to utter the words that would return to haunt him in 1930 as his nomination to the Supreme Court foundered in the Senate. Although his gubernatorial race was unsuccessful, Parker did garner significantly more votes statewide than any other Republican to that date.8 This brought him attention at the federal level and eventually, in 1925, a federal judgeship.

Even after his appointment to the federal bench, correspondence between Parker and his younger brother, S.I. Parker, reveals Parker's continued interest in Republican politics and his ambition to be elevated to the US Supreme Court. He watched the 1928 elections closely, writing S.I. Parker in September of that year, that he thought the Republicans had the "best chance to carry the state that they have had in my recollection. I am much interested in the situation, and I am really sorry that circumstances are such that I cannot get out and get in the fight."9 A year and a half later S.I. Parker wrote his brother, raising for the first time the possibility of a Supreme Court appointment. On February 2, 1930, the brother asked Parker of the propriety of Parker's attending a Republican gathering in Greensboro. Normally, federal judges, appointees for life, refrained from involvement in politics, but the letter mentioned that two other federal judges (Hayes and Meekins) were to attend the Lincoln Day Dinner. Parker responded on February 6, expressing his doubt about attending, but stating that "in view of the fact that Judge Hayes and Judge Meekins are to be present I think that it would be better for me to go."10 Writing that Hoover's appointment of Charles Hughes as Chief Justice was "a splendid one,"11 Parker reflected that, after his brother's earlier letter to him, Justice Taft had in fact resigned from the Supreme Court due to illness. Although the US Senate confirmed Hughes on February 14, 1930, the nominee had significant liberal opposition during his confirmation proceedings,12 a foreboding of events in the Parker nomination.

Hoover's Nomination of Parker

Supreme Court Justice Edward T. Sanford, a southerner,13 died on March 7, 1930, creating a vacancy on the Court that many believed should go to a southerner. Parker's supporters immediately went to work, meeting with Hoover and pressing him to nominate the North Carolina Republican. A major figure in these efforts was Republican Congressman Charles A. Jonas of North Carolina who wrote Parker on March 9, 1930, expressing his support and outlining their strategy. After warning against "too much political color" in bringing the matter to the president, Jonas wrote:

The movement should be started among the bar and judiciary of the state, and at the proper time

in a quiet way of course the endorsement of the party organization will come along, or the president advised that the organization is backing you to the limit.

I think your old law firm members should take the lead in assembling your case in North Carolina. See Plummer [Stewart]14 and you and he decide the best method and let them go to work. Of course you will want to have nothing to do with it openly, but you can direct your friends.15

Judge Parker's papers do not reveal how active he was in eliciting support for his nomination; if he did direct the campaign, he did so in correspondence that is not in his papers at Chapel Hill or he did so by telephone. His papers do substantiate that he communicated frequently with supporters by telephone at later times during the confirmation battle.16 Goings contends that Parker was active in his nomination and confirmation efforts from March 10 to his defeat on May 7, 1930, and expresses the belief, without substantiation, that "[t]his behavior, for 1930, was questionable in terms of propriety . . . ."17 Parker did take an active role in the later confirmation process, primarily in an effort to defuse his opposition.

Opponents of Confirmation: African Americans

Initial reaction to his appointment was favorable, but shadows of dissent slowly manifested themselves. Labor leaders began the initial inquiry as to Parker's suitability when they questioned his Fourth Circuit opinion upholding "yellow-dog" contracts. While labor, however, was determining whether it would oppose the nomination, the NAACP made public that it would file a protest against Parker's nomination.18 The basis of their objection was the speech which Parker had made in his 1920 gubernatorial campaign and which they paraphrased in a telegram to Parker on March 26, 1930:

YOU ARE QUOTED AS HAVING SAID UPON YOUR NOMINATION TO THE GOVERNORSHIP OF NORTH CAROLINA IN NINETEEN TWENTY QUOTE THE NEGRO DOES NOT DESIRE THE BALLOT STOP HE IS INCOMPETENT AND THE REPUBLICAN PARTY DOES NOT DESIRE HIM TO PARTICIPATE IN THE POLITICAL LIFE OF THE STATE UNQUOTE MAY I INQUIRE ON THE BEHALF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IF YOU MADE THIS STATEMENT OR IF IT IS INDICATIVE OF YOUR ATTITUDE SO FAR AS THE NEGRO IS CONCERNED IN THE ENFORCEMENT OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION KINDLY WIRE REPLY COLLECT

WALTER WHITE ACTING SECRETARY NATL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE 69 FIFTH AVE19

In what may have been his biggest blunder in the confirmation process, Parker did not respond to the telegram, writing instead to one of his prime supporters, David H. Blair, a North Carolina Republican who was active in Parker's confirmation proceedings. He agreed that the telegram gave the substance of what he said, but acknowledged that he no longer had a copy of the speech. He wrote Blair that "in what I said I was not attacking the colored people, but was decrying the practice of certain politicians whose custom it was to stir up racial prejudice for partisan advantage." He concluded his letter with his belief that if the NAACP "understood the real spirit in which the speech was made, they would have nothing to criticize."20

On April 1, 1930, Parker received a second telegram, this one from Baltimore's Afro American, questioning him about the 1920 speech. Parker never responded directly to the Afro American or the NAACP.

Opponents of Confirmation: Labor

Parker's supporters still considered the major opponent of Parker to be organized labor. While the

NAACP was fighting confirmation, labor was solidifying its decision that Parker was not labor-friendly and would not, therefore, be an acceptable Supreme Court justice. Its opposition rested solely on the Red Jacket case.

The Red Jacket case was actually 12 cases consolidated for hearing. Owners and operators, 316 strong,21 of coal mines in West Virginia initiated the lawsuits against the United Mine Workers of America (UMW), to restrain interference with their businesses by the union and its members, interference they claimed constituted a restraint on trade and commerce in violation of the Sherman Act.

The plaintiffs operated their mines on the “closed-nonunion-shop” basis, meaning that they notified their employees that they would not hire union members and that they required most of their employees to sign a contract (the infamous “yellow-dog” contract) agreeing they would not join a union while employed by the plaintiffs. In various ways, UMW sought to unionize the employees of the various West Virginia companies which produced 90% of coal shipped in interstate commerce. The plaintiffs alleged violence, threats, intimidation, picketing on the part of the union and its members. According to the opinion in the case, state officers actually had a “pitched battle” with the union members; martial law was declared, and federal troops were sent into the state.22

The federal district court had found, among other things, that the union and its members had conspired to restrain interstate commerce in coal and had “unlawfully, maliciously, and unreasonably to induce, incite, and cause the employees of the plaintiffs . . . to violate their contracts of employment.”23 The trial court enjoined the union and its members from, among other things, interfering with the employees of the coal mines and from attempting to incite, induce, or persuade the employees of the plaintiffs to break their contracts of employment.

On appeal, UMW had argued that the portion of the decree enjoining it and its members from persuading the employees of the plaintiffs to break their contracts of employment restrained the union from attempting to extend its membership among the employees of the plaintiff companies and, for an indefinite period of time, from presenting any “lawful and proper argument in favor of union membership.”24 Setting the groundwork for labor’s opposition to him in 1930, Judge Parker rejected the contention:

If we so understood the decree, we would not hesitate to modify it. . . . [T]here can be no doubt of the right of defendants to use all lawful propaganda to increase their membership. On the other hand, however, this right must be exercised with due regard to the rights of complainants. To make a speech or to circulate an argument under ordinary circumstances dwelling upon the advantages of union membership is one thing. To approach a company’s employees, working under a contract not to join the union while remaining in the company’s service, and induce them, in violation of their contracts, to join the union and go on a strike for the purpose of forcing the company to recognize the union or of impairing its power of production, is another and very different thing. What the decree forbids is this “inciting, inducing, or persuading the employees of plaintiff to break their contract” and what was said in the Hitchman Case with respect to this matter is conclusive of the point involved here.25

Parker’s reference to Hitchman, a Supreme Court case decided in 1917, would become a focal point of debate when Parker’s nomination went to the Senate. In that case, the Supreme Court had found that the efforts of unions in the Hitchman coal mine and neighboring mines were not just to increase their memberships but also to organize the mines. In 1927, when he wrote the Red Jacket case, Parker thought he had sound precedent. The 1930 debate over his confirmation contested his assumption.

The Senate Fight

The idea that labor would form the greater barrier to Parker's confirmation began to change in mid-April 1930 when newspaper accounts reflected heightened opposition among Negroes and its effects on senators. The April 17, 1930, News and Observer noted that labor opposition had been put in the background and that the increasing activity of Negroes was causing nervousness among senators who were up for re-election in the fall and whose constituents contained a significant number of Negroes. In addition, opposition within Hoover's own party was mounting. Among those listed as Parker opponents were Republican Senators Kean of New Jersey, Robsion of Kentucky, Goff of West Virginia, and McCulloch of Iowa. Nevertheless, the consensus was that the Senate would confirm the president's appointee.26

On April 5, 1930, at the hearing of the subcommittee of the Committee of the Judiciary of the US Senate, Walter White of the NAACP appeared to protest the appointment of Judge Parker. After reading from the judge's 1920 speech, White traced the effort of his organization to obtain information from Parker (the March 26, 1930, telegram), and the history of the grandfather clause of the constitutional amendment to which Parker referred and which had been declared unconstitutional by the Supreme Court. He concluded that Parker's support of such a clause, which had the purpose of disenfranchising Negroes, disqualified him from service on the Supreme Court. White was forceful in his opposition:

Judge Parker as a lawyer and as a judge of the federal court could not but have known that such a statement and such practices as were advocated and approved by him in the foregoing statement were an open, shameless flouting of the fourteenth and fifteenth amendments to the Federal Constitution. The National Association for the Advancement of Colored People is convinced that no man who entertains such ideas of utter disregard of integral parts of the Federal Constitution is fitted to occupy a place on the bench of the United States Supreme Court. . . .

. . . If Judge Parker, for political advantage, can flout two amendments to the Federal Constitution to pander to base race prejudice, we respectfully submit that he is not of the caliber which loyal, intelligent Americans have the right to expect of justices of the nation's highest court.27

After a four-hour hearing which included labor opposition as well as the NAACP's opposition, the subcommittee recommended approval of the Parker nomination by a vote of 2-1. Senator Overman, a North Carolina Democrat, and Senator Hebert, Republican of Rhode Island, voted in favor of Parker while Senator Borah, Republican of Idaho, expressing misgivings regarding the labor issue,28 opposed him. The fight moved to the Senate Judiciary Committee.

By April 18, however, the persistence and depth of Parker's opposition were having their effects. There were efforts to have Hoover withdraw the nomination, but the administration remained firm, pending, however, Parker's reply to what was becoming known as "the Negro question" or "the race question." Senator Watson, Republican of Indiana, called a meeting of Senate Republicans to discuss how to handle the growing protest, after which he called for Parker to appear before the Senate Judiciary Committee to answer the charges against him.29 On April 19, 1930, the nominee indicated his willingness to come before the Senate Judiciary Committee,30 only to have the Judiciary Committee vote on April 21 against an invitation and against his confirmation. The vote of the committee was ten to six, with a majority of committee Republicans opposing him. Among the surprise votes against confirmation were Republicans Steiwer of Oregon, Deneen of Illinois, and Robinson of Indiana.31 Despite the vote of the committee, Parker supporters and the administration remained hopeful that the full Senate would confirm the nominee.32 It was not to be.

Full Senate hearings began on April 28, 1930. A review of the 176 pages of the nine days of Senate record33 reveals a heated debate that contained charges, on one side or the other, of racism, vote-buying, anti-unionism, Bolshevism, communism, improper suppression of evidence, intimidation, and attempts to destroy the Court. The rhetoric was thick. Some senators,

particularly Senator Fess, Republican of Ohio, tried to cast Parker's nomination in historical context, outlining in great detail the history of the Court and its members. Parker's 1920 comments on Negro suffrage and his view toward African Americans received less debate on the Senate floor than Parker's opinion in the "yellow-dog" contract case. Leading the labor opponents against Parker were Senators Borah and Wagner, Democrat of New York. Neither senator had any difficulty with Parker's character. On the Senate floor, Wagner quickly established that he did "not question Mr. Parker's integrity. Nor do I doubt that he possesses a knowledge of the law. That is but the lawyer's stock in trade."34 However, both men questioned Parker's commitment to "principles and propositions" which they opposed.35 Borah related his strong opposition with Parker's identification with the "yellow-dog" contract. Borah read Parker's Red Jacket opinion to go "further in sustaining the principles of that contract and in supporting and enforcing it through the powers of the injunction than any other judge who has ever been called upon to deal with the matter."36 Specifically, the Idaho Senator read the Red Jacket opinion to go further than Hitchman, in that Hitchman sanctioned an injunction because the union and its members had "employed deceit and misrepresentation"37 in their efforts to persuade nonunion members to join the union. Citing the 1921 case of American Foundries v. Tri-City Council,38 Borah contended that the Supreme Court had clearly limited Hitchman to situations involving deceit and misrepresentation. Parker's failure to use this case to limit the injunction in the 1927 Red Jacket case to unlawful acts, as opposed to peaceful persuasion, equated to a philosophy he found unacceptable. Borah described the end result of the "yellow-dog" contract as allowing an employer to exercise duress against employees by, in essence, saying "You can go without work, you can go hungry, your wife and your children may go hungry, but you can not have work until you give up your right to associate with your fellow men even to advance your interest."39

Wagner was equally opposed to Parker's confirmation. Stating his belief that the Constitution is what judges say it is and that the "peculiar quality required of a Supreme Court judge can best be described by the term 'statecraft,'" Wagner identified three problems that divided the Supreme Court in 1930. One of the three was: "What is the scope of permissible action by employees in attempting to further their economic interest?"40 Wagner realized that the "nature of the personnel of the Supreme Court will determine whether the area of permitted action shall be wide and free or narrowly construed,"41 and he exceeded Borah in his condemnation of the Red Jacket case. In a point by point analysis of that case and Hitchman, he debunked the notion that Parker was adhering to precedent.42

Borah's and Wagner's allegations did not go without dispute. Of course the two senators from North Carolina, Overman and Simmons, supported Parker throughout the confirmation process, although Overman was to waver somewhat as the process continued. Senator Gillette, Republican of Massachusetts, spoke in defense of Parker's labor question, but his speculation that Parker, once on the Supreme Court, would change his views43 was lame. Senator Hastings, Republican of Delaware, expressed his concern at what labor was stirring up in the Parker confirmation process. He claimed to know the working man and to have sympathy for what labor sought to accomplish. He resented, however, labor's "efforts to come here and undertake to control the only independent body that there is in this land" and "to make out of that body a party scheme. . . ."44 Hastings' phrase "party scheme" is an oblique reference signifying the third factor in Parker's defeat: party politics.

Perhaps the most important day in the debate on Parker's confirmation was April 30. On that day, Senator Wagner, Democrat of New York, made a passionate plea for Parker's defeat, connecting the issue of Parker's labor opinion to his 1920 speech:

Mr. President, I see a deep and fundamental consistency between Judge Parker's views of labor and his reported attitude toward the colored people of the United States. They both spring from a single trait of character. Judged by the available record, he is obviously incapable of viewing with sympathy the aspirations of those who are aiming for a higher and better place in the world. His sympathies naturally flow out to those who are already on top, and he has used the authority of

his office and the influence of his opinion to keep them on top and to restrain the strivings of the others, whether they be an exploited economic group or a minority racial group.45

A more significant aspect of this April 30 debate, however, was the introduction into the record of a letter from Joseph M. Dixon, Hoover's first assistant secretary of the interior, to Walter H. Newton, a Hoover aide in the White House.

The Dixon Letter and Parker's Defeat

Throughout the growing debate over Parker's nomination and confirmation, proponents were counting on support from southern Democrats. These senators were, of course, all white, and they held racial views similar to those espoused by Parker in his 1920 speech. The NAACP was not a threat to them in 1930 and there is no evidence that it affected their votes. A classic example of these senators was Furnifold Simmons from North Carolina. Simmons, as chairman of the North Carolina Democratic Executive Committee, had led the 1898 campaign "to restore the state to the white people." Portraying African Americans in every position of power over whites, he appealed to the basest instincts of whites, ending his plea with the declaration that "North Carolina is a WHITE MAN'S STATE, and WHITE MEN will rule it, and they will crush the party of negro domination beneath a majority so overwhelming that no other party will ever again dare to establish negro rule here."46 In 1930, Simmons was strongly urging Parker's confirmation.

Perhaps the votes expected from the South can best be explained by the candid words of Senator Stephens, Democrat from Mississippi:

There is not an honest, decent, respectable white man in the South who does not hold the same views on . . . [the race] question that Judge Parker holds, and yet, . . ., I want it thoroughly understood that that would not disqualify a real man from sitting on the Supreme Court bench. I recall that Chief Justice White, an ex-Confederate soldier, sat on and presided over that great tribunal; I recall that L.Q.C. Lamar, from my own state, a soldier and an officer in the Confederate Army, sat there. Mr. Justice Reynolds is there now. Other men from the Southland have sat on that bench, and I defy any man to point out where anyone of those men from the South who ever graced that bench has ever been anything but entirely fair to all classes and to all races, whether they were rich or poor, whether they were employers of labor or members of a labor union, or whether they were white or black.

If southern senators cause the rejection of Judge Parker, it will be a Samsonian victory. They will pull down the temple of hope and opportunity upon every lawyer in the great Southland, who has an ambition to serve on the Supreme Court of the United States. Many of the nation's greatest lawyers reside in that section. The South is still a part of the nation, and I shall not, by my vote, virtually declare her citizens ineligible for service on our highest tribunal.47

Although Parker's ambivalence toward blacks should have affected his confirmation positively among southerners, in the end it did not. Ten of the 23 Democrats voting against him were from the South. While the issues surrounding the Parker fight were complex, Joseph Dixon's letter to Walter Newton could only have undermined the strategy to win with southern Democrats.

Introduced by Senator Kenneth McKellar, Democrat of Tennessee, to refute allegations that Parker's opponents were engaging in partisan politics, the March 13, 1930, letter to Walter H. Newton, a Hoover aide in the White House, placed Parker's nomination in political context:

MY DEAR MR. NEWTON: I speak as a native-born North Carolina Republican.

North Carolina gave President Hoover 65,000 majority. In my judgment it carries more hope of future permanent alignment with the Republican Party than any other of the southern states that

broke from their political moorings last year.

If the exigencies of the situation permit, I believe the naming of Judge Parker to the Supreme Court would be a major political stroke.

North Carolina has had no outstanding recognition by the administration. The name of Judge Parker at this time would appeal mightily to state pride. It would be the first distinctive major appointment made from the South. It would go a long way toward satisfying the unquestioned feeling that the administration has not yet recognized the political revolution of 1928.

***

I may be prejudiced on account of my knowledge and sympathy for the North Carolina Republicans who have borne the banner, in season and out, under tremendous discouragement. I believe Judge Parker's appointment would be a master political stroke at this time. [Emphasis added.]

If in the midst of overwhelming demands upon your time and his these considerations could be presented to President Hoover, I believe they are worthy of serious thought.

Yours very sincerely,

Jos. M. Dixon48

The letter came on the heels of the oratory of a Parker supporter, Ohio Republican Simeon D. Fess, who had presented the history of the Court and the need to keep politics out of the confirmation process. Fess had alleged that Parker was being opposed on partisan grounds. Hence, the Dixon letter was a shock to many senators. Senator Overman, a North Carolina Democrat whose state Hoover had carried in 1928, could not have ignored the implications of the strategy outlined in Dixon's letter.

That the Dixon letter stunned Overman was the conclusion of the News and Observer. Reporting the letter the next day, the Raleigh paper highlighted the revelation with bold headlines, "DIXON URGED HOOVER TO NOMINATE PARKER AS POLITICAL MANEUVER." A sub-headline read "Disclosure Painful Shock to Senator Overman," followed by part of the report which read, "The disclosure came as a painful shock to Senator Overman, who has zealously championed the cause of the North Carolinian. He had not heard of the endorsement of Judge Parker as a political appointee."49 Dixon's letter provided concrete evidence that political strategy had played a role in Hoover's nomination of Parker, and it was evidence that could not be ignored.

The Dixon letter revealed a growing concern of the Hoover administration: the possibility that Hoover's nominee to the Court could not win confirmation by a Senate with a strong Republican majority. In 1930 there were 56 Republicans, 39 Democrats, and one member of the Fusion-Labor party, and Parker needed only a simple majority for confirmation. Labor and black opposition to Parker heightened the anxiety of all politicians, Republicans and Democrats, as news accounts reflected.50 Just as the administration began to realize it would have difficulty mustering enough votes from within its own ranks, the Dixon letter jeopardized potential southern Democratic allies.

While the questions concerning Parker's views on labor and race continued to dominate Senate debate, the controversial Dixon letter was not forgotten. When Senator McKellar first introduced the letter, Senate discussion revealed that Dixon, now a Montanan, had run unsuccessfully against Montana Senator Wheeler, a Democrat who would eventually vote against Parker's confirmation.51 On May 2, Senator Overman took the floor to state that he had received criticism for not putting into the record all of the letters and telegrams concerning Parker. He then read into the record a letter from R.M. Taylor, secretary of the Durham Central Labor Union, which stated

clearly the dilemma Dixon's letter had caused:

Your continued support of Judge Parker indicates your desire to assist Republican Party in its master political stroke to keep North Carolina in the Republican column. We deeply deplore your position.52

As the Senate moved closer to a final vote on the nomination, the News & Observer reported that the administration was "[r]esorting to [h]igh [p]ressure [t]actics" in an effort to convince two Democrats to support him.53 As reflected by the News & Observer, the strategy suggested by the Dixon letter remained a sticking point, however:

Own Funeral

If the confirmation of Judge Parker is to be construed as a "master political stroke" for making the South Republican, then many southern Democratic Senators do not feel they ought to be asked to participate in their own funeral. They recall, too, that the North Carolina State Republican convention got actively into the fight for confirmation. State Republican Chairman J.S. Duncan, of Greensboro, has been here [Washington] lobbying for his confirmation. Representative Jonas, Republican national committeeman, praised the appointment as a great political achievement which entitled him and Representative Pritchard to the hall of fame for having done more than all the democratic congressmen had been able to do in a hundred years.

If Judge Parker is defeated for confirmation, experienced political observers from North Carolina say it will be due to the prompt efforts of Republican leaders in the state to capitalize his appointment for political purposes. Many Democratic Senators resent this, because they know that many prominent Democrats endorsed Parker, that they did this with the expectation that it would be not considered as political, and particularly do they resent the embarrassing position in which Senator Overman has been placed.54

Potential southern votes were falling by the wayside. Of the ten southern Democrats who eventually voted against Parker, only five spoke up during the entire process. On three of these, the letter had an obvious effect.55 Senator McKellar had, of course, introduced the letter, and it is obvious he had done so to sway southern Democrats.

On May 7, 1930, after a short debate, the US Senate voted 41 to 39 to reject John J. Parker as an associate justice of the Supreme Court. Republicans failed to give Parker the votes he needed, casting only 29 of their 56 votes for him; of the remaining Republicans 17 voted against confirmation, and ten abstained. Ten Democrats voted for confirmation while 23 opposed Parker and six abstained. Among the Democrats voting for confirmation were Simmons and Overman, senators from Parker's home state and, therefore, committed to seeing one of their own on the Court. From newspaper accounts, however, one must conclude that Overman was somewhat embarrassed about the Dixon letter and the possibility that he was betraying his own party.

Conclusion

John J. Parker had come so close. If only one of the "nays" had voted "yea," Vice President Curtis would have cast the tie-breaking vote, and the Senate would have confirmed him. What, in the end, led to Parker's failure?

It is certain that organized labor's opposition played a major role in the Senate's rejection. Parker's opinion in the Red Jacket case dominated the debate. The NAACP's efforts to defeat Parker were strenuous and effective and, as a recent study contends, signified the coming of age of the civil rights group.56 However, allegations that leaders of the association, including W.E.B. Du Bois, Mary White Ovington, chairman of the board, William Pickens, a field secretary, and Felix Frankfurter were communists, Bolshevists, or radicals,57 probably eroded some of the

organization's impact.

Joseph M. Dixon's March 13, 1930, letter injecting partisan politics into the debate also took a toll. Having lost many of the votes of his own party on issues of race and labor, Parker had to rely on southern Democrats for confirmation.58 With fresh memories of Republican gains in the South in 1928 and the Dixon letter suggesting that Parker's nomination would solidify those gains, southern Democrats would not provide the margin for confirmation. This is true whether or not President Hoover saw the Dixon letter and allowed it to influence his choice. The letter planted the seed of a southern strategy, and that seed bore Parker bitter fruit.

Parker remained on the Fourth Circuit until his death in 1957. By all official accounts, he was well respected by the bench and the bar. Although Parker's name surfaced in connection with later Supreme Court vacancies, no president saw fit to submit his name to the Senate again.

Elizabeth McCrodden is an attorney and mediator practicing in Raleigh, NC. She is an adjunct associate professor at the University of North Carolina at Chapel Hill School of Law and a former judge on the North Carolina Court of Appeals.

Endnotes

1. Because Sanford was a southerner, many believed that his replacement would be a southerner. According to a plethora of congratulatory letters sent to Parker, his nomination on March 21, 1930, initially received wide support. The first indication of real opposition in Parker's Papers came in the form of a March 26, 1930, letter from H. Woodward Winburn of Commonwealth Bond and Mortgage Company in Durham. Winburn expressed his surprise at labor's emerging opposition. H. Woodward Winburn to John J. Parker, March 26, 1930, (Southern Historical Collection, University of North Carolina), Personal Series, Box 5A, File 77. See also Files 62-76 for supporting letters and telegrams. Parker's Papers hereafter cited as Parker Papers.

2. 18 F.2d 839 (4th Cir., 1927).

3. North Carolina's disfranchisement amendment established as a qualification for voter registration that each registrant should be able to read and write any section of the Constitution in the English language. It contained a grandfather clause, designed to assuage illiterate whites, excepting from this qualification all persons and their lineal descendants who were entitled to vote on January 1, 1867, and who registered to vote prior to December 1, 1908. Since blacks could not vote on January 1, 1867, and, since education among them had advanced but little, registration for most blacks was impossible.

4. Greensboro Daily News, April 19, 1920, p. 1.

5. Kenneth W. Goings, "The NAACP Comes of Age": The Defeat of John J. Parker (Bloomington: Indiana University Press, 1990).

6. William C. Burris, Duty and the Law: Judge John J. Parker and the Constitution. (Bessemer, AL: Colonial Press, 1987), p. 29.

7. Burris, p. 35.

8. Parker carried only 27 out of North Carolina's 100 counties, but he received 230,000 votes, the largest any Republican had ever received and 63,000 votes more than the total votes received by previous gubernatorial candidates of any party. Burris, p. 57.

9. John J. Parker to S.I. Parker, September 22, 1928, Parker Papers, Box 4, File 53.

10. John J. Parker to S.I. Parker, February 6, 1930, Parker Papers, Box 4, File 54.

11. John J. Parker to S.I. Parker, February 6, 1930, Parker Papers, Box 4, File 54.

12. Henry J. Abraham. Justice and Presidents: A Political History of Appointments to the U.S. Supreme Court, 2d.ed. (New York: Oxford University Press, 1985), pp.198-200.

13. Goings, p.20, citing "Associate Justice" presidential files, Herbert Hoover Papers, Hoover Institution Archives (Stanford, California), Box 63.

14. Charlotte attorney with whom Parker practiced law prior to going on the federal bench.

15. Charles A. Jonas to John J. Parker, March 9, 1930, Parker Papers, Box 4, File 55.

16. Parker Papers, Box 4, Files 57, 58, 60.

17. Goings, p.30.

18. "Nothing Done in Fight on Parker," News and Observer, March 28, 1930, p. 2.

19. Walter White to John J. Parker, March 26, 1930, Parker Papers, Box 5A, File 77.

20. John J. Parker to David H. Blair, March 26, 1930, Parker Papers, Box 5A, File 77.

21. Over the course of the protracted litigation, some owners of the coal mines agreed to unionization and dropped out of the lawsuit.

22. 18 F.2d at 841.

23. 18 F.2d at 842.

24. 18 F.2d at 848.

25. 18 F.2d at 849.

26. "Want Parker Nomination Carried Over to December," News & Observer, April 17, 1930, p.1. Several Republican senators, facing re-election in November 1930, wanted the nomination carried over until December. According to the news article, Republican Senators Kean of New Jersey, Robsion of Kentucky, Goff of West Virginia, and McCulloch of Ohio, all up for re-election, were concerned with their African-American voters. The News and Observer, however, was wrong about Kean and McCulloch. Kean came up for reelection in 1934; McCulloch, in 1932. Kean and McCulloch eventually voted for confirmation while Robsion and Goff abstained.

27. "Hearing before the Subcommittee of the Committee of the Judiciary, United States Senate," April 5, 1930, p. 75.

28. Borah spoke forcefully against Parker on the labor issue at the full Senate hearings. Congressional Record, Vol. 72, Part 8, April 29, 1930, pp. 7930-39. See text, pp.50-51.

29. "Wants Parker to Appear for Examination," News & Observer, April 18, 1930, p. 1.

30. "Judge Parker Willing to Face Judiciary Committee," News & Observer, April 20, 1930, p. 1.

31. "Judge Parker's Chances of Confirmation Dimmed by Action of Committee," News &

Observer, April 22, 1930, pp.1-2.

32. “Parker Battle Scheduled to Open in Senate Monday,” News & Observer, April 23, 1930, p. 1.

33. Congress, Senate, “Nomination of Judge John J. Parker,” Congressional Record, Vol. 72, Part 7 (28 April 1930): p. 6819 through Vol. 72, Part 8 (7 May 1930): p. 8488.

34. Congress, Senate, “Nomination of Judge John J. Parker,” Senator Wagner of New York, speaking against confirmation, Congressional Record, Vol. 72, Part 8 (30 April 1930), p. 8033.

35. Congress, Senate, “Nomination . . .,” Senator Borah of Idaho, speaking against confirmation, Congressional Record, Vol. 72, Part 7 (29 April 1930), p. 7930.

36. Congress, Senate, “Nomination . . .,” Senator Borah of Idaho, speaking against confirmation, Congressional Record, Vol. 72, Part 7 (29 April 1930), p. 7930.

37. Congress, Senate, “Nomination . . .,” Senator Borah of Idaho, speaking against confirmation, Congressional Record, Vol. 72, Part 7 (29 April 1930), p. 7933.

38. 257 U.S. 184 (1921).

39. Congress, Senate, “Nomination . . .,” Senator Borah of Idaho, speaking against confirmation, Congressional Record, Vol. 72, Part 7 (29 April 1930), p. 7931.

40. Congress, Senate, “Nomination . . .,” Senator Wagner of New York, speaking against confirmation, Congressional Record, Vol. 72, Part 8 (30 April 1930), p. 8034.

41. Congress, Senate, “Nomination . . .,” Senator Wagner of New York, speaking against confirmation, Congressional Record, Vol. 72, Part 8 (30 April 1930), p. 8034.

42. Congress, Senate, “Nomination . . .,” Senator Wagner of New York, speaking against confirmation, Congressional Record, Vol. 72, Part 8 (30 April 1930), p. 8034.

43. Congress, Senate, “Nomination . . .,” Senator Gillette of Massachusetts, speaking for confirmation, Congressional Record, Vol. 72, Part 7 (29 April 1930), p. 7943.

44. Congress, Senate, “Nomination . . .,” Senator Hastings of Delaware, speaking for confirmation, Congressional Record, Vol. 72, Part 8 (30 April 1930), p. 8032.

45. Congress, Senate, “Nomination . . . ,” Senator Wagner of New York, speaking against confirmation, Congressional Record, Vol. 72, Part 8 (30 April 1930): p. 8037.

46. Paul D. Escott. Many Excellent People: Power and Privilege in North Carolina, 1850-1900 (Chapel Hill: The University of North Carolina Press, 1985), p. 255.

47. Congress, Senate, “Nomination . . .,” Senator Stephens of Mississippi, speaking for confirmation, Congressional Record, Vol. 72, Part 8 (5 May 1930).

48. Congress, Senate, “Nomination . . . ,” Letter of Joseph M. Dixon to Walter H. Newton (March 13, 1930), introduced into the record by Senator McKellar of Tennessee, speaking against the nomination, Congressional Record, Vol. 72, Part 8 (30 April 1930): p. 8040.

49. “DIXON URGED HOOVER TO NOMINATE JUDGE PARKER AS POLITICAL MANEUVER,” News & Observer, May 1, 1930, p. 1.

50. See, for example, “Negro Question Causing Increasing Nervousness in Republican Ranks, News & Observer, April 17, 1930, p. 1; “Distressed Republicans Want Parker to Appear for Senate Examination,” News & Observer, April 19, 1930, p. 1.

51. Congress, Senate, “Nomination . . . ,” Senator McKellar of Tennessee, speaking against confirmation, Congressional Record, Vol. 72, Part 8 (30 April 1930): p. 8040; Record of the vote, Vol. 72, Part 8 (7 May 1930): p. 8487.

52. Congress, Senate, “Nomination . . . ,” R. M. Taylor Letter to Senator Overman (undated), introduced into the record by Senator Overman, Congressional Record, Vol. 72, Part 8 (2 May 1930) p. 8181.

53. “Need Two More Votes to Confirm Tar Heel Jurist,” News & Observer, May 4, 1930, p. 1.

54. “Need Two More Votes to Confirm Tar Heel Jurist,” News & Observer, May 4, 1930, p. 2

55. Senators Robinson, Democrat from Arkansas, and Connally, Democrat from Texas, either had already spoken about Parker or would speak about him for other reasons. During one of the debates on the Red Jacket case, Connally had registered his concern that Parker would be a “slavish servant to precedent,” Congress, Senate, “Nomination . . .,” Congressional Record, Vol. 72, Part 7 (29 April 1930), p. 7943.
Robinson would later speak on the controversy over the administration’s alleged promises of judgeships in return for a vote for Parker. See text, pp. 60-61. Congress, Senate, “Nomination . . .,” Congressional Record, Vol. 72, Part 8 (6 May 1930).

56. See Goings.

57. Congress, Senate, “Nomination . . . ,” Vote on the Nomination, Congressional Record, Vol. 72, Part 8 (6 May 1930): p. 8435. Frankfurter was to serve on the Supreme Court from 1939 until 1962.

58. The News & Observer reported that the administration was pressuring Democrats to supply the winning margin. “Need Two More Votes to Confirm Tar Heel Jurist,” News & Observer, May 4, 1930, p. 1.

The Changing Face of Judicial Elections

By J. Christopher Heagarty

The state's method of judicial selection has been a paradox. The citizens of North Carolina readily agree that they do not want judges to be "politicians". They want the judiciary to be fair and impartial and above politics. Yet, they overwhelmingly believe that they should retain the right to elect their judges. Thus, the paradox:judicial candidates have been forced into a system requiring them to raise campaign funds, advertise, and do all the things associated with being a political candidate even though voters do not want them to be political.

But changes are in store for North Carolina's judicial elections, based on recent legislative actions and the decision of the US Supreme Court in the Republican Party of Minnesota v. White case.

Selection of judges through partisan elections is not a common practice. North Carolina is one of only 14 states to select judges this way. Many advocates who want to address the problems inherent with electing judges through partisan political campaigns point to merit-selection via legislative or executive appointment as a solution. In North Carolina, respected legal scholars such as Professor Paul Carrington have designed models for how such a selection system could work. Without denying the benefits of such proposals, it is important to realize that such changes require not only legislative approval, but also public approval via referendum to amend our state's constitution. Past attempts to move away from electing our judiciary have failed here and elsewhere. No state that elects judges has abandoned that practice in almost 20 years (though New Mexico did move to a system combining partisan elections and appointments in 1988). An April poll by the NC Center for Voter Education found that 81% of surveyed voters favored election over appointment. Past studies also confirm these numbers: North Carolina cannot muster the public support necessary to pass such a constitutional amendment. The same poll revealed that a majority of North Carolinians could not identify members of the Supreme Court. Still, voters are determined to vote for them.

If we continue to elect judges, we need to improve how we elect them. There are many problems inherent to political campaigns that threaten the independence, and perhaps the public respect, that have been hallmarks of our state's courts. We pride ourselves on the civility, and relative inexpensiveness, of past judicial elections, but for much of our state's history judicial elections were an afterthought. One party rule in the state meant that many judges went unchallenged and when a race did occur it was rarely competitive. Now that candidates of both parties stand an equal chance of being elected on a statewide basis, the gentlemanly contests of years past have given way to accusations of ethical misconduct and other personal attacks. A look at judicial elections in other states provides an ominous warning of things to come.

Campaign spending for state supreme court races around the country has more than doubled since 1994. Increased costs are concerning, as they provide real obstacles for our sitting judges, who are limited in their ability to raise funds and campaign from their seat, and for candidates who might be tremendous legal scholars but are limited in their fundraising ability. Special interest groups are spending millions of dollars in an attempt to influence public policy, and state courts that select judges through popular elections have become battlegrounds for national organizations like the US Chamber of Commerce or the AFL-CIO. However, while the amount of money spent is troubling, even more so is the way in which that money is spent.

Increased campaign spending on judicial races does not mean more information for voters on the qualifications and background of these candidates. Often campaigns purposefully seek to blur the facts. Campaign spending may originate from political parties trying to win seats with hot-button issues and slogans or from special interest groups that, while denying they are trying to influence the outcome of judicial decisions, readily admit they are trying to buy a "philosophy" on the court.

For example, Andy Doehrel, president of Ohio's chamber of commerce tells the story of making the rounds of the 1990 election night parties after a Republican sweep of many key executive and legislative offices. He thought he'd take on a rival AFL-CIO official about the major victories for business in the state. However, the union boss trumped him by pointing out the Democratic victories on the state supreme court, noting "we figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators." Justice Robert Young of the Michigan Supreme Court, the victim of a campaign by anti-business interests, theorizes that, "It's worth noting and underscoring that resort to the courts is one of the cheapest political campaigns one can wage. Instead of having to convince a majority of one's state legislature, the governor, and the constituencies that they represent, a political litigant need only convince one trial judge, two judges on the court of appeals, and a majority of the state supreme court."

While judges may disagree, or perhaps rightfully be offended by these claims, their beliefs on the matter do not dissuade the millions of dollars that have been poured into judicial races in other states by national special interest groups. Learning from labor, the business community has changed their national strategy for election activism. US Chamber President and CEO Tom Donohue recently outlined his organization's policy priorities for 2002. The first paragraph of priorities listed in the press release, after quick references to war and recession, reads, " Elections: Identify and recruit pro-business candidates. Raise record amounts of PAC money. Hold fundraisers for vulnerable freshman pro-business members of Congress. Play an increasingly vigorous role in state judicial and attorney general elections to ensure that business gets a fair hearing in the courts."

Certainly these organizations have a first amendment right to express themselves politically. However the concept that raising record amounts of PAC money will allow a special interest to "get a fair hearing" in our courts is disturbing to most citizens. The NC Center for Voter Education found that 78% of voters believe campaign contributions to judges have some (40%) or a great deal (38%) of influence over judicial decisions. And while voters still maintain confidence in the individual men and women serving on the courts, (24% of voters have "a great deal," 55% of voters have "some" trust and confidence in the North Carolina court system) they are beginning to doubt whether or not North Carolina's judicial elections reflect the will of the average person (46% agree, 47% disagree). Gone unchecked, this perception of impropriety can spread to the bench. A 1999 survey of Texas judges by that state's Supreme Court and bar association found that almost half the state's judges believed contributions had a significant effect on court room decisions.

This infusion of money manifests itself in the form of vicious negative attack ads that many would see as harmful to the integrity of the judiciary. These are often paid for through independent expenditure campaigns or "issue advertising" or through state political parties. In Ohio, Justice Alice Resnick was bombarded by television advertisements from the business community that directly accused her of making rulings and reversing opinions to satisfy campaign contributors. In Michigan, Justices Markman, Taylor, and Young were attacked by advertisements from a state Democratic party committee that featured them dancing around, literally in the pocket of an insurance executive, being showered with cash. But particularly despicable was an attack ad run by a Republican party committee against Michigan Judge E. Thomas Fitzgerald that described the acts of a pedophile and featured menacing and disturbing images. It then placed personal responsibility for the criminal's actions on the judge for "overturning convictions."

Again, given North Carolina's sterling judicial history, one might think that this could never happen here. However, we must take a hard look at what has happened in other states to avoid going down the same path. North Carolina remains quite vulnerable to the ability of special interests to influence the outcome of judicial elections. A recent US Supreme Court decision may trigger even more political activism and bare-knuckled campaigning in judicial contests.

By a 5-4 vote, the Court found this past June that Minnesota's canon prohibiting judicial

candidates from announcing their views on disputed legal and political issues violates the First Amendment. The Supreme Court held that the “announce clause” in Minnesota’s Code of Judicial Conduct infringes upon a judicial candidate’s right of free speech. The disputed section of the Code prescribes that a candidate “shall not . . . announce his or her views on disputed legal or political issues.” Many states have used these types of canons to keep candidates from dueling with promises or strong suggestions about how they would rule on specific matters that might appear before them, regardless of the evidence or rule of law involved in specific cases. By polluting contests that have typically been decided on qualifications, character, and temperament with announced promises to curry favor with certain political groups, we move further away from the concept of impartiality so important to the judiciary.

Fortunately, while Republican Party of Minnesota v. White is sounding alarms in many states that restrict judicial campaign speech by statute, its effects may be muted in North Carolina. Most states have fairly restrictive laws governing judicial campaign speech, but in North Carolina these laws were liberalized some years ago and while most of our state judicial candidates still abide by the spirit of the canons, there is no statutory measure requiring them to do so. In fact, North Carolina has until recently been observed as an experiment to determine if “self-regulation” of campaign speech will work.

While the pressure on judicial candidates to police themselves may be reduced due to Republican Party of Minnesota v. White, recent legislation may help reduce the temptations for candidates to appeal to political party agendas or special interest constituencies. The Judicial Campaign Reform Act enacted this past fall should lessen the influence of special interest money and political party agendas over judicial elections.

The Judicial Campaign Reform Act would make the races for the appellate courts nonpartisan, just as they are for our lower courts. The ideal judge makes decisions based on legal scholarship, not on personal political philosophy, thus party labels should be irrelevant when considering which candidate for the bench would make the best judge. Competition can be a good thing, if it is motivated by the right reasons. Misfeasance, malfeasance, and nonfeasance should not be tolerated and an informed electorate should vote out of office any judge guilty of such behavior. However, well-qualified and well- respected incumbent judges are targeted for defeat by political parties solely for the sake of winning a majority of seats on the bench. Judicial campaigns are being increasingly funded and organized by state parties, and rely on public opinion research and hot-button issues to persuade voters in their choices, rather than on the merits of their candidates.

More troubling, perhaps, are the conflicts that occur between political parties that turn into conflicts between institutions. Several recent cases decided in the appellate courts overturned decisions by the legislature. Due to partisan differences between the make-up of these institutions, accusations have flown that decisions are based on partisan politics. Judicial decisions are attributed, by political spin-doctors and sometimes by the media, as being influenced by political considerations. Regardless of the merits of these cases and the factors that led each justice to arrive at his or her position, many in the public and media make the accusation that politics determined the outcome of these decisions pointing to each justice’s individual political party membership. This is dangerous to public faith in the impartiality of the courts. Once the courts have been perceived, rightly or wrongly, to have entered the political arena, they become targets for political pay-back and can be attacked by other government institutions with reductions in funding, slashing of benefits, and the like. If party membership does not play a factor in judicial decision making, and instead only serves to cast doubts on the impartiality on judicial decision-making, why not eliminate it? If judicial decisions will be second-guessed, due to the partisan-identification of those on the court, and if this subjects the courts to partisan political attacks, then moving to nonpartisan elections should protect the integrity of those decisions.

The Judicial Campaign Reform Act also addresses the method of financing judicial races. The

Lake-Frye contest for NC Supreme Court resulted in the state's first million-dollar judicial campaign. Raising funds to finance these expensive campaigns has been the most problematic aspect of electing judges, and is one of the chief causes for a declining public faith in the judiciary. The public has incredible distaste for the amount of money raised for judicial campaigns by attorneys, even though few people other than attorneys take an active interest in these campaigns and are willing to finance them. Judicial candidates are still restricted in fundraising methods by the canon of ethics. Sitting judges are further restricted by their office hours and confinement in government offices where fundraising activities are prohibited. For our appellate division judges, this makes the prospect of being able to finance a statewide campaign, which must compete with campaigns for governor and US Senator for the voters' attention, quite difficult.

The Judicial Campaign Reform Act creates a voluntary program of public campaign financing, and a candidate would be free to opt for the current campaign funding approach. But, for those who agree to limit their campaign spending, and who can raise a modest sum of qualifying money to prove they are credible competitors, such candidates would receive campaign funds from the state to run competitive races without having to engage in a fundraising war. Candidates who are excellent legal scholars, but who are not adept at political fundraising, could run on their strengths, not on their bank account.

Funding for such a system would also be provided on a voluntary basis. First, attorneys will be offered the option of making a voluntary contribution when paying their privilege license fee. Many attorneys contributing smaller amounts can raise just as much for these campaigns as the smaller number of attorneys who currently contribute so much individually. And, when faced with the inundation of fundraising invitations and the uncomfortable situation of being approached for a campaign contribution, many attorneys could legitimately say they "gave at the office." Second, taxpayers tired of political campaigns and excessive fundraising can designate three dollars on their state income tax forms to the fund, just as they do now for political parties. Third, for those law firms that enjoy hosting fundraising events, voluntary contributions can be made into the fund, and events can be scheduled that would benefit all participating candidates.

Finally, the Judicial Campaign Reform Act calls for the creation of a judicial voter guide that provides useful information about candidates for statewide judicial office. These guides are modeled on those used successfully in other states and on the proposals of legal scholars such as Professor Carrington. Many private organizations have compiled excellent voter information resources, but these are only made available to a limited number of voters. Voter guides will provide citizens with information about candidates' experience, education, endorsements, and personal statements on why they are running. These guides provide voters with relevant information, not the slick campaign materials favored by media consultants and with any luck will help voters think of these elections in a different way. They also reduce the expensive burden on the candidates of trying to educate voters statewide with limited funds. These guides can be published on-line, can be distributed by newspapers, or can be mailed directly to voters. Research studies find that such guides are considered very useful by voters and are often relied upon to distinguish objective data from political rhetoric. In our state, polling shows that a majority of voters (57%) feel they have little or no information about judicial candidates and cite not knowing enough about the candidates as the primary reason for not voting in judicial elections.

Citizens and elected officials agree that compared to other branches of government, judges should be held to a higher standard. While other states have suffered from a growing influence, or perceived influence, of money and politics over judicial elections, North Carolina should be able to preserve voters' faith in these elections. Under these newly enacted reforms we can create a system where voters take their responsibility for electing judges more seriously. Rather than succumbing to the passions of partisan politics, voters can evaluate judicial candidates as they would job applicants. This might not be as exciting as the circus environment surrounding most political elections, but in the long run, it will go a long way toward protecting the independence of

our judiciary and perhaps help unravel the paradox of our judges being political candidates without being political.

Chris Heagarty is the executive director of the NC Center for Voter Education, and a frequent commentator on government and political issues. He serves on the board of directors for the NC Institute of Political Leadership.

Retired Judges, Substitute Judges, and Civil Rule 63

By Thomas L. Fowler

After many years of distinguished service, a judge is defeated in the November elections. As occasionally happens, some of the decisions that resolved matters heard by that judge in the months before she retired were not reduced to writing and signed by the judge before the date of her retirement.1 Once reduced to writing, should these tardy written orders and judgments be delivered to the retired judge for her review and signature? Or is another of the district's judges authorized to sign such orders or judgments?

I. The Status of a Retired Judge

This question turns on whether a retired judge retains some sort of residual jurisdiction after retirement to sign orders or judgments relating to matters he or she heard and decided prior to retiring. One might reasonably believe that retired judges do retain some authority. One legal encyclopedia states the general rule as follows:

A judge whose term of office has ceased may perform clerical duties, such as the making of a finding for the purpose of perfecting an appeal or the signing, nunc pro tunc, of an order for the entry of a judgment pursuant to a docket entry made before expiration of his or her term. However, where the authority of a trial judge is terminated and there is pending before him or her matters upon which the judge has not ruled, the judge's authority to rule terminates at the time of the expiration of his or her authority as judge.2

In several cases, the North Carolina Supreme Court has acknowledged that the trial judge who presided at the trial but who subsequently retired or resigned, nevertheless retained authority over "all matters pertaining to the settlement of the case on appeal."3 G.S. 1-283 also provides that: "A judge retains power to settle a record on appeal notwithstanding he has resigned or retired or his term of office has expired without reappointment or reelection since entry of the judgment or order."4 Because North Carolina recognizes this specific residual judicial authority in resigned and retired trial judges, it was plausible to believe that our appellate courts might follow the general rule as set out above. The policy behind the rule seems sound—resigned or retired trial judges are not permitted to decide or resolve matters previously heard but are simply allowed to document matters properly decided or resolved prior to their resignation or retirement. But this conclusion has proven false.

II. In Re: Pittman 5

After a November 2, 2000, hearing, District court judge Sarah P. Bailey orally adjudicated a minor to be a neglected juvenile and vested physical custody in DSS. Subsequently, on January 16, 2001, Judge Bailey signed a written order consistent with her verbal judgment. The parents gave notice of appeal, arguing that "the adjudication and disposition order signed by Judge Bailey is void as she was no longer a de jure nor a de facto district court judge at the time she signed the order." The court of appeals agreed and vacated the order.

The court noted that although Judge Bailey orally stated her order at the conclusion of the hearing, she did not reduce her judgment to writing at that time. Her announcement of judgment in open court was "the mere rendering of judgment"6 and was not the entry of judgment—the entry of judgment being a necessary event to vest the court of appeals with jurisdiction to hear an appeal.

The court observed that Judge Bailey was defeated in the judicial election of November 2000 by William G. Stewart, and as of January 16, 2001, the date the adjudication and disposition order was signed by Judge Bailey, she was no longer an elected judicial official. As of January 16, 2001, Judge Stewart had been sworn into office as a district court judge and officially held the position of district court judge formerly held by Sarah Bailey. At that time, then, Sarah Bailey was neither a "judge de jure,"7 nor a "judge de facto."8 She was, instead, a usurper—"one who undertakes to act officially without any actual or apparent authority." As of January 16, 2001, Judge Bailey, "having suffered defeat in the general election for office of district court judge and having vacated and surrendered office to another candidate receiving a majority of votes without contesting his right to office, had no rights under statute or case law to reassume office."9

The court concluded that:

Judge Bailey is an usurper here. Since Judge Bailey was no longer a judicial officer after her term expired, the adjudication and disposition order entered on 16 January 2001 is absolutely void. Having no effective judgment for purposes of this appeal, we conclude that this action has been pending since the filing of the juvenile petition on 16 October 2000. ... Accordingly, we remand to the trial court to enter an order or exercise its discretion in this matter consistent with Rule 63.10

III. Civil Rule 63

In re Pittman establishes that a retired judge does not retain jurisdiction to sign orders or judgments relating to matters he or she heard and decided prior to retiring. Rule 63 of the Rules of Civil Procedure11 has, however, recently been rewritten to allow for the use of a substitute judge in these circumstances.12 Rule 63 was rewritten as follows:

"Rule 63. Disability of a judge. If by reason of death, sickness, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, a trial or hearing is otherwise concluded, then those duties duties, including entry of judgment, may be performed: (1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district. If such this judge is himself under a disability, then the resident judge of the district senior in point of service on the superior court may perform those duties. If a resident judge, while holding court in his the judge's own district suffers disability and there is no other resident judge of the district, such duties may be performed by a judge of the superior court designated by the chief justice of the Supreme Court. (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the director of the Administrative Office of the Courts. If the substituted judge is satisfied that he or she cannot perform those duties because he the judge did not preside at the trial or hearing or for any other reason, he the judge may in his discretion may, in the judge's discretion, grant a new trial. trial or hearing."

IV. The Limited Function of a Substitute Judge

Rule 63 does not allow a substitute judge—who did not hear the witnesses or participate in the trial or hearing—to participate in the decision making process.13 The rule only allows the substitute judge to perform such ministerial acts as are necessary "to effectuate a decision already made."14

In Bank v. Easton, the action was tried before a judge without a jury. At the conclusion of the evidence, the trial judge indicated his intention to rule in favor of the plaintiff and plaintiff's counsel was instructed to prepare and submit a proposed judgment containing appropriate findings of fact and conclusions of law. This was done but the trial judge died without having signed the proposed

judgment. Plaintiff moved before another judge, then presiding over a regular session of superior court, that he sign the proposed judgment which had been tendered to the trial judge. This judge concluded that because no verdict was returned in the trial and no findings of fact and conclusions of law were filed, he was without jurisdiction to sign the judgment. Plaintiff appealed.

The court of appeals noted that at the conclusion of the trial, the (now deceased) trial judge had stated: “It is not a matter of issues except as a basis of findings of facts and conclusions of law and the judgment. I will ask counsel to carefully draw up the findings based on this, and the conclusions of law, and the judgment.”15 The trial judge had then proceeded to orally indicate an answer in favor of plaintiff to issues which had been prepared by counsel for defendant in anticipation of a jury trial. On appeal plaintiff argued that in answering these issues the court returned a verdict within the meaning of Rule 63, and that these issues when considered together with the court’s answers thereto, constituted sufficient findings of fact and conclusions of law under Rule 52(a)(1) to permit a substitute judge to proceed under Rule 63.

The court of appeals disagreed, stating that Rule 52 required the trial court to find the facts and state separately its conclusions of law and that the trial judge had not done so.16 The trial judge answered the draft jury issues simply as a guide to assist plaintiff’s counsel in preparing findings of fact and conclusions of law for the draft judgment which might, or might not, be adopted by the court. Because no verdict was returned in the trial and no findings of fact and conclusions of law were filed, the necessary decisions in the case had not already been made, and the second judge could not act as the substitute judge authorized by Rule 63. There was not a sufficient decision to effectuate.17

V. Must Parties Consent to Use of Substitute Judge?

Rule 63 has no requirement that the parties consent to the use of a substitute judge. Indeed, jurisdiction can not be created or conferred by consent of the parties.18 The parties’ consent, or lack thereof, may, however, indicate if there is any dispute that the presiding judge left a sufficient record of his or her necessary decisions in the matter to allow the substitute judge’s role to be only ministerial.

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

Endnotes

1. Civil Rule 58 provides that a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.

2. 46 Am.Jur.2d, Judges, Section 29, “Powers and duties after expiration of term,” at page 151 (1994). See also Crawford v. Crawford, 315 S.W.2d 190 (Texas 1958)(“[T]he powers of a district judge do not cease in their entirety upon his resignation or the expiration of his term of office. ... [T]he trial judge’s judicial function continued and survived after he vacated the office of district judge, as necessary to lend efficacy, validity and legality to the act of signing the judgment ....”); Martinez v. Martinez, 759 S.W.2d 522 (Texas 1988)(“[A] district judge who has been properly replaced by a successor has the authority to sign a written judgment after he has been replaced, provided he heard the cause and entered his judgment in the docket sheet of the cause before the expiration of his term.”).

3. State v. Stubbs, 265 N.C. 420, 427 (1965); Hoke v. Greyhound Corp., 227 N.C. 374, 376 (1947).

4. See also Rule 11 (Settling the Record on Appeal), Rules of Appellate Procedure.

5. __ N.C.App. __, 564 S.E.2d 630 (filed: 18 June 2002).

6. See Worsham v. Richbourg's Sales and Rentals, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996).

7. A judge de jure "is one who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right. All his necessary official acts are valid, and he cannot be ousted." In re Pittman, supra.

8. A judge de facto "is one who goes in under color of authority . . . or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid as to the public and third persons; but he may be ousted by a direct proceeding." Id.

9. Id.

10. Id.

11. For criminal cases, see G.S. 15A-1224, Death or disability of trial judge.

12. The effective date of revised Rule 63 was 18 August 2001. The earlier version of Rule 63 did not expressly address substitutions for retired judges.

13. For a discussion of former Federal Rule of Civil Procedure 63, which was virtually identical to former North Carolina Rule of Civil Procedure 63, see Note, Neil Stern, Death Or Disability Of Judges In Civil Litigation—Substitution Under Federal Rule 633, 44 Ohio State Law Journal 1125 (1984).

14. Bank v. Easton, 12 N.C. App. 153, 155, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971); In Re Whisnant, 71 N.C. App. 439, 441, 322 S.E.2d 434 (1984)("The function of a substitute judge is thus ministerial rather than judicial.").

15. Id., at 155.

16. The requirement of Rule 52 to make findings of fact and conclusions of law is mandatory, and a failure to do so is grounds for granting a new trial. Kirby Building Systems v. McNiel, 327 N.C. 234, 241, 393 S.E.2d 827 (1990).

17. Id. Quoted with approval in Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 182, 419 S.E.2d 195 (1992): "Rule 63 anticipates a situation where a trial judge performs his role to the point that a verdict is returned or findings of fact and conclusions of law are filed but then is unable to perform the ministerial functions which follow." See also In Re Whisnant, 71 N.C. App. 439, 441, 322 S.E.2d 434 (1984).

18. "As a general rule, parties cannot confer jurisdiction upon a court by consent, waiver, or estoppel. Hart v. Motors, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956); see also Burroughs v. McNeill, 22 N.C. 297, 301 (1839)." Hayes v. Town of Fairmont, 130 N.C. App. 125, 128, 502 S.E.2d 380 (1998). See also Vance Construction Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997), where, after the final judgment was upheld on appeal, both parties asked the trial judge to hear a Rule 60(b) motion although the judge was presiding over the courts of another district at the time. The court of appeals found it irrelevant that the parties consented to the motion being heard in Edgecombe County, as subject matter jurisdiction, "cannot be conferred upon a court by consent, waiver, or estoppel." But see 46 Am.Jur.2d, Judges, Section

33, By stipulation, at p. 156: “The parties to an action may agree or stipulate that the action may be decided by a successor judge upon his or her reading and consideration of the record of evidence taken upon trial of the cause before the predecessor.” Compare Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994)(Plaintiff waived his right to challenge the validity of court orders on the ground that the trial judges lacked subject matter jurisdiction, since plaintiff could have presented the same challenges in his initial appeals which were dismissed, and, following those dismissals, he accepted the benefits of those judgments); Prescott v. Prescott, 83 N.C. App. 254, 260, 350 S.E.2d 116 (1986)(“An absolute want of subject matter jurisdiction might constitute a fatal deficiency, but consent to judgment and acquiescence thereto over a period of years was held grounds to deny a subsequent motion attacking it.” citing Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984)).

A Story of Recovery: An Interview with Barry Nakell

By Michael J. Dayton

“I’d like this to be a recovery story,” Barry Nakell says toward the end of a two-hour interview. Nakell, a noted civil rights lawyer and former law professor at UNC-Chapel Hill, knows something about recovery. He’s on the mend from one of the more spectacular falls in the state’s recent legal history.

Nakell’s story is one of national prominence for his legal expertise in a string of high-profile cases—and an equal share of notoriety for several highly publicized arrests.
Today, Nakell is back in the spotlight for his work on behalf of Rebekah Chantay Revels, a St. Pauls resident who was crowned Miss North Carolina in June. Officials with the local and national pageants said Revels, a Lumbee Indian from Robeson County, voluntarily resigned in late July after a former boyfriend alleged he had compromising pictures of her.

Revels later said she was forced to resign and launched legal action to get her title back. As she pressed her cause in federal and state court, Nakell was by her side.
The choice of Nakell as Revels’ attorney came as no surprise. Nakell has served as an advocate for Robeson County’s Native Americans since 1973, when he helped save “Old Main,” a building at Pembroke State University.

“Old Main had deep historical and cultural significance for the Native Americans as the Indian school and at one time was a central meeting place,” Nakell says. “It was their building, and the university had announced plans to tear it down and build an auditorium.”

Nakell followed that success with a lawsuit that in 1975 overturned a discriminatory system of school board elections in Robeson County and opened the door to greater participation by the Native American population.

Nakell was also part of the criminal defense team of Indian activist Eddie Hatcher, who in 1988 forcibly seized the offices of The Robesonian newspaper in Lumberton, holding 20 staff members hostage.

It was during the Hatcher case that Nakell picked up his first two legal strikes. In 1989, a superior court judge found Nakell in contempt of court, fining him $550 and ordering him jailed for ten days, after Hatcher had a violent outburst at one hearing. In 1991, Nakell and other attorneys who filed a civil lawsuit on Hatcher’s behalf were sanctioned $50,000 for a Rule 11 violation.

To this day, Nakell vigorously defends his action in both those cases and speaks in great detail about what he contends is the unfairness of those charges.

But those legal battles proved to be just the beginning of Nakell’s professional woes. Over the next several years, he would be arrested three times for shoplifting. In 1991 he took a book from a Carrboro store. In 1996 he stole $36 worth of items from a Chapel Hill gourmet food store. Three years ago, he walked out without paying for a book at an Albemarle bookstore.

The second shoplifting cost Nakell his tenured faculty position at UNC’s law school. The criminal charges also drew disciplinary action from the bar. He currently practices under a five-year stayed suspension.

Nakell no longer dwells on those past events, instead focusing on the present with the simple goal of doing “the next right thing.”

In an October 25 interview at his Chapel Hill home, Nakell spoke candidly about the low-level depression and unusual stresses that played a part in his shoplifting. He also talked about his participation in the bar program FRIENDS. Founded in 1999, the program offers assistance to any North Carolina lawyer suffering from depression or other mental conditions.

“I’m in a better place than I ever have been in terms of my emotional and mental health,” he says.

Dayton: In recent newspaper accounts you’ve mentioned that depression played a part in your shoplifting incidents.

Nakell: That’s correct. I think I realize now, but didn’t recognize at the time, that I suffered from low-level depression. Throughout my career, I’ve dealt with people with really serious problems—alcohol, domestic violence, poverty—and my problems seemed pretty trivial. That was my thought process. I had a very successful life at the time. I was a member of the faculty at a very fine law school, I had a lovely family, I was doing what I wanted to do and helping people with my legal skills. So things were going along pretty well, but still I had this depression that wasn’t related to any circumstance but was due to my own background. And I had a lot of anger. I would fly off the handle and explode verbally.

Dayton: What kinds of things would set you off? Are you talking about professional issues?

Nakell: No, nothing really in the classroom or professionally. It was my personal life, with a lot of anger at home. I was stewing but I couldn’t really talk about it and I couldn’t explain it. So what would I do? I’d just yell some more. I wasn’t prepared to acknowledge it and get help, but it was something that was dysfunctional and wasn’t helping my family or me.

Dayton: Did that kind of underlying anger and depression figure into the shoplifting incidents?

Nakell: It wasn’t a natural progression, but I don’t know whether I can describe the dynamic. There was a lot happening around the time that the Rule 11 order came down. I felt pretty confident that we would win it, and I was putting in a lot of time and effort on the defense. I was also teaching class and I was doing other research. So I was pretty much overwhelmed, but I always thought I could handle everything.

Dayton: So there was a pattern of professional and personal stresses?

Nakell: Yes, and the stress got worse when the Rule 11 order was issued. That was devastating. Professionally, I didn’t take it seriously, because I knew it was wrong and I felt it was undeserved. But I had been successful and respected in court and had done pretty well, then, all of a sudden, this order clobbered me. At some point I broke from the other lawyers who were on the case and represented myself. So I’m doing all this work on the case, I’m teaching classes, I’m trying to do research, and I’m saying to myself, “I can handle all this.” Then I get hit with a contempt citation that I also believed was unfair.

Dayton: So in your mind it was a one-two punch, with the Rule 11 and the criminal contempt order?

Nakell: Yes, and on top of that, my father was dying, so three times I flew out to California to spend time with him, and that was very stressful. My father was saying, “What is all this, what are you doing representing this Eddie Hatcher, and what is all this negative stuff coming down on you? What’s the matter with you?” So in January 1991, I’m in my office working on both cases, the Rule 11 and the contempt case, and representing myself, and I go out to the market to pick up some food to take back to the office. I stopped at a bookstore, I see this book, and I walk out with it. I’d picked it up and I went to ask the clerk a question. I couldn’t get his attention, so I walk out with it. Now what happened there?

Dayton: Were you displaying a little anger at that point?

Nakell: A little? (laughs). Yeah. There was a lot of anger in the whole thing. And that was what got me into therapy, which was what I needed all along. And the therapist didn't want to talk about that [shoplifting offense]. All he wanted to talk about was my father. And in the course of the therapy, I was moved to say something that, at the time I said it, I didn't think would mean anything and I could take it back. I said, "I forgive you, Dad." That was the most powerful moment of my life, and once I said that, a whole burden was lifted from my shoulders. That therapy was very effective, and we continued in that until the doctor got sick and discharged me.

But I thought I was doing well, and I went about my business. And then my marriage collapsed, and it was another huge loss and very stressful. I was getting ready to go out of town and meet some friends who had offered me comfort, and I was working late at the office and trying to get some work done so I could get away. So I went down to A Southern Season to pick up some food, and I walked out with some items.

Dayton: Do you also see this as tied to your personal stresses?

Nakell: I see it as tied to the marriage collapse. I was trying to negotiate an amicable settlement, and I'd just learned my ex-wife had served a complaint on me. That was devastating to me. Was it related to anger? I'm not sure, I thought I'd worked through my anger.

Dayton: Newspaper articles regarding the third incident in 1999 state that you had come to some realization about the extent of your problem.

Nakell: I was in therapy with a doctor at that time, and I think I started becoming concerned about how I was feeling. But I was going through inner conflict, because after the second incident I was fired from the university and after both incidents I went into a deep depression. I thought at times that my life was over—I'd lost my job and my marriage. I was in deep despair, because I'd lost everything that mattered. I use that as an example. It's hard to believe how I felt then, but today I'm in a better place than I ever have been in terms of my emotional and mental health.

I used to teach a course in law and psychiatry, law and mental health, and a psychiatrist friend and I used to have a debate on suicide. I was in favor of personal rights and he was in favor of intervention. He said I came from the perspective of liberty, and he came from the perspective of compassion. He would say sometimes people wanted to commit suicide and they feel at the end of their rope, but it's just a momentary thing, and if we can get them past that, then they get over it. I didn't understand that point of view then, but I understand it now. I was never suicidal, but I was deep in despair. Now I look back and think, "That was silly, that was just a moment in my life."

Dayton: What triggered the third event?

Nakell: I was doing well, I was in a practice that I enjoyed, and there were some things going on that I was gloating about. I met with my therapist and said, "I think I'm getting arrogant." But I'm not sure that we ever dealt seriously with the meaning of that. Then, I was out in Albemarle taking depositions and they finished in early afternoon. I left and mailed some letters, and on the way back I passed this bookstore and walked out with a book.

Dayton: Has anyone suggested staying away from bookstores?

Nakell: That's part of what I've done. After that third incident, I was in a men's group that includes some alcoholics. And they said they're real careful about going any place where alcohol is served so that they're not tempted. It occurred to me that I had a lot in common with them emotionally.

And that seemed like a pretty good rule for protection, and I decided to just stay out of stores. I resolved then that I would not go into stores alone, although I made an exception for food stores and supermarkets because there wasn't any way to avoid that. But I pretty much stuck to that rule for other stores. I think I'm safe, and I think I could do that, but the consequences would be too self-destructive.

Dayton: Tell us about your involvement with the Bar's FRIENDS program.

Nakell: I called Ed Ward, who is the director. I went to Raleigh and met with him and he invited me to join, and he also invited me to meet with him on a regular basis. The FRIENDS program, like the PALS program, is a 12-step plan. I'd never been through one before, so I began with the first step and think I could say I've been through all 12, at least informally, now.

Dayton: So you've voluntarily embraced this program?

Nakell: I did. Actually, when I first talked to Ed, I thought I had an arrangement worked out with the State Bar for resolution of the grievance arising out of my third shoplifting offense. Later the State Bar decided to take it to a hearing, but at the time there was no impetus from that grievance to join. But being in the program was helpful at the State Bar hearing, and part of the latest bar order requires me to participate. But I started before that order.

FRIENDS is a very impressive group. I think I've formed a number of friendships with people, many of whom have had very impressive careers, and many of whom still are enjoying impressive careers. They've helped me explore the motivation for my shoplifting, and there are a lot of things that have been explored. One was being self-destructive. Obviously my shoplifting was so inept that it had the earmarks of that. So people would ask, "Did you want to get caught? Was there some reason that you felt you should be punished?"

Lately, my practice is at a level where I'm enjoying it, and I've been getting a lot of positive publicity, so my current therapist and people in the FRIENDS program have been good enough to say, "Hey, stop—are you at risk of doing anything now? We don't know if there was anything in those past events where you were trying to sabotage your success, but if there was, you need to be alert to the possibility." So I've got a community of people who care about me and don't want me to hurt myself. They say be careful and remember that you're a shoplifter and remember how dangerous that is, and that you can't do that anymore. They want to make sure I'm in touch with my feelings and make sure I'm not unaware of any stress like I was before, when I had all these things coming down on me but I thought I was doing fine.

Dayton: Do you see yourself as a success story?

Nakell: Rather than success story, I'd use the term recovery. And I'd like this to be a recovery story, because I'd like people to know that things can really seem bad, but they're not. I think back when I picked up my second shoplifting. My attitude was, "This is terrible, I need to beat myself up and be real hard on myself because I've done a terrible thing." But I remember some kid in law school who was caught smoking marijuana in class. The press talked to him, and he was quoted as saying, "I just lost it, man." I thought to myself, "Damn, I wish I could have said that." When they called me why didn't I just say, "I just lost it," instead of taking it so seriously? I've learned an important lesson—to not to take myself so seriously because life isn't necessarily serious. One of my favorite sayings now is, "What if the hokie-pokie really is what it's all about?" There is no evidence out there that life is serious, and whether that's true or not, it's an attitude change that is very helpful.

I was a professor of law at the University of North Carolina School of Law, and people addressed me as doctor. I'm no doctor. I didn't graduate from college before I went to law school, and I tried not to take that title too seriously, but you end up identifying with that, and suddenly you're

devastated when you're not that anymore. You've lost that. Then you ask yourself, "What are you going to be, what are you going to do?" But I realized that there are a lot of people out there who never were a professor of law at the University of North Carolina, and they're happy. How could that be if they're not a professor of law? And how can they be happier than I ever was when I had that title? It's an interesting lesson about what's really important.

I always concentrate on a slogan that has helped in my recovery: "Do the next right thing." Don't get caught up in what you've done and think you have to remain mired in that. Whatever you've done, whatever has happened, put that behind you and don't live in the past. Do the next right thing next time—that's your goal.

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

Transformational Lawyering: New Approaches to Expanding Our Choices in Law Practice

By J. Kim Wright

Besides the adversarial model of law that has survived for centuries, there is a growing movement toward a new approach to legal practice and new theoretical approaches. This new model is responsive to the rapid change that has challenged the legal profession and society.

Susan Daicoff, an associate professor of law at Florida Coastal School of Law, has been instrumental in bringing this movement to the attention of the legal profession and legal education. Professor Daicoff, who is also a psychologist, was researching high levels of lawyer distress and lawyer personality traits when she started coming across lawyers who were breaking out of the mold and creating new approaches to practicing law. She noticed that these lawyers expressed higher satisfaction and fulfillment with the practice of law and began to study these new approaches. As she did, she began to see similarities and a common foundation. Daicoff refers to the movement as Comprehensive Law or Transformational Law. (www.fcsl.edu/faculty/daicoff/law.htm) Others have coined terms like visionary lawyering, integrative law, and holistic law. Generally, Daicoff, a math major, describes the different approaches as vectors. Each vector is a bit different from the others but all have common characteristics. All of these new approaches are sensitive to the needs, values, and highest good of the client, society, and the legal professionals. They offer solutions to problems, using many different approaches, skills, and creative thought. They generally focus on the future rather than the past, although there is a component of healing the past as we move toward the future. In this new paradigm, the lawyer utilizes not only legal reasoning but facilitation, coaching, and creative skills. Many of those engaged in these new approaches consider them to be indicative of the future of law practice. Many have even begun to speak of these new approaches as a movement to transform the legal system.

Following is a very short summary of some of the various vectors and links or addresses so you can follow up if you want more information.

Traditional Legal Practice

The Transformational Law movement is not intended to replace traditional practice and most lawyers are willing to admit that the litigation model will always be a necessary tool in some cases. However, many have pointed out that 98% of all cases are already resolved outside of the courtroom. Many of the so-called new approaches have been used by lawyers for many years but are now being recognized and incorporated into the legal system and law schools are beginning to incorporate courses in the new skills that are necessary for the new approaches. This movement recognizes Appropriate Dispute Resolution and encourages lawyers to design practices that reflect the lawyer's personality type, values, and goals while also serving the needs and values of the clients. Rather than one tool, litigation, it offers lawyers and clients a whole menu of options tailored to each situation.

Collaborative Law

The founder of Collaborative Law is Stuart Webb of Minneapolis, MN. Collaborative Law was originally a family law model in which the parties and their attorneys contractually agree at the outset that they will not litigate. They focus on resolution and problem solving without the threat of court filings and process. Thus, unlike other forms of alternative dispute resolution in which a lawsuit is filed first and then referred for mediation or arbitration, mutually satisfactory cooperative resolution is the focus of all parties from the outset. Collaborative Lawyers work with their clients

and each other, volunteer information to aid with resolution, and strive for a collegial atmosphere. In Collaborative Divorce, a team of professionals is assembled to assist in creating the foundation for sustainable solutions. Similar examples abound in other business law oriented practices, business entity formation and operations set up, business growth and development where mergers and acquisitions take place, plans for downsizing, employment or corporate benefit planning and similar situations that require team coordination and cooperation to avoid problems which may lead to litigation. The concepts of Collaborative Law have evolved into an organization called the International Academy of Collaborative Professionals. More information is available on their web site, www.collabgroup.com.

Holistic Justice or Holistic Law

Some would say that all of these vectors are subsets of Holistic Law while others would say that Holistic Law is a separate vector unto itself. The basic focus in Holistic Law is looking at the whole picture—the lawyer's role, the client's responsibility, the impact on the community—and seeking an answer to the situation that benefits the greatest good and promotes healing and completion. Holistic lawyers are often trained in other disciplines, from counseling to energetic healing, and may use those skills in their legal work as well. That may be a narrower focus of this approach for a select client base, but nevertheless an emerging client base that seeks practitioners with similar values represented by these skills or practitioners who actually use those skills in service delivery. The International Alliance of Holistic Lawyers has a website, www.iahl.org, and hosts annual conferences where holistic lawyers come together to network, share, and provide support for this approach.

Therapeutic Jurisprudence

Also called TJ, this is an interdisciplinary perspective that focuses on the law's impact on the emotional and psychological health of the participants, mostly the clients. The goal is to bring sensitivity into law practice. TJ focuses on listening to clients with an awareness of psychological and emotional issues including stress, confidence, and trust. TJ also looks at the court system and how it impacts society. It provides a new contextual platform by which to look at the concept of jurisprudence and the underlying purposes of the legal system. This perspective allows inclusion of concepts such as open dialogue and the role of apology in the resolution process, in addition to litigation strategies and procedures. For more information, see the International Network on Therapeutic Jurisprudence, David Wexler, Director, at www.therapeuticjurisprudence .org. In addition, TJ practitioners have incorporated theories of Procedural Justice into their work, which is more of a philosophical approach to the legal system that focuses on whether the participants in the system believe it is fair. Studies have shown that satisfaction with the legal system has much to do with litigants' impressions of fairness.

Preventive Law

Pioneered by Professor Ed Dauer, Preventive Law refers to the approach to law where the parties and their attorneys are proactive in limiting their exposure to litigation. This is the term now recognized to describe "minimiz[ing] the risk of legal disputes and maximiz[ing] professional opportunities[, and providing] suggestions for practicing law or business in compliance with the law so that individuals and corporations can best use their resources and capitalize on their profits" says the website for The Preventive Law Reporter, a quarterly publication of the University of Denver College of Law for over 15 years, dedicated to increasing the awareness and practice of preventive law. See www.preventive-law.org.

The need of the legal profession to support the growth of this approach has not escaped the notice of law schools. Founded originally at the University of Denver in 1986, the National Center for Preventive Law is now housed at California Western School of Law. California Western is also home to the Louis M. Brown Program in Preventive Law, see

www.cwsl.edu/mcgill/mc_brown.html. The late Louis Brown's work on preventive law dates back to the 1950's, based on the premise that "the legal profession can better serve clients by investing resources in consultation and planning rather than relying on litigation as the primary means of addressing legal problems. This theory recognizes that while litigation is sometimes necessary to address past wrongs, the fact that one ends up in an adversarial proceeding may be evidence of a lack of planning or communication. By applying foresight, lawyers may limit the frequency and scope of future legal problems."

For example, in a corporate setting, a legal department focused on Preventive Law would put its attention on training and educating managers to predict and prevent conflicts among employees and with others outside the company.

Creative Problem-Solving

Also based at California Western School of Law, this approach encourages lawyers to use the broadest array of creative problem solving techniques to achieve better results for their clients. The law school teaches the kinds of creative thinking processes that are often taught in progressive business schools. It encourages lawyers to be trained in creative thinking and to have many different tools—in addition to litigation—at their disposal. CPS seeks many points of view and examines problems for their relational impacts at all levels: individual, institutional, societal, and international. CPS seeks to develop solution systems based upon what is learned about a problem, rather than what is habitually done. It is a caring approach that seeks transformative solutions to redefine problems, expand resources, and facilitate enhanced relationships between the parties. These programs set a standard for legal education emphasizing development or enhancement of broader and more encompassing approaches to legal professional services. See www.cps.cwsl.edu.

Restorative Justice

Restorative Justice ("RJ") is based upon tribal models that honor the community while addressing harm and the issues surrounding it. There are many different approaches to restorative justice. In some situations, that focus on the rights of the accused seemed to "leave out" a consideration of the impact of the legal process on communities and the victims of crime and RJ was instituted as a balance. In a typical RJ oriented approach, the victim, offender, community members, and members of the court system all sit down in a facilitated conference, discussing the impact of the event and creating a resolution that works for everyone. RJ seeks to advance restorative purposes that will identify and take steps to repair harm done, identify and involve all stakeholders, and transform the traditional relationship between communities and their governments, instituting interactions between the community and legal system through programs such as the development of community service programs. A few RJ models focus on the role of the community and may even include having the community apologize for not providing sufficient guidance and love to the offender and seek ways to repair that harm. For more information, see the website of the International Centre for Justice and Reconciliation, www.restorativejustice.org and www.restorativejustice.com, the website "dedicated to learning together how to heal the harm of crime" created and facilitated by Tom Cavanagh, from New Zealand, who was encouraged to pursue this work after a 28 year career as a court reporter. Print resources include the books Changing Lenses: A New Focus for Crime and Justice (Herald Press, 1990) and Transcending: Reflections of Crime Victims (Herald Press, 2001) both by Howard Zehr. Restorative Justice principles are incorporated by many dispute resolution centers in North Carolina.

New Approaches to Mediation

For great information and more links about Mediation, go to www.mediate.com. In many ways, mediation has opened doors to the new approaches by offering more choices and allowing lawyers to expand their litigation skills to include creative problem-solving and facilitation. As

mediation has become more accepted and institutionalized, new approaches have arisen, many tailored to the organization or system in which they are employed. While the success of a typical mediation process is measured by whether settlement is reached, transformative mediation often has broader goals. At least three distinct approaches to transformative mediation are in wide use.

The first approach to Transformative Mediation is based upon a book by Robert A. Baruch Bush and Joseph P. Folger called The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey-Bass, 1994). This form of Transformative Mediation is a process whereby the parties in conflict can change the quality of their conflict interaction. The focus is not only on resolution, but provides conscious emphasis on transforming the interaction from negative and destructive to positive and constructive. Practitioners use the complementary models of empowerment (facilitating and supporting the considered, deliberate decision-making of the parties) and recognition (highlighting opportunities for voluntary interpersonal perspective-taking and understanding.) In this model, the focus is on revealing and understanding the underlying dynamics of the conflict, to both resolve the presenting issue and prevent future similar ones. For more information, see also the website for the Institute for the Study of Conflict Transformation at Hofstra School of Law, at www.hofstra.edu/Law/isct—another educational option for anyone embracing visionary law concepts particularly within professional practices focused on litigation or handling and resolving any other types of conflicts.

Gary Friedman and Jack Himmelstein, co-founders and co-directors of The Center for Mediation in Law, detailed at www.mediationinlaw.org, teach another Transformative Mediation model dedicated to integrating mediative principles into the practice of law and the resolution of legal disputes, with a focus on empowering the people involved. Their model is described as the “Understanding Model.” In it, the goal is to reach deeper levels of values and meaning, and to attain the means to more lasting and healing resolutions generally not even addressed in adversarial proceedings. Such approaches often have the power to heal even profound social wounds.

Attorney Barbara Ashley Phillips, author of The Mediation Field Guide (Jossey-Bass, 2001), has still another distinctive approach that focuses on the “inner aspects” of conflict resolution. She is Director of the North American Institute for Conflict Resolution, and its website, www.crtraining.org (last visited September 8) is also a resource for materials on forgiveness. See, particularly www.crtraining.com/forgiveover.htm#top.

Drug Treatment Courts

Drug treatment courts provide another opportunity to implement a visionary legal approach. The drug treatment court is designed to interrupt the cycle of substance abuse. Using this holistic process, defendants identified as addicted enter a structured recovery program with built-in incentives for their success. Judges and attorneys involved in such projects report much higher satisfaction with the court system and fulfillment. There are hundreds of drug treatment courts in the US. For more information, see the website maintained by the Justice Programs office of the School of Public Affairs (SPA) at The American University in Washington, DC, at www.american.edu/justice/drugcourts.html.

Community Lawyering

Community Lawyering is a movement where the lawyers, especially those in government, public interest, etc., work together to address the underlying problems that result in clients being in court, as well as to promote the welfare of the community and each in relationship to one another. Community lawyers take on projects that get to the source of cases that recur in the court system. Housing issues are an example of one issue addressed by community lawyers. Instead of litigating one tenant issue after another, a community lawyer might work to create standards for rental units, for example. For other examples, see the website of Roger Conner, a visiting fellow

with the National Institute of Justice in Washington, DC, at www.communitylawyering.org. He describes this model as a way of practicing law by attorneys who take a direct working interest in the peace and safety of particular places, and work to generate outcomes the community values in addition to winning cases.

Peace-Making

The approach came about as a way to focus on peacefully settling disputes, and many lawyers involved consider themselves to be peace-makers. They express that in many ways. Some actually create organizations dealing with international conflict, like Ambassador John McDonald, a lawyer, diplomat, former international civil servant, development expert, and peace-builder, concerned about world social, economic, and ethnic problems, who spent 20 years of his career in Western Europe and the Middle East and worked for 16 years on United Nations economic and social affairs. His current work is as chairman and co-founder of the Institute for Multi-Track Diplomacy, which can be reviewed at www.imtd.org. Others seek to heal and bring peace at a more personal, energetic level like Jill Dahlquist and Johanna Halgren (an attorney and psychotherapist, respectively) facilitators of The Group Peace Process. Their work is described at www.grouppeace.com. Sharif M. Abdullah, a former North Carolina lawyer, has written and spoken on campaigns for expanding the consciousness for peace, as the founder and director of www.commonway.org. His most recent completed project helped bring peace to Sri Lanka, ending a long-term war.

Contemplative Practice

Lawyers often seek relief from personal stress through meditation and then discover that meditation leads to further growth. The Center for Contemplative Mind in Society, www.contemplativemind.org, has a program focused on law. Through contemplative law retreats, they have addressed questions and ideas from both a contemplative and legal perspective, including the nature of winning and losing, the role of compassion in adversarial situations, truth and “right speech,” Socratic and contemplative methods of inquiry, action and non-action, separation and connection, and listening. Many lawyers are integrating their spiritual and religious practices into their legal life. Pioneered by Steven Keeva’s book, Transforming Practices, Finding Joy and Satisfaction in the Legal Life (Contemporary Books, 1999), this approach to law allows for the inclusion of the lawyer’s spiritual values, as well as those of the client. Keeva’s book looks at several different approaches based upon values and life purpose viewing the practice of law as a “ministry” focused on healing, service, mindfulness, contemplation, and listening. See Keeva’s site at www.transformingpractices.com.

The Project on Integrating Law, Politics, and Spirituality

The Project is a group of lawyers and legal educators committed to (1) the integration of spirituality and politics and (2) the incorporation of a spiritual-political understanding into American legal culture. The national conference on the Politics of Meaning, held in Washington, DC, in 1996, drew some 1,800 people committed to a new spiritual-political vision of social transformation. Growing out of that conference, the law task force has met by a monthly conference call since that time, has held annual retreats, and has made presentations and organized several events around the country. Members of the task force have written and spoken widely on the need for legal culture to transform itself to address the social alienation—those distortions in human relationship resulting from living in an isolated, individualistic, and materialistic culture blind to the communal longings of the human soul—that is at the heart of much social conflict. The Project is hosted by New College of California, where its leader, Peter Gabel, teaches in its public interest law school as well as its program on culture, ecology, and sustainable community. Gabel was a founder of the Critical Legal Studies movement, is co-editor of Tikkun magazine, and the author of many articles and essays, some of which are collected in his book, The Bank Teller and Other Essays on the Politics of Meaning (Acada Books, 2000). For

more information contact Paul Lehto at lehto@eskimo.com.

Legal Counseling

This is a relatively new approach being developed by Eva Van Loon, a lawyer working on an advanced counseling degree. Van Loon has noted that many clients are not even clear enough about their goals to choose their lawyer or to make decisions through the process. Van Loon's program trains lawyers and others to help clients identify their plan of action so they may choose the appropriate lawyer and then pursue the appropriate course of action in their legal dispute. Ms. Van Loon may be reached at Mettalaw@aol.com.

Coaching

A professional coach in this context is a trained professional who assists clients in creating their future and designing plans to achieve that future. At times, lawyers hire coaches as support staff, to work with their clients to clarify goals or deal with life issues affecting their legal matter. This approach has led to various expressions including unbundling services, assisting pro se litigants, and coaching divorce clients.

Some lawyers are discovering that coaching skills are useful in their client relationships. Coaches are partners in creating results, rather than omniscient guides, and many lawyers have found that approaching their relationship from a coaching perspective helps clients own their choices and outcomes. Some even enjoy coaching other lawyers to find greater fulfillment in their lives and the practice of law. There are now many coaching schools and training programs. See a list of coach training programs accredited by the International Coach Federation at www.coachfederation.org/ training/programs.htm. The Coach U program hosts a special interest group of lawyer-coaches held by telephone on the second Monday of each month. For more information, contact Warren Simonoff at warrensimonoff@qwest.net. Renaissance Lawyer Society also hosts an informational call on coaching issues and on the innovations occurring in the law. For more information about that program, contact attorney-coach Debra Bruce at Debra@ DebraBruce.com.
Many lawyers have found that they are supported by hiring a coach for themselves. Other web resources for information about lawyers and coaching include www.lawyercoaches.com and www.renaissancelawyer. com.

The list of approaches cited is not all-inclusive. They philosophically overlap one another representing, like a web, separate developments (directions) in an overall cultural evolution—hence their description as vectors within a "Comprehensive Law" movement. Many lawyers are being trained in counseling, listening, coaching, and even massage therapy and energetic healing as additional tools to resolve conflict. Some are leaving law practice for related careers. Multi-disciplinary practices, multi-jurisdictional practices, legal education, and related movements overlap these new models and reflect the creativity and future thinking of lawyers. In addition, the use of conflict resolution practices, apology, forgiveness, and other healing tools have found their way into the legal process and have altered the experience of the legal system for many stakeholders. Many lawyer assistance programs have moved their focus from alcohol and substance abuse to include transitions and holistic issues. The movement reflects the calling to law, along with the intelligence and creativity of lawyers as they work to redesign a new legal system that truly works for everyone.

J. Kim Wright, JD, is a member of the North Carolina Bar living in Oregon. She is the president of the nonprofit Renaissance Lawyer Society, www.renaissancelawyer. com, Creating a Legal System that Works for Everyone, and a principal in www.cleuniversity.com, and www.thebalancedbarrister.com. She practiced holistic family law at the Divorce and Family Law Center in Graham, North Carolina, before relocating in 2000. She offers products and services for lawyers to "balance their lives, transform their practices, and feed their souls." She can be

reached at kim@jkimwright.com.

The Lawyer's Myth: Reviving Ideals in the Legal Profession

By Walter Bennett, The University of Chicago Press
Reviewed By G. S. Crihfield

Walter Bennett of the UNC Law School has written a book which every member of the legal profession, every law school teacher, every law student, and every entering law student should read. The Lawyer's Myth: Reviving Ideals in the Legal Profession is an insightful discussion of the loss of professionalism that has occurred. By using the Parcival myth as an analogy he shows the deterioration of professionalism, reasons why it has occurred, and is able to connect these issues to what has happened in our society that has impacted the profession.

As a law professor, he must be applauded for starting his analysis in the legal academy. He uses his own experience as a first year student at the University of Virginia Law School where he observed the "murder of moral purpose." He goes on to discuss the proposition that the legal educational system ignores moral commitment and observes that the legal method that is used in virtually all law schools is an arrogant notion which begins the creation of a lawyer who has abandoned higher reasons for being a lawyer for those of ends justifying the means, altruism is for suckers, and the goal is to be a super competent lawyer rather than seeking moral growth.

Professor Bennett then describes the diminution of the profiles that lawyers used to present such as the lawyer-statesman, the pillar of the community, the champion of people and causes, the paragon of virtue and rectitude, and conscience of the community which have been exchanged for goals of greed and winning at any cost. He believes that the ignoring of the ideals of the profession has created an intellectual atmosphere that is far below that to which the profession should aspire.

He then presents negative lawyer types including the shyster/trickster lawyer and merges these two types of persons into a mythology about lawyers. By doing this, he suggests that we need to learn to identify our own version of what we are so that we understand our professional journey and recognize the ideals we hope to achieve rather than just having "something out there" to which we pay little attention.

The discussion about the loss of community within the bar had a particularly strong impact on me. A number of writers have written about a general breakdown of community within our society. Professor Bennett's book analyzes how this has also occurred within the legal profession and its effect on the bar as well as the individual lawyer. Having done so, he then argues why the profession should be saved and addresses what we have been in the past and what we can be in the future.

Parcival is contrasted to the Red Knight who is the personification of the masculine mentality within the profession and the warrior approach to the practice of law. Professor Bennett observes that "The Red Knight is alive and well in today's legal profession." Thereafter there is a discussion of how the profession needs to approach some of these issues by creating new heroes to save the profession within the changing morals of society and its effect on the individuals who now constitute the bar. Turning to the theory that the profession should be one of serving greater ends than one's self, he describes a new ideal for lawyers to contemplate and asks the question "Whom do lawyers serve?" The book raises a number of questions about the profession and makes suggestions solving some of the dilemmas that we face. Of particular interest are views of the roles of the law school and the organized bar in conceiving a new profession.

There is a huge amount of food for thought in this work for all practicing lawyers, judges, law professors, law students, and entering law students. So I renew my suggestion that we read Professor Bennett's book, think about it, talk about our dilemmas, and undertake the journey to

save our profession.

An Interview with Our New President—James K. Dorsett III

Q: You come from a family of distinguished lawyers. Describe your family and explain how you got to be where you are.

Many members of my extended family have been North Carolina lawyers. Both my father and my grandfather served as president of the North Carolina Bar Association. As a young man I was inspired by their examples of using a law license to serve clients, public, and private institutions and society in a variety of ways. While both represented corporate clients and prominent individuals, they also did a great deal of free legal work to help people in need. I think the variety of matters they were able to work on and all they could accomplish as lawyers appealed to me a great deal. Many of their friends also were lawyers, and I saw them as talented people who enjoyed a wide variety of interests. So, I suppose that I was inspired to become a lawyer by the examples set by my relatives and their partners and friends.

Q: Did you ever consider doing anything else?

Our family doctor encouraged me to pursue a career in medicine, but I was not inspired with the text he lent me or with dissections in biology class. During high school I thought I might become a tennis pro, but after playing in college I realized that I would not likely succeed on the tour, and I became bored with teaching lessons. I really loved history and literature and considered becoming a teacher. In the final analysis, law seemed to offer a more active and varied career that I might succeed in.

Q: Talk a little bit about the legal culture of your extended family and your law firm.

My family environment was one in which emphasis was placed upon faith, hard work, and respect for all people. My parents instilled a deep appreciation for the democratic ideals of our country and its system of laws—the rule of law. My father showed me that a lawyer could be a zealous advocate, yet treat all people with fairness and courtesy. As a young lawyer with Smith Anderson, I saw the senior lawyers set an example of providing service to the bar as well as clients and the community. Professionalism was expected. I was encouraged to volunteer in civic organizations as well as with the bar, in addition to providing the best possible legal service to clients. That was and continues to be the expectation for lawyers in my firm. With family and other interests, it does make for a busy life.

Q: How would you describe your own law practice? How has it evolved and where do you think it's going?

I have always practiced in the civil litigation area. For a number of years my practice principally was in insurance defense, handling a wide variety of tort cases. This work gave me experience in many interesting lawsuits and trying cases in state and federal courts across the state. I represented insurers, manufacturers, airlines, banks, and other businesses in all types of cases. Later, I began to concentrate in commercial litigation matters such as trade secrets, contract, and shareholder cases. I have also represented plaintiffs in wrongful death cases and in serious injury and brain damage suits. I really enjoy working on a wide variety of cases rather than limiting myself to just one area of the practice. If I had the time, I would probably enjoy the business practice, too.

Q: How did you come to be involved with the State Bar?

Initially, I volunteered on several committees of the Wake County Bar Association. Later, I served on the boards of the local and statewide legal services organizations. Eventually, I was nominated and elected a councilor with the State Bar representing the 10th Judicial District.

Q: What were you expecting when you took your seat on the State Bar Council? And were you surprised by anything you observed or experienced?

To be frank, I really didn't know what to expect. I had to go read the statutes to find out exactly what the State Bar's regulatory functions are. Once I joined the council I was surprised to learn how much work was required to carry out the bar's charge of regulating the practice including the admission of lawyers, continuing education, discipline, ethics opinions, unauthorized practice issues, and administrative matters.

Q: What aspect of your service on the council has been most gratifying? What has given you the most concern?

The most gratifying part has been the opportunity to work with outstanding lawyers from across the state who give freely of their time in service to the bar and the public. I have also been pleased with the progress we have made during my 11 years on the council, for example, with the addition of the PALS Program and the Client Assistance Program. My greatest concerns have to do with disciplinary cases where we see lawyers who have gotten into trouble and harmed their clients and themselves.

Q: Does self-regulation of the legal profession still make sense for the people of North Carolina?

There is no question in my mind that self-regulation best serves both the public and the bar. When lawyers elected from across the state meet with the common goal of improving the practice in the public interest, they bring experience to bear that no governmental bureau could so effectively direct to the task. Also, all of the councilors and the officers serve without compensation, which is a benefit to the public. In fact, the State Bar, although an agency of the state, is self-sustaining and does not spend one penny of the taxpayers' money.

Q: What in your view does the State Bar do best?

In addition to setting the standards for admission to the bar and requirements for professional conduct and continuing education, I think we do a good job of dealing with lawyers who have violated the rules and harmed their clients or the administration of justice. We also provide prompt advice to lawyers who have requested informal ethics opinions.

Q: How do you feel about becoming the president of the North Carolina State Bar?

I was overwhelmed to be sworn in by the chief justice in the presence of distinguished judges and lawyers from around the state as well as my family, friends, and law partners. I feel a great sense of responsibility to the public and the bar to do my best to advance the rule of law in this state. I am motivated to work hard and feel confident that with the support of the councilors and staff, I can do a job worthy of my predecessors.

Q: How do you respond to the criticism that the leadership of the State Bar is too often drawn from the ranks of big firms and big cities?

Our new vice-president, Bud Siler, hails from Franklin, which few consider to be a major metropolitan area. It is my recollection that about 40% of the lawyers in the state practice in the larger cities, and about the same percentage of the officers have come from the larger firms and towns.

Q: Given your metropolitan background, do you think you can truly understand realities of law practice in our state's small towns and rural communities?

My trial practice has taken me to many parts of the state, and I have gotten to know lawyers in

many communities. More importantly, as president, I will have the benefit of working with elected councilors from across North Carolina, many of whom know first-hand the reality of practicing in small towns. Of course, only in recent years has Raleigh become a metropolitan area.

Q: During the past year the State Bar has been involved in a rather divisive matter relating to the participation of non-lawyers in residential real property closings. Some would contend that the bar has been too responsive to the concerns of the Federal Trade Commission and not responsive enough to the needs of consumers and real estate lawyers. What do you think?

This was a very difficult and emotional issue for the bar and especially our real estate practitioners. However, the leaders of the Real Property Section and the president of the Bar Association all have endorsed our proposed ethics opinions on residential real estate closings as being the best result that could be achieved for the public and the bar given all of the circumstances we faced. All that the opinions allow non-lawyers to do in a closing is present the documents for signatures and handle and disburse the proceeds. We felt it would be difficult to argue successfully in court that these acts invariably constitute the practice of law. Our anti-trust counsel so advised, and apparently the RPS leadership reached the same conclusion. The real property lawyers actually influenced the eventual proposals in significant ways. I am hopeful that despite the unnecessary intrusion of the FTC, North Carolina homebuyers will continue to enjoy the lowest cost and highest quality real property legal services in the nation.

Q: What are the most significant issues facing the legal profession at the present time?

Of course, there are issues involving the balance between security and personal freedoms that fall outside the State Bar's regulatory powers. In North Carolina we must adjust to the increasingly interstate and international nature of the practice of law in a way that protects our citizens. We must help lawyers impaired by substance use and depression, resolve nearly 2,000 grievance complaints brought against lawyers each year, respond to complex ethics inquiries, and protect the public from non-lawyers who seek to provide legal representation. We face plenty of challenges.

Q: Is there anything in particular that you would like to see accomplished during your year as president?

In addition to the matters I just listed, I would like to see more lawyers covered by malpractice insurance, which would protect both the lawyer and the client from losses resulting from mistakes. I would like for us to address problems related to pro hac vice admissions by out of state lawyers. I think we can do more to protect the public from impaired lawyers and work with the voluntary bar on mental health issues. I want to encourage lawyers to support the legal services organizations and better funding for our court system.

Q: Apart from your identity as a lawyer, how would you describe yourself?

I am a person who loves to spend time with family and friends, play tennis, travel, and read widely. I wish that I had more time to enjoy these activities, but it does not appear that I will during the next year.

Q: What is more important to you, law or tennis?

In either case, I can say that I'm going to court. I really do love to play tennis, and it is immensely helpful to me in maintaining health and balance given the pressures of law practice. Now, three of my children are playing junior tennis tournaments, and I have a wonderful time hitting with them. My wife Wynn plays, and our five year old seems to be catching the bug, as well.

Q: What do you think the profession will be like in 20 years?

No doubt the technology we employ will continue to evolve in ways that we cannot imagine. Lawyers may practice in settings other than the traditional law firm or solo practice that we now know. However, I suspect that as now and for centuries past, lawyers will continue to help people and entities resolve disputes and facilitate business transactions. These disputes and transactions will be interstate and international as well as local.

Q: Will you encourage your children to become lawyers?

I will encourage them to consider a career in law but will not push them to choose it. The practice of law has become a high stress occupation. However, for those who are willing to work hard, the law continues to offer many and varied opportunities for interesting work and service. I would be proud if one or more of my children choose to become a lawyer.

Q: Would you do it again?

Yes. I don't know what else I would find to do that would involve such interesting problem solving. Although from time to time I imagine pursuing another career, I suspect that I'll continue to practice law for another 25 years or so. I hope that I can also keep playing tennis for at least that long.

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

By Thomas L. Fowler and Thomas P. Davis

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

I. Recently Published Articles of Interest to North Carolina Attorneys1

John L. Saxon, North Carolina Revised Child Support Guidelines, Family Law Bulletin, No. 13 (July 2002): "This Family Law Bulletin describes the revisions to North Carolina's 1998 child support guidelines that were adopted by the Conference of Chief District Court Judges on June 17, 2002 (effective October 1, 2002). The full text of the revised (2002) child support guidelines . . . is posted on . . . http://ncinfo.iog.unc.edu/ faculty/saxon/2002guidelines.pdf." "The 2002 revisions to North Carolina's child support guidelines . . . retain the fundamental structure and purpose of the 1998 child support guidelines while updating the economic data on which the schedule of basic child support obligations is based; providing clarification with respect to some of the issues that have arisen with respect to the guidelines' application; and incorporating recent appellate decisions regarding application of the child support guidelines."

David M. Lawrence, Closed Sessions Under the Attorney-Client Privilege, 103 Loc. Gov't Bull. 1 (April 2002): IOG Professor Lawrence notes that four recent court of appeals decisions have interpreted the authorization for closed sessions found in N.C.G.S. sec. 143-318.11(a)(3): H.B.S. Contractors v. Cumberland County Board of Education, 122 N.C. App. 49 (1996); Multimedia Publishing of North Carolina, Inc. v. Henderson County, 136 N.C. App. 567 (2000); Sigma Construction Co. v. Guildford County Board of Educ., 144 N.C. App. 376 (2001); Multimedia Publishing of North Carolina, Inc. v. Henderson County, 145 N.C. App. 365 (2001). For this reason, "it is appropriate to undertake a detailed consideration of the authorization . . . ."

Joseph Finarelli, Employer's Defense to Employee Disloyalty: A Shrinking Shield and a Blunted Sword, 22 The Litigator 7 (Aug. 2002): This short article analyzes Dalton v. Camp, 353 N.C. 647 (2001). Dalton "provides an instructive example of the changes occurring in the legal battles between employer and employee." An "unintended consequence of the Dalton decision may be an increase in the use of covenants against competition, as employers discover the limited options available to them to protect themselves against their own employees."

James C. Drennan, Viewpoint: Ensuring Common Ground Between State Court Administrators and Chief Justices, 86 Judicature 7 (July-Aug. 2002): A former director of the North Carolina Administrative Office of the Courts discusses seven key issues on which the chief justice and the state court administrator must find common ground if they are going to function effectively as a team.

Mike Tonsing, Digital Photographic Evidence Presents Challenges, 49 Fed. Law. 18 (Sept. 2002): Digital photography, "an entirely different species of evidence," presents a challenge to the existing rules of evidence in the areas of relevance and authenticity of photographs."[T]here exists no way to distinguish a copy from the original." "The ease with which a digital image can be altered makes any intrinsic verification—simply by 'eyeballing' the image itself—all but impossible." "Worse yet is any incarnation of the best evidence rule, as applied to computer-generated data generally, that follows the Federal Rules of Evidence by defining a computer printout as an 'original' for purposes of the rule." "[T]he best evidence rule seems to have become an irrelevancy."

Mark A. Berens & Cary Silverman, The Case For Adopting Appointive Judicial Selection Systems

For State Court Judges, 11 Cornell L. & Pub. Pol'y 273 (2002): "Spending in judicial campaigns [continues to] increase at an exponential rate. As competition and special interest group participation increases, judicial elections are getting 'noisier, nastier, and costlier.'" . . . . "The increasing flow of money into judicial campaigns is staggering. In 2000, candidates spent more than $45 million on state supreme court campaigns—a 61% increase from 1998." . . . . "Campaign finance reform and tinkering with judicial codes of conduct to regulate speech in judicial campaigns do not offer a comprehensive solution to the systematic problems inherent in judicial elections." This article evaluates the impact of judicial campaigns on public confidence in the courts, demonstrates the incompatibility of elections with proper judicial function, and offers practical advice for states seeking to move to an appointive system.

Owen G. Abbe & Paul S. Herrnson, How Judicial Election Campaigns Have Changed, 85 Judicature 286 (May-June 2002): "Competitive judicial elections are now remarkably common across all levels of courts, forcing candidates to raise money and gain the support of interested groups." "This article explores electoral competition, campaign fundraising, spending, communications, and the involvement of political parties and interest groups in judicial elections." The study is based on a nationwide survey.

Jack N. Rakove, Judicial Power In The Constitutional Theory of James Madison, 43 Wm. & Mary L. Rev. 1513 (2002): Madison's reflections on judicial power after his retirement from the presidency in 1817 were occasioned chiefly by criticism of the Marshall Court by two Virginia Republicans, Jon Taylor and Spencer Roane. These men built "a more systematic and militant exposition of the doctrine of states' rights" from "the somewhat ambiguous legacy of the Virginia and Kentucky Resolutions of 1798." Roane and Taylor believed in state judicial parity with the United States Supreme Court, arguing that the Court "'could not constitutionally review state court decisions on questions of federal law.'" Madison rejected this position as "fundamentally inimical to the Union," and refused to support these men who "harked back, over his objections, to the Doctrine of 1798 to whose formation he had contributed, inadvertently if fatefully." In relevant correspondence with Jefferson, Madison argued that "the Federal Convention had designed the Supremacy Clause and Article III to assure that the federal judiciary would be responsible for resolving all federalism questions properly present to it 'in the exercise of its functions,' secure in the knowledge that the role of the Senate in appointing judges, the independent tenure of the judges, and 'the surveillance of public Opinion' would all operate to 'guarant[ee] their impartiality.'"

Thomas B. McAffee, The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution??, 80 Oregon L. Rev. 1245 (2001): McAffee delivers his shots, once again, at judicial activists who defend an "open-ended 'moral' reading of the Constitution"—that is, at anyone who defends the modern Court's role in fundamental rights cases. The essay is interesting in that it focuses on the "writtenness" of the Constitution, and what that means. It is also valuable for its footnotes on this and other issues he raises. McAffee also suggests that "even though he is charged with inconsistency with the ideals of the framers, the central figure of early American constitutionalism should perhaps be Justice James Iredell. In rejecting Justice Chase's call for reliance on natural law-based limitations on government, even if not included in the written Constitution, he contended that there is no fixed standard for judges to use to determine violations of natural law."

II. Jurisprudence Beyond Our Borders2

Andersen v. Two Dot Ranch, Inc., 49 P.3d 1011 (Wyo. 2002): Three vehicles collided with a cow on a state highway in an area posted as open range resulting in two fatalities. The plaintiffs sued Two Dot Ranch, Inc. (Two Dot), the owner of the cow. The trial court granted summary judgment for defendant. The Supreme Court affirmed. The Court stated the issue as follows: "In light of Wyoming's historical adherence to the open range doctrine and statutory provisions regulating grazing and pasturing of livestock, does a livestock owner owe a duty of care to protect the

motoring public by preventing his livestock from wandering onto an unfenced road in a posted open range?" The Court noted that this was an issue of first impression, which was "striking considering the historical prominence of the livestock industry" in Wyoming. The plaintiffs argued the open range doctrine did not excuse a livestock owner from the exercise of reasonable care in pasturing his cattle and applied only to claims for damage caused by trespass of the livestock, thus questioning its relevance to this case. Two Dot countered that the open range doctrine effectively immunizes it from any claims of negligence arising from pasturing its cattle in open range. The Court concluded that the open range doctrine, or "fence out" rule, as developed by Wyoming's common law, in concert with Wyoming's statutes governing the control of livestock on public highways, established that there was no duty requiring livestock owners to prevent livestock in open range from naturally wandering onto unfenced roads.

Davis v. The Tennessean, 29 Media L. Rep. 2468 (Tenn. Ct. App. 2002): An inmate filed a libel action against a newspaper, The Tennessean, alleging his reputation had been harmed by a sentence in an article which stated that he had shot a man, when, in fact, his co-defendant had killed the victim. The trial court granted the defendants' motion to dismiss, finding the plaintiff to be "libel proof" in this matter because he had been convicted of aiding and abetting in the murder and incarcerated for the remainder of his life for the crime, "rendering any reputation he may have had virtually valueless." The court of appeals affirmed, stating: "Although Mr. Davis alleges he suffered unjustified humiliation because of the publication, he does not allege his public reputation has been injured. We conclude he cannot show such injury because, at the time of the publication, he was serving a 99 year sentence for aiding and abetting the murder which is the subject of the article and his complaint. He participated in the crime which resulted in the murder. His character reputation with the public was established and could not be harmed by inaccurate attribution to him of conduct which was part of the crime in which he participated. His continued incarceration for a long time after the publication renders actual damage, with regard to his standing in the community, as a result of the article unlikely.. . . . Thus, we agree with the trial court that Mr. Davis's conviction resulting in incarceration for 99 years "renders any reputation he may have virtually valueless and that he is in the eyes of the law 'libel-proof.'"

Burling v. Chandler, 804 A.2d 471 (N.H. 2002): Petitioners requested that the state supreme court declare existing representative districts unconstitutional. The state supreme court appointed a technical advisor to assist it in reviewing redistricting plans submitted to the court. The court rejected all such plans and established its own. The court stated:" For the first time in the history of this state, the supreme court is required to scrutinize the process of apportioning the people's right to vote in the election of representatives. That scrutiny has revealed significant anomalies, perpetuated for many years in the legislative redistricting process, which have undermined the principles of equality upon which the New Hampshire House of Representatives was founded. . . . .Rather than protecting the people's constitutional right to 'one person/one vote,' a system has evolved that falls far short of that ideal. We hold, therefore, that the current method of creating districts fails to insure that 'every voter is equal to every other voter' in this state. . . . .This court has been drawn reluctantly into what is primarily a legislative task. It is not our function to decide the peculiarly political questions involved in reapportionment, but it is our duty to insure the electorate equal protection of the laws.. . . .Therefore, when the legislature has failed to act, it is the judiciary's duty to devise a constitutionally valid reapportionment plan.. . . . In furtherance of that duty, we establish a plan for new house districts.. . . .This plan corrects the constitutional deficiencies in the existing districts and eliminates the present inequities. We are primarily governed by the constitutional requirement of 'one person/one vote.' In addition, in this case, we are
able to adhere to other New Hampshire constitutional requirements and traditional state redistricting policies. We are indifferent to political considerations, such as incumbency or party affiliation. The plan we establish restores as nearly equal weight as possible to the votes of the people of New Hampshire. We do this by eliminating floterials and creating as many single-

member districts as possible, with as few multi-member districts as necessary."

AIDA v. Time Warner Entertainment Co., 772 N.E.2d 953 (Ill. App. Ct. 2002): Plaintiff sued defendant seeking a declaratory judgment that various episodes of a television program, The Sopranos, breached the Individual Dignity Clause of the Illinois Constitution. The trial court's dismissal of the action was upheld by the court of appeals. Plaintiff AIDA (American Italian Defense Association) is a non-profit organization formed to oppose "all forms of negative stereotyping and defamation of Italian Americans." Plaintiff alleged that "various episodes of The Sopranos alone or the series when taken as a whole, breaches the Individual Dignity Clause of the Illinois Constitution with respect to Italian Americans individually or as a group by reason of, or by reference to, the ethnic affiliation of the characters portrayed in that program." The Individual Dignity Clause of the Illinois Constitution provides: "To promote individual dignity, communications that portray criminality, depravity, or lack of virtue in, or that incite violence, hatred, abuse, or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national, or regional affiliation are condemned." The constitution also includes a right to remedy clause which provides:"Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property, or reputation." Nevertheless, the court of appeals stated that, the individual dignity clause "is hortatory and does not create a cause of action. The plain and ordinary meaning of the clause is to condemn such communications, not to make them unlawful. The legislature is merely expressing its distaste and disapproval of such communications."

Endnotes

1. A more comprehensive list of recent articles of interest is accessible on the world wide web from the homepage of the North Carolina Supreme Court Library, at www.aoc.state.nc.us/www/copyright/ library/libpers.htm.

2. These are recent cases from other jurisdictions that address issues of possible interest to North Carolina attorneys.