Journal 8,1

Court Administration and the Internet

By Steven J. Bryant

I am a district court judge in the 30th Judicial District—a seven county district in the western part of our state. Several years ago, I found myself increasingly dissatisfied with the traditional Monday morning calendar call that I had used in civil terms during my entire tenure as a district court judge. To me, especially in the larger counties in the district, these calendar calls had begun to resemble a rugby scrum. There were too many cases, too few lawyers, and a lot people with dashed expectations of their cases being reached. I contemplated various alternatives that could be utilized to improve the civil and domestic calendaring process. It seemed to me that the ability to organize the calendar in advance of the term was potentially the answer to the problem. For a while, I tried to fax trial schedules to the attorneys, but found it extremely time consuming for both our civil case manager and me. Additionally, the calendar in advance of the term was usually too fluid to keep everyone updated by fax communications.

I was looking for a method by which I could quickly communicate with the lawyers, the lawyers could communicate with me, and that the information gathered could be easily shared among those participating in a given civil term. I had watched with some interest the evolution of the Internet and its application to other types of businesses. It dawned on me that this might be the answer to my civil calendar problems.

I had used computers over the past decade or so, primarily for word processing. I had browsed the Internet, but never really contemplated building a website. As the idea of a court-related web site started to take root in my brain, the somewhat irrational idea of building my own website followed. One day, at the conclusion of court, I made my way to the nearest Office Depot and bought some web building software. After working my way through the software’s tutorial on website building, I began the process of constructing my own website. After a process of considerable trial and error, I launched the first, very rudimentary, version of the website in

February of 2000. Shortly thereafter, I began to pursue what eventually became my “Electronic Calendar Call.”

E-Calendar Call

The premise is really pretty simple. If the information traditionally provided at a Monday morning calendar call could be provided in advance of the term, the need for a calendar call would be eliminated and a trial/hearing schedule could be set prior to the commencement of the term. For each civil term, I begin by e-mailing a calendaring memo to all of the attorneys who have cases on the docket. This is a form memo that only requires me to change the relevant dates for each term. This calendaring memo provides the lawyers with instructions regarding the information needed from them and the deadline by which the information is to be relayed to me. Initially, the attorneys send their calendaring memo responses to the civil case manager in our district via e-mail. The pertinent information is then e-mailed to me and I post that information on the “Civil Case Status” page of the website. The lawyers can then access that web page to see what the other lawyers have reported on their cases and thereby better gauge the readiness and expected duration of the other cases on the docket. After the deadline passes and I have all of the requested case information, I produce a trial schedule for the first two days of the term. This schedule is forwarded to the attorneys approximately one week in advance of the term. The schedule sets a specific time for each case. I no longer have a calendar call on Mondays, as that has been accomplished electronically in advance of the term. Lawyers are instructed that neither they nor their clients need to be present in court at any time other than when their case is called for hearing.
I see several benefits to this process:

1. The lawyers are required to come into the courtroom only when they are needed to try a case or participate in a hearing. If they are not scheduled for a hearing on Monday (or any other day for that matter), they know that they are free to attend other courts without concerns of conflict with my court or they can set appointments in their offices for times that would otherwise be set aside to be in court for the calendar call. Out-of-county or out-of-district lawyers no longer need to drive a considerable distance just to answer calendar call.

2. The parties to the actions are no longer required needlessly to take off work to sit in the courtroom on Monday mornings, waiting to see if their case is among those called for trial that day. They can arrange their work schedules more easily as a result of having a full week’s notice. The parties no longer have to pay their attorneys to sit in a courtroom for an hour or two just to relay information to the court about the readiness of their cases.

3. Instead of fielding questions about when their client’s case might be called for trial, several of the lawyers have told me that they now refer their clients to the website, as it is updated nightly with the next day’s schedule. The parties can now find out the status of their case daily, without contacting their lawyer.

4. The receipt of advance information allows me to work around scheduling conflicts that the lawyers have. If several lawyers need to be in superior court, I can select other lawyers and other cases and eliminate the conflict between the two courts. This serves to maximize our available court time and results in a greater portion of each court week actually spent on the trial of cases. As my web building skills advanced over the last few years, the process has been further refined. Now, instead of e-mailing the responses to the civil case manager, I have created an online case information form that has a series of drop-down boxes that let the lawyers quickly select among the available options, click “send” and forward the information directly into my e-mail inbox.

This procedure has led to a remarkable reduction in wasted court time. The time previously used to call the calendar is now used for trials or hearings. I start my first hearing at 9:30 on Monday mornings. Because of the advance scheduling there are fewer instances where it is impossible for me to find two lawyers in the same case to try something. It has taken some time for this process

to evolve, but today it seems to run very efficiently. The civil clerks in each of the counties in the district seem to like the process and have been a considerable help in its implementation. Our civil case manager continues to play an integral part in the process.

Other Website Features

While the desire to improve the administration of civil court was a driving force in the creation of www.judgebryant.com, I like to think that the site has much more to offer to both the lawyers and general citizenry of my district.

“E-Jury Excuses”
One day a lady e-mailed me from my website and indicated that not only was she unable to serve as a juror, but that she could not make it to court to offer her excuse. I responded via e-mail and took care of deferring her to a later court date. It gave me the idea of making available to prospective jurors an electronic jury excuse. I developed a form on the website that allows prospective jurors to make requests for jury excuses or deferrals online. The jury summonses that go out in our district contain a reference to my website at the bottom of the page. Instead of missing work or dragging the kids with them to stand in line for a judge to consider their request to be excused or deferred from jury service, prospective jurors can now submit that request any time of the day or night from wherever they have Internet access. Like the “e-calendar call,” I provide a series of drop-down boxes to make filling in the form very easy. If they have medical excuses, they are instructed to have their doctors fax the medical excuse directly to my home fax number. I let them know if they are excused or deferred by return e-mail within 48 hours. The clerk is also notified of my decision.

While a large majority of the prospective jurors in the district still opt to appear in court to secure a jury excuse, I have had a steadily growing number of online requests. The feedback from those availing themselves of this service is very positive.

General Website Information

General Information: The website also provides the following general information:

· Directory—includes contact information for court personnel, clerks of court offices, and attorneys located in the 30th Judicial District

· Speeding Fines, etc.—includes chart of speeding fines used in our district, list of traffic offenses for which an appearance is required, ignition interlock device information, license points chart, and vehicle seizure information

· Forms—all forms used pursuant to our local civil rules are available online. Additionally, there is a direct link to the AOC website forms page.

· Calendars—my monthly court schedule and the six-month schedule for all five district court judges are posted. Links to the AOC criminal calendars for our seven counties are also available.

· Local Civil Rules—includes the full text of the local civil rules and model continuance policy.

· Legal Links—links to other legal and/or legislative websites

· Appellate Cases—a synopsis of new appellate cases with a link to the entire text of the case.

· Bulletin Board—an eclectic collection of memoranda and forms including self-calculating child support forms and self-calculating indigent fee applications. Many of the items on this page are things that I want to be able to access from the bench.

· Judicial Orders—this is an area of the website where orders issued by the judges in our district are posted to allow attorneys to see how a particular judge has ruled on a particular action in the past. The hope is that attorneys preparing for trial before a particular judge will gain insight into how he might approach the case.

· Announcements - a section of the home page of the web site to disseminate information that I think might be of interest to the lawyers or general public.

Electronic Communications

In addition to the website itself, I have attempted to find new ways to employ both e-mail and instant messaging to enhance communications among the participants in the court system. As a seven-county district spanning a considerable geographical area, efficient communications can be a real plus.

E-mail

E-mail has made bench/bar communications much easier. In the past, it was difficult for me to contact lawyers who were busy in court and it was difficult for lawyers to contact me at a time when I was off the bench. We used to spend a great deal of time engaged in “phone tag” to just complete a single conversation. This problem was made worse if two or more attorneys needed to be involved in the same conversation. E-mail solves those problems. Unless it is an emergency, I can write to the lawyers whenever I have time to sit down and send an e-mail and they can do the same. With copies sent to all parties involved, ex parte communications are not a problem. Additionally, the ability to send documents as attachments provides another layer of usefulness to this process.

“E-Signed” Orders

In addition to the use of e-mail generally, I have developed a way to “e-sign” attachments. A lawyer can send me an order for signature by attaching it to an e-mail. I can then add my signature to that document and e-mail it back to them. When printed out on the receiving end, it is indistinguishable from an original signature on an original document. The lawyer then simply takes the order to the courthouse for filing.

This procedure is especially helpful for lawyers seeking emergency custody orders or temporary restraining orders. In the past, if a judge wasn’t presiding in their county (often the case in smaller counties), the lawyer would have to get in his or her car and drive until they could find a judge. Now they e-mail me the complaint and proposed order (they still need to fax me the verification page). I review the documents and, if appropriate, attach my signature and return the signed order to the lawyer. The lawyer then prints the “e-signed” order and takes the order to the courthouse. The lawyer never has to leave his/her office until the document is ready for filing.

This has proved to be a very popular feature among the lawyers.

Instant Messaging

Instant messaging became an option when the Administrative Office of the Courts completed the connections to the Internet from every bench in our district. I have set up instant messaging between myself and clerks, magistrates, juvenile court counselors, sheriffs, community service, and the district attorney’s office. In addition to the instant and real time communications, one can also send attachments using instant messaging. I now transmit virtually all of my ex parte domestic violence orders to the other counties in this manner.

This has proved to be a far more useful tool than I would have imagined. From the bench, I can contact most of the assistant/deputy clerks in any of the seven clerk’s offices in the district.

Similarly they can reach me without having to call the clerk's office in the county in which I am holding court and waiting for a return call. I can set the instant messaging program to indicate that I am busy trying a case so I will not be contacted when my attention is on a trial. The communication benefits are significant.

While clearly biased in my opinion, I believe that these electronic means of communication will only become more important as caseloads in the various courts increase. The courts generally seem a little slower than business to embrace technology and the benefits in efficiency that it can provide. I feel certain that widespread use of the internet in the court system is inevitable.

Please visit www.judgebryant.com and feel free to contact Judge Bryant with any questions or comments you may have. His e-mail address is sbryant@judgebryant.com.

Albert Coates—From "The North Carolina Century: Tar Heels Who Made a Difference, 1900-2000"

By Milton S. Heath Jr.

A biographical sketch of Albert Coates could be deceptively short and simple because of the intense and single-minded focus of the man. His place in history arises from his creation and nurturing of an extraordinary vehicle for the improvement of local and state government through education, the Institute of Government of the University of North Carolina at Chapel Hill—the extension arm of the university to the public service. In the words of John L. Sanders, Coates's successor as director of the Institute. Coates was the Institute's "founder, and for 30 years its identity and his were fused in ways that defied distinction."

Albert Coates was born in Johnston County on August 25, 1896. He was the fourth of nine children, a country-bred boy, like so many of North Carolina's leaders during the years of the early and mid-twentieth century, which were, as Sanders wrote, those "hopeful years of the progressive era of American politics, when the conviction was widely shared that the public institutions of the nation were perfectible, and that perfecting them was worthy of the best efforts of the best citizens."

The Coates family not only grew farm products but also grew children with a yen for "the lifting power of education," in the words of Charles B. Aycock, North Carolina's education governor at the turn of the century. Two of Albert's siblings, Dora and Kenneth, would have long and distinguished careers as university professors. His other siblings each either taught school at one time or married educators. Albert enrolled at the University of North Carolina in the fall of 1914 and completed his undergraduate degree just in time to enter military service in 1918. He was commissioned a second lieutenant in the army, but armistice intervened before he was called into combat.

During his bright college years Coates was exposed to the beliefs of UNC President Edward Kidder Graham that the university should serve not only its on-campus student body but also the people of the whole state. Coates also was a protege of E. C. Branson, the chair of the Department of Rural Economics and Sociology, who encouraged students to organize county clubs for the study of the economic and social life of North Carolina's 100 counties. In his senior year, Coates assisted Branson in a detailed study of county government, which would provide the underpinnings for later examination of county government under the umbrella of the Institute of Government.

Coates entered Harvard Law School in 1920, graduating with an LL.B. in 1923. A talented pair of Tar Heel roommates shared his time at Harvard: Thomas Wolfe of Look Homeward, Angel, and William Polk, later attorney and editorialist with the Greensboro Daily News. Another Tar Heel, Sam Ervin, also spent Cambridge time with Coates as a law student and the two became lifelong friends.

Coates moved directly from law school to an assistant professorship at UNC Law School in 1923, an associate professorship in 1925, and a full professorship in 1927. Criminal law was his first love as a teacher, competing for his attention with municipal law, legislation, and family law. These four courses became, in time, the enduring nucleus of the Institute of Government. The Institute would develop a unique legislative service and would undertake intensive training, research, and consulting with city and county officials, with social service personnel, and with court and criminal justice officials. Much later it would build from these subjects to its current involvement with all of state and local government in North Carolina.

Early on, Coates began experimenting with bringing the real world into his teaching. He asked law enforcement, court, and correctional officials into his classrooms, rode with police officers on their beats, followed them into the criminal courts, and followed convicted persons into the

prisons. He lobbied Dean Maurice T. Van Hecke of the UNC Law School to accept the Coatesian notion that the “law in books” should mirror the “law in action,” and to broaden the mission of the law school to encompass the public service. The dean and the law faculty were not tempted by this invitation offered in the face of budget and salary cuts brought on by the Depression. In the long run this may have been a blessing in disguise, one that enabled Coates to develop an independent organizational setting to pursue his ideas.

While continuing to teach his law school courses with the reluctant acquiescence of the law faculty, Coates launched the Institute as a private venture. In 1931 he began with a series of conferences for law enforcement officers held throughout the state. By the fall of 1932 an Institute of Government had been formally created, the first issue of its magazine Popular Government was published, and its first statewide conference had been held with Dean Roscoe Pound of the Harvard Law School as its principal speaker. But it had no staff, no organizational or physical home, and no reliable funding—conditions that would dog Albert Coates all too often for the next decade.

During the lean years of the Depression, there would be other high spots. One was the hiring of the first of a series of outstanding professional staff members. (The first three were Henry Brandis, later dean of the UNC Law School; Buck Grice, later deputy state auditor; and Dillard Gardner, later marshal and librarian of the North Carolina Supreme Court.) Another encouraging note was a trail of gifts from generous donors whose names comprised a who’s who of North Carolina business leadership—the Cones, the Haneses, the Grays, the Hills, Clay Williams, Ashley Penn, A. H. Bahnson, Ed Millis, and Spencer Love. The special beneficence of Julian Price and the brothers Gordon and Bowman Gray made possible the completion of the Institute’s first home in 1939 on downtown Franklin Street.

But for all the highs, there would be years of frustrating lows. Albert and his wife, Gladys, exhausted their own meager financial resources, borrowed on insurance, and moved into a rented cottage. When operating funds ran out, the original staff had to be let go, and later some of their replacements. Only Coates’s extraordinary tenacity, endurance, and salesmanship would carry the skeleton of the Institute through its hard times, coinciding with the depth of the Depression.

Coates the promoter finally captured the fancy of a key ally in 1940, recently installed University Controller W. D. Carmichael Jr., a financier of unusual vision. Together they prevailed upon Spencer Love to keep the Institute afloat through 1942, and upon Governor J. Melville Broughton to recommend a $15,000 state appropriation by the 1943 General Assembly. These resources and these compelling personalities persuaded the UNC Board of Trustees to formally accept the Institute as a part of the university in 1942. It would be another 15 years before the university in 1957 would give Institute staff members full faculty status as assistant professors, associate professors, and professors.

Coates was a master recruiter who rarely took “no” for an answer. Over the years he persuaded some of North Carolina’s brightest and best to cast their lots with the Institute—the likes of Terry Sanford, Bill Cochrane, Dickson Phillips, Robert Byrd, Malcolm Seawall, Paul Johnston, Edward Scheidt, Alex McMahon, Mary Oliver, George Esser, Clyde Ball, Philip Green, Donald Hayman, Lee Bounds, Jack Elam, Roddey Ligon, Beta McCarthy, Ruth Mace, Basil Sherrill, Hugh Cannon, Clifford Pace, John Fries Blair, Fannie Memory Farmer, Richard Myren, John Scarlett, Jake Wicker, John Sanders, and Henry Lewis. In time these ex-Institute faculty would number a governor, a US senator, state legislators and judges, a state attorney general, law school deans, major corporate presidents, a publisher, state cabinet officers, city and county managers and attorneys, city and regional planners, the head of the North Carolina Fund, and later Institute directors.

A lifelong workaholic, Coates expected no less of his staff. These expectations first and foremost generated rich dividends for the citizens of North Carolina in terms of productive work for the

public good. Their flip side is another story. “Meet me at the Carolina Inn for breakfast” meant starting the workday an hour early and being prepared perhaps to pick up the tab—the latter probably a holdover from the desperate threadbare days of the 1930’s.

In 1956, the Institute moved into its home on South Road at the entrance to the UNC campus, the Joseph Palmer Knapp Building. It was financed by a $500,000 grant from the Joseph Palmer Knapp Foundation and a matching appropriation of $500,000 by the 1953 General Assembly.

The dedication of the Knapp Building would leave Coates only five years until mandatory retirement as administrative director of the Institute in 1962. Its annual operating budget was $400,316—state appropriations accounting for $254,154 and publication sales, fees for services, and dues from counties and cities amounting for most of the balance. (Coates had early persuaded counties and cities to pay voluntary membership “dues.”) The Institute published its own guidebooks, texts, bulletins, and magazine for public officials. Its faculty also wrote extensively in national journals and taught a number of courses in the graduate and professional schools of the university. These combined resources reached thousands of local and state officials every year through training, consulting, and research.

After retirement, Coates taught in the law school for another six years. He also turned to some unfinished business in support of civics and government teachers in the public schools. With the backing of Governor Terry Sanford, Coates created an Institute of Civic Education in the University’s Extension Division. Well into his seventies he held workshops for civics teachers and taught civics to Raleigh high school students. In 1980 the State Board of Education approved the Albert Coates Citizenship Education Program as part of the public schools curriculum.

Coates wrote a dozen law review articles between 1936 and 1968, mainly on criminal law, constitutional law, and local government law topics. In the same period he served as editor of the Institute’s magazine and turned out a steady stream of articles. He also authored or coauthored a half dozen major Institute publications in the form of guidebooks, constitutional commentaries, and reports to the governor or General Assembly.

The extraordinary history of Coates’s long and desperate struggle to build the Institute is best captured in two publications—The Story of the Institute of Government (1944) and What The University of North Carolina Meant to Me (1969).

Late in his eighth decade Coates wrote two remarkable full-length books that plumbed the depths of his feelings for family and loved ones. Inspired by his long and happy marriage to Gladys, one was an epic “saga of women in North Carolina,” By Her Own Bootstraps, warmly dedicated to his beloved Gladys. The second of these deeply personal accounts was a full-scale biography of his brother, Professor Kenneth Coates, who devoted a 41-year career of teaching at Wofford College and of shared community concerns with his friends and neighbors in Spartanburg.

Gladys Hall had just completed her junior year at Randolph Macon College in the summer of 1923 when she met Albert. They were engaged in 1925 and married in 1928. Their long, rewarding, and eventful life together in the Chapel Hill neighborhood where they began married life would go on for 61 years until his death in 1989. No child was born to this union, nor ever needed to compete for attention with the offspring of Albert’s creative mind, the Institute. By the time Gladys and Albert settled into married life, he was well into sketching his dream of the Institute to come. In the new century that Albert never saw, Gladys Coates still lived in the home they built on Hooper Lane, which became their lasting home in the early 1960’s.

Coates accumulated more visible monuments, awards, and honors in a lifetime than most humans could imagine. A distinguished professorship at the University of North Carolina bears his name, endowed by Paul and Margaret Johnston. Two buildings also bear his name: the Coates Local Government Center in Raleigh (home of the North Carolina League of Municipalities and Association of County Commissioners) and the Albert and Gladys Coates

Building in Chapel Hill (the original Institute of Government building on Franklin Street). Decorating the foyer of the Coates Building in Raleigh is a bust that faithfully records the craggy Coatesian visage in bronze.

The university reflected its respect and indebtedness to Coates by awarding him three of its most cherished honors: the O. Max Gardner Award in 1952, as the faculty member who has contributed the most to the welfare of the human race; the William Richardson Davis Award in 1984; and the Di Phi Award in 1951. Three universities awarded Coates honorary LL.D. degrees: Wake Forest in 1960, Duke University in 1971, and the University of North Carolina at Chapel Hill in 1974.

He was given the John J. Parker Award of the North Carolina Bar Association in 1964, and a certificate of appreciation by the North Carolina State Bar in 1977. He was inducted into the State Bureau of Investigation Hall of Fame in 1987. Coates was given the North Carolina Award in 1967 and the North Carolinian Society Award in 1979. The North Carolina Citizens Association awarded Coates its citation for Distinguished Public Service in 1978.

Two markers were lasting monuments to Gladys: the original Institute building on Franklin Street—now called the Albert and Gladys Coates Building—and a distinguished professorship at the Institute endowed in name by Paul and Margaret Johnston, the Gladys Hall Coates Professorship. She was the first recipient of the university's Bell Award in 1993, the UNC General Alumni Association Distinguished Service Medal in 1992, and the Randolph-Macon Woman's College Alumnae Achievement Award in 1990.

At the east end of the Old Chapel Hill Cemetery on South Road, across from the current home of the Institute of Government, are a dozen or more rows of tombstones that resonate with the history of Chapel Hill and the university since the 1930's. The roll call makes the ears ring with familiar sounds: Graham, Odum, House, Branson, Kyser, Koch, Green, Lefler, Wettach, McCall, Hobbs, Couch, Cobb, Johnston (Paul and Margaret), Carroll, Bason—and on they go.

One more stone, along the last paved path, carries a message that will echo as long as anyone remembers Gladys and Albert Coates: "Married June 23, 1928, and lived happily ever after." The long, productive, dynamic life of public service that was Albert Coates ended at his Chapel Hill home in 1989.

Milton S. Heath Jr. is a longtime faculty member of the University of North Carolina Institute of Government, and an adjunct professor in the UNC School of Public Health and Duke's Nicholas School of the Environment. He grew up as a faculty child in the Chapel Hill of the 1930's the son of family friends and neighbors of Albert and Gladys Coates. His first encounter with the Institute of Government came in 1940 when he was sent to the library of the new Institute building to complete a sixth grade civics assignment. He is a product of the Chapel Hill public schools, Phillips Exeter, Harvard College, and Columbia Law School. Albert Coates appointed him to the Institute in 1957. He served under Coates for five years and under each of Coates's successors as director of the Institute.

This biography appears in The North Carolina Century: Tar Heels Who Made a Difference, 1900-2000. To obtain a copy of this book, contact the Levine Museum of the New South in Charlotte, 704.333.1887.

For more information, see:

. Coates, Albert. Bridging the Gap Between Government in Books and Government in Action. N .p., 1974.
. By Her Own Bootstraps: A Saga of Women in North Carolina. N.p., 1975.
. Edward Kidder Graham, Harry Woodburn Chase, Frank Porter Graham.: Three Men is the Transition of the University of North Carolina at Chapel Hill from a Small College to a Great University. A. Coates, 1988.

. Presidents and the People with Whom I Have Lived and Worked from 1914 to 1969. William Byrd Press, 1969.
. The Story of the Institute of Government, the University of North Carolina, Chapel Hill. National University Extension Association, 1944.
. Talks on the Rule of Law and the Role of Government in the Cities, the Counties, and the State of North Carolina. Professor Emeritus Fund, 1971.
. Talks to Students and Teachers: The Structure and Workings of Government in the Cities and the Counties, and the State of North Carolina. Creative Printers, 1972.
. The University of North Carolina at Chapel Hill. - A Magic Gulf Stream in the Life of North Carolina. N.p., 1978.
. James C. N. Paul. A Report to the Governor of North Carolina on the Decision of the Supreme Court of the United States on the 17th of May 1954. Institute of Government, 1954.
. Green, Philip P., and John L. Sanders. “Albert Coates.” Popular Government 54 (Spring 1989): 2-6.
. Olivier, Warner. “The Ugly Duckling at Chapel Hill.” Saturday Evening Post, February 24, 1945, 14-15, 72, 74.
. Sanders, John L. “Albert Coates: Institution Builder.” Popular Government 54 (Spring 1989): 7.

Functus Officio: Authority of the Trial Court After Notice of Appeal of a Non-Appealable Interlocutory Order

By Thomas L. Fowler

As a general rule, the trial court is divested of jurisdiction when a party gives notice of appeal, and pending the appeal, the trial judge is functus officio.1 Functus officio means that the trial court has completed its duties pending the decision of the appellate court.2 This follows from the basic rule that two courts cannot have jurisdiction of the same case at the same time, so that upon perfecting3 the appeal, the lower court is ousted of its jurisdiction.4

Although there are the inevitable exceptions,5 this rule is relatively straightforward when the determination being appealed is a final judgment. But the issues can become more complicated when the trial has not been completed, there is no final judgment, and the order being appealed is interlocutory. In such cases, notice of appeal does not always deprive the trial court of jurisdiction.

A final judgment disposes of all issues as to all parties leaving nothing to be judicially determined by the trial court.6 Final judgments are always appealable.7 All other judgments or orders of the court are interlocutory. Appeal of interlocutory orders must usually be accomplished as a part of the appeal from the final judgment.8 Immediate appeal of an interlocutory order is allowed, however, in two instances: (a) when the challenged order affects a substantial right pursuant to G.S. 1-277 and G.S. 7A-27(d); and (b) if the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Civil Rule 54(b) by finding that there is no just reason for delay. This article will address the first instance.

Appeal of an Immediately Appealable Interlocutory Order

Filing notice of appeal of an interlocutory order that affects a substantial right, i.e., an immediately appealable interlocutory order, renders the trial court functus officio to proceed with the trial. For instance, in Patrick v. Hurdle,9 plaintiff's motion for a change of venue was granted and the matter was calendared for trial in the new county. Defendant, however, filed a timely notice of appeal of the order granting the change of venue. The appeal was properly perfected and the court of appeals ultimately reversed the order granting the venue change. In the interim, however, the trial judge had proceeded with the trial of the matter and had reached a final judgment three months earlier. The court of appeals vacated this final judgment noting that

> [a]n appeal from an appealable interlocutory order carries the interlocutory order and all questions incident to and necessarily involved therein to the appellate division. ... And the appeal stays all further proceedings in the trial court upon the order appealed from, or upon the matters embraced therein. ... The very question sought to be determined by the former appeal was the right of the Superior Court of Currituck County to transfer this case to the Superior Court of Pasquotank County for trial; therefore, the Superior Court of Pasquotank County was without jurisdiction to try the case pending the appeal. ... Since the Superior Court of Pasquotank County was functus officio to try the case, it follows that the trial, the verdict, and the judgment are nullities.10

Appeal of a Nonappealable Interlocutory Order

Filing notice of appeal of an interlocutory order that does not affect a substantial right, i.e., a non-immediately appealable interlocutory order, does not render the trial court functus officio to proceed with the trial. For instance, in T & T Development Co. v. Southern Nat. Bank,11 the trial court granted defendant's motion in limine to exclude certain evidence at the trial. The plaintiffs immediately gave notice of appeal of this order and, when the trial court then called the case for trial, the plaintiffs refused to offer any evidence on the grounds that the trial court was "functus

officio." The trial court then granted the defendant's motion to dismiss plaintiffs' claims. On appeal, the court of appeals held that because plaintiffs had no right to appeal the granting of the motion in limine, the trial court was not deprived of jurisdiction and did not err in calling the case for trial and dismissing it when plaintiffs failed to offer any evidence. The court stated: "Although an appeal generally divests the trial court of jurisdiction, an appeal from a nonappealable order does not deprive the trial court of jurisdiction to try and determine a case on its merits."12

The case law is thus clear that the trial judge has the authority to decide that the attempted appeal is of an nonappealable interlocutory order so that the functus officio rule does not apply—that is, the trial court is not required to await the determination of the appellate court that the attempted appeal is, indeed, of an nonappealable interlocutory order.13 If the trial court reaches this conclusion, it can proceed with the matter, and if it is correct in its conclusion, it is not functus officio.

But what if the trial court reasonably concludes that the interlocutory order being appealed does not affect a substantial right and proceeds with the trial to final judgment, but the appellate court later concludes that the interlocutory order was immediately appealable? The rule would seem to be clear that, in this case, the trial court was functus officio and lacked jurisdiction to proceed—and that the reasonableness of the trial judge's conclusion that the interlocutory order did not affect a substantial right has no legal significance. But a recent case holds differently.

Appeal of an Interlocutory Order that is Unexpectedly Found to be Immediately Appealable

In RPR & Asssociates, Inc. v. The University of North Carolina-Chapel Hill,14 the trial court denied defendant's Rule 12(b) motions to dismiss and the defendant filed notice of appeal. The plaintiff continued to pursue its claims in superior court, and defendant sought a stay from the trial judge, contending that its notice of appeal removed jurisdiction from the trial court pending resolution of the appeal. The plaintiff responded that the orders denying the 12(b) motions was interlocutory and nonappealable, so that notice of appeal did not deprive the trial court of jurisdiction to proceed with the case. The trial court denied defendant's motion to stay the proceedings and defendant thereafter filed a petition for writs of certiorari and supersedeas with the court of appeals, and moved for a stay of the trial court proceedings. The court of appeals initially granted defendant's motion for a stay, but later dissolved the stay and denied the writs. The defendant renewed its motion for a stay in the trial court and it was again denied. The trial court proceeded with the matter, heard the evidence, and reached a final decision on the merits prior to the court of appeals' resolution of the defendant's appeal.

On appeal, the court of appeals concluded that because the motion to dismiss was based in part on the doctrine of sovereign immunity, the denial of such motion affected a substantial right, thus rendering the decision of the trial court immediately appealable.15 However, the court then concluded that the trial court had properly denied defendant's motions to dismiss. Nevertheless, the defendant had argued to the court16 that the final judgment of the trial court had to be a nullity because, even if the trial court's denial of the 12(b) motions was technically correct, the immediate appeal of the denials rendered the trial court functus officio to proceed with the merits of the case. Surprisingly, the court of appeals overruled this assignment of error.

The court acknowledged the general functus officio rule, but then focused on the "reasonableness of the trial court's decision" to proceed with trial on its belief that the orders were not immediately appealable—"underscored by the fact" that the appellate courts had "repeatedly rejected defendants' attempts to stay the lower court proceedings or otherwise remove jurisdiction from the trial court." The court concluded:

Because the trial court had the authority to determine whether its order affected defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after defendant filed its notice of appeal. The trial court's

determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this state to stay proceedings. Although this court ultimately held that defendant's appeal affected a substantial right, it also held that defendant was not immune to suit. Defendant states no grounds, nor has it produced any evidence to demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case.17

Conclusion

The test for determining when an interlocutory order affects a substantial right and so is immediately appealable has never been an easy one to apply. Our Supreme Court has stated: "Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered."18 But it is clear that the matter is properly considered by the trial court when an interlocutory order is appealed before or mid-trial, and that if it is a close call the trial court or the appellate court can grant a stay of the trial proceedings pending the appellate court's resolution of the matter. This seems a reasonable remedy for those situations where the substantial right question is legitimate—and the appellant is not simply attempting to improperly stall the proceedings.19

The new rule applied in RPR & Asssociates, Inc. v. The University of North Carolina-Chapel Hill,20 seems both unnecessary and inconsistent with the basic functus officio rule. If jurisdiction is removed from the trial court when a party seeks to appeal an order that our laws stipulate is immediately appealable, then our appellate system is undermined by allowing the trial proceedings to effectively continue while the appeal is unresolved. And the jurisdiction of a court is that court's only legitimacy—it is the only basis for that court's power to authoritatively address an issue.21 Our case law is clear that subject matter jurisdiction is not conferred upon a court by consent, waiver, or estoppel.22 If the trial court in RPR & Associates lacked jurisdiction to proceed with the trial, as the functus officio rule seems to clearly provide, it is difficult to understand how it is relevant that the defendant "state[d] no grounds, nor ... produced any evidence to demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case," as the court of appeals stated.23

In Patrick v. Hurdle,24 discussed above, the defendant who properly appealed an immediately appealable interlocutory order, declined to participate in the trial of the matter which the trial judge improperly refused to stay. Although this fact is noted in the court of appeals' opinion, it does not appear to be in any way a part of the court's analysis or holding. In RPR & Associates it does appear that the similarly situated defendant may have participated in the trial of the matter—even while arguing that the superior court judge had no jurisdiction to conduct the trial. Although the RPR Court does not expressly state that this "two bites at the apple" strategy on the part of defendant is the basis for its decision, one wonders if it was a significant factor. But, like the "reasonableness" of the trial court's conclusion that the Rule 12(b) denials did not affect a substantial right, the actions of the appellant in participating in the allegedly improper trial should have no impact on the recreation of trial court jurisdiction that had been properly ousted pursuant to the long established functus officio rule.25

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. Bowen v. Motor Co., 292 N.C. 633, 635, 234 S.E.2d 748 (1977); Sink v. Easter, 288 N.C. 183, 197, 217 S.E.2d 532 (1975).

2. Functus officio means “a task performed.” Black’s Law Dictionary, (West 1968) at 802.

3. Although an appeal is not “perfected” until duly docketed in the appellate court, such perfection relates back to the time notice of appeal was given so that it is the notice of appeal that effectively terminates the trial court’s jurisdiction. Lowder v. Mills, Inc., 301 N.C. 561, 581, 273 S.E.2d 247 (1981).

4. See Wiggins v. Bunch, 280 N.C. 106, 110, 184 S.E.2d 879 (1971).

5. The general rule is subject to two exceptions and one qualification: “The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that “the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned” and thereby regain jurisdiction of the cause.” Bowen v. Motor Co., 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977), quoting Machine Co. v. Dixon, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963). For cases on what constitutes abandonment of an appeal, see Kirby Building Systems v. McNiel, 327 N.C. 234, 240 (1990), reh’g denied, 328 N.C. 275 (1991)(Abandonment of an appeal exists only where there is express notice, showing, and judgment of abandonment of appeal); McGinnis v. McGinnis, 44 N.C. App. 381, 260 S.E.2d 491 (1980)(Defendant’s notice of appeal from the trial court’s order did not divest the trial court of jurisdiction to enter further orders in the cause, since defendant’s failure to perfect his appeal by the time judgment was entered almost three months later constituted an abandonment which reinvested the court with jurisdiction to render further orders in the cause).

6. Veazey v. Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950): “A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.”

7. Embler v. Embler, 143 N.C. App. 162, 671, 545 S.E.2d 259 (2001); see G.S. 7A-27(b) and (c).

8. Morris Comm. Corp. v. City of Asheville, 145 N.C. App. 597, 603, 551 S.E.2d 508 (2001)(As a general rule, a party has no right to immediate appellate review of an interlocutory order); see also G.S. 1-278 (upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment).

9. 7 N.C. App. 44, 171 S.E.2d 58 (1969).

10. Id., at 45-46 (emphasis added). See also Carpenter v. Carpenter, 25 N.C. App. 307, 308, 212 S.E.2d 915 (1975)(Where the trial court entered an order determining the amount of support due defendant from plaintiff pursuant to a separation agreement between the parties, and plaintiff appealed from that order, the district court was without jurisdiction to enter further orders in the matter while plaintiff’s appeal was pending).

11. 125 N.C. App. 600, 603, 481 S.E.2d 347 (1997), disc. rev. denied, 346 N.C. 185 (1997).

12. Id. See also Veazey v. Durham, 231 N.C. 357, 364, 57 S.E.2d 377 (1950); Velez v. Dick Keffer Pontiac-GMC Truck, 144 N.C. App. 589, 591, 551 S.E.2d 873 (2001)(the trial court had jurisdiction to enter an order compelling discovery against defendant bank even though defendant dealer’s appeal of an order compelling discovery against it was then pending where the order against the dealer was interlocutory and not immediately appealable); Harris v. Harris, 58 N.C. App. 175, 177, 292 S.E.2d 775 (1982)(an attempted appeal from a non-appealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction).

13. See cases cited in footnote 11. See also RPR & Assoc. v. Univ. of Chapel Hill, __ N.C.App. __, __ S.E.2d __ (10-15-2002)("[T]he trial court had the authority to determine whether its order affected defendant's substantial rights or was otherwise immediately appealable ...."). But see Estrada v. Jaques, 70 N.C. App. 627, 640, 321 S.E.2d 240 (1984)("[R]uling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.").

14. __ N.C.App. __, 570 S.E.2d 510 (filed: 15 October 2002).

15. RPR & Assocs. v. State, 139 N.C.App. 525, 534 S.E.2d 247 (2000), affirmed per curiam, 353 N.C. 362 (2001).

16. The second time the case was appealed to the court of appeals.

17. __ N.C.App. __, 570 S.E.2d 510, 515 (filed: 15 October 2002).

18. Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338 (1978) see also Cagle v. Teachy, 111 N.C. App. 244, 245, 431 S.E.2d 801 (1993)(a right is substantial when it will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment; "no hard and fast rules exist for determining which appeals affect a substantial right"). See generally J. Brad Donovan, The Substantial Right Doctrine and Interlocutory Appeals, 17 Campbell Law Review 71 (1995)(summarizing the North Carolina cases applying the substantial right test); Willis Whichard, Appealability in North Carolina: Common Law Definitions of the Statutory Substantial Rights Doctrine, 47 Law & Contemp. Probs. 123 (1984).

19. See Velez v. Dick Keffer Pontiac-GMC Truck, 144 N.C. App. 589, 591, 551 S.E.2d 852 (2001)("[A] litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a non-appealable interlocutory order of the trial court.").

20. __ N.C.App. __, 570 S.E.2d 510 (filed: 15 October 2002).

21. Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

22. Deep River Citizens v. N.C. Dept. of Env., 119 N.C. App. 232, 235, 457 S.E.2d 772 (1995); State v. Earley, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975); Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937)(a party may not waive jurisdiction).

23. Compare Vance Construction Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997), where the court of appeals vacated the trial court's order based on the trial court's lack of jurisdiction to consider the matter before it, without any mention or consideration of whether any party had shown prejudice, and expressly denying the relevance of both parties' willingness and consent for the trial court to rule on the matter.

24. 7 N.C. App. 44, 171 S.E.2d 58 (1969).

25. G.S. 1A-1, Rule 12(h)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." The appellate court can dismiss for lack of jurisdiction on its own motion even if the parties did not object at trial or attempt to appeal the issue. Vance Construction Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997); Ramsey v. Interstate Insurors, Inc., 89 N.C. App. 98, 102, 365 S.E.2d 172, 175, disc. rev. denied, 322 N.C. 607, 370 S.E.2d 248 (1988)(appellate court may raise the question of subject matter jurisdiction on its own motion, even if it was not argued by the parties in their briefs).

Rhetorical Style

By Craig D. Tindall

Legal writing is rhetoric in the classical sense—it seeks to persuade by argument. Rhetoric, a term that has been abused for many years, actually has quite a distinguished history. Around 450 B.C., the Greeks began to develop the tenets of rhetorical argument.1 The Romans furthered the development of rhetorical thinking and began to pay close attention to the style.2 Style and substance, in fact, were viewed as equals.3 The Roman philosopher Cicero commented that "distinction of style is impossible to achieve without worthy ideas; conversely, ideas remain lifeless without stylistic distinction."4

Today, while clearly subservient to substance, style remains important. At its most elemental, persuasive writing requires a definitive thesis, well-reasoned argument, logical application of the facts, and effective style. Too often, that last element—style—is given short shrift or completely ignored and, as a result, the persuasiveness of the writing is diminished.

As any experienced legal writer knows, decision-makers—judges, arbitrators, hearing officers, for example—are susceptible to many influences beyond the writer's control. In order to be effective, a legal writer must engage and hold the mind of the decision-maker. Credible, well-supported legal argument alone cannot guarantee the conclusion desired by the writer. Unless a writer can reach the reader—can grab his attention, develop his understanding, secure his confidence—there is little likelihood that writer will be persuasive.

Developing a persuasive rhetorical style takes study, which requires time and practice; bad news for most modern practitioners who lack the time to study style. Samuel Johnson, the 18th Century English writer, once commented, "Other things may be seized by might, or purchased with money, but knowledge is to be gained only by study, and study to be prosecuted only in retirement."5 Taking liberties perhaps with Johnson's notion of retirement, this observation remains relevant today. It would, obviously, be of no value to develop a strong persuasive writing style in one's retirement.

Fortunately, there are certain classical rhetorical devices, or figures of speech, that can, if used properly, assist a writer in expressing his or her arguments in an interesting, engaging, memorable, and consequently convincing style. These devices are not shortcuts or exacting formulas that can merely be applied by rote. On the contrary, used improperly, they can make the writing appear stilted, amateurish, or worst of all for the legal writer, confusing to the reader. But, if employed with sufficient finesse, rhetorical figures of speech can, with a modicum of practice, be useful in constructing an argument that will hold a decision-maker's attention. That alone is worth the effort.

For some writers, no effort will be required to employ these devices. Some have already adopted a few of these rhetorical figures of speech as part of their standard drafting repertoire. Most likely, these were learned from absorbing the works of other strong legal writers. For others, understanding that certain stylist structures are acceptable will be a creative release. A rhetorical device can be a license to bend or break a grammatical rule that conventional wisdom holds inviolable for some unexplained reason.

The knowledge that a particular figure of speech has been formally recognized empowers the less confident writer to take a chance on interesting phrasing and challenges experienced writers to express themselves more creatively. As one rhetorician commented:

[F]igures of speech reveal to us the apparently limitless plasticity of language itself. We are confronted, inescapably, with the intoxicating possibility that we can make language do for us

almost anything we want. Or at least a Shakespeare can. The figures of speech help us to see how he does it, and how we might.6

And so, out of the many recognized rhetorical devices,7 the following few are humbly offered to assist modern legal writers. Some figures of speech are in general more useful to legal writers than others. All writers, in keeping with their personal style, will likely find some of those listed more attractive than others.

In any event, the following list is not intended to be comprehensive. There are figures of speech that have not been listed because, while occasionally useful, they are commonly known and generally understood, although not always employed well or even properly. Euphemism, the substitution of a milder phrase for one more harsh, and hyperbole, deliberate exaggeration for emphasis, are examples of this group. Other devices are both well-known and employed quite well by legal writers—similes and metaphors, for example8—and are omitted for that reason.

Instead, inclusion in the following list was reserved for those rhetorical figures of speech that are hopefully the most useful and at the same time might expand the writer's knowledge of the style of argument. With that objective in mind, the following few rhetorical terms are those that the legal writer might benefit from by their acquaintance.

Devices of Repetition

Anadiplosis is essentially a doubling back; it is the repeated use of a word or phrase at the end of one sentence or clause and the beginning of another. An anadiplosis is effective for tying thoughts together by reemphasizing the principal object of the previous thought while advancing the thought as a whole.

Men in great places are thrice servants: servants of the sovereign or state; servants of fame; and servants of business.9

Everything that can be said, can be said clearly.10

Anaphora occurs when a word or phrase is repeated at the beginning of each successive phrase or clause.

We shall not flag or fail. We shall go on to the end. We shall fight in France, we shall fight on the seas and oceans, we shall fight with growing confidence and growing strength in the air, we shall defend our island, whatever the cost may be, we shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills. We shall never surrender.11

An anaphora, which can be very effective in speaking, can also create a memorable rhythm in the reader's mind. This rhythm, as demonstrated above, can dramatically emphasize the writer's position.
Although less dramatic, it can also be used quite readily to maintain the readers' focus on a particular notion.

She was not quite what you would recall refined. She was not quite what you would call unrefined. She was the kind of person that keeps a parrot.12

As with most devices of repetition, and for that matter most any rhetorical device, anaphora should generally be used sparingly. It can quickly become tiresome and lose its effectiveness.

Antistrophe, or epistrophe, is generally considered to mirror an anaphora in that the repetition of a word or phrase occurs at the end of successive clauses instead of the beginning. It is effective for emphasizing the primary point of the idea being expressed.

In 1931, ten years ago, Japan invaded Manchukuo—without warning. In 1935, Italy invaded Ethiopia—without warning. In 1938, Hitler occupied Austria—without warning. In 1939, Hitler invaded Czechoslovakia—without warning. Later in 1939, Hitler invaded Poland—without warning. And now Japan has attacked Malaya and Thailand— and the United States—without warning.13

An antistrophe is also considered to be the repetition of a word or phrase in the same position in a sentence as it was placed in a previous sentence. This broader definition, of course, does not change the purpose or effectiveness of the repetition.

Antanaclasis uses one word with different meanings repeatedly, implying a different meaning with each use.

We must all hang together or assuredly we will all hang separately.14

An antanaclasis can provide the reader with an easily remembered quip. If not deftly formed, however, it can become too much of a pun and produce the usual groaning response. It can also sound trite, idiomatic, overly informal, or confusing. Consequently, legal writers should only cautiously employ this device. Nevertheless, if done well, an antanaclasis can succinctly drive a point home by taking advantage of the flexibility of our language.

Devices of Omission

Ellipsis condenses an expression and relies upon the surrounding text to supply the full meaning. This device works beyond economy of words and allows sentence to take on an unexpected complexity. It shows the writer's confidence in the reader—although there is always the danger that this confidence is misplaced—allows the sentence to be subtly imbued with the emotion of the surrounding text, an attribute that is particularly useful when the emotion is difficult to verbalize directly.

Don't throw stones at your neighbors if your own windows are glass.15

Everybody's friend is nobody's.16

Zeugma is a form of ellipsis that employs one verb to govern two or more words or phrases. Again, the reader is relied upon to make an implication, which should be obvious.

Histories make men wise; poets, witty; the mathematics, subtle; natural philosophy, deep; moral, grave; logic and rhetoric, able to contend.17

A zeugma can show the relationship between multiple ideas and actions by linking them with a single verb. It can also be used to highlight the contrasting quality of the words dependent on the verb.
Neither the sun nor death can be regarded steadily.18

Waging war and peace at the same time is bound to be operationally destabilizing.19

The various forms of the zeugma demonstrate its flexibility. While for practical purposes subdivision of this figure is not practically important, there is, for example, the prozeugma, the linking word comes before the linked words; its opposite, the hypozeugma, the linking word follows the linked words; mesozeugma or synzeugma, the linking word appears in the middle of the linked words; the diazeugma, a single subject links several verbs or verbal constructions. For completeness, one might note that the hypozeuxis is the opposite of a zeugma, with each in a series of parallel clauses having a unique verb.

Syllepsis is another form of ellipsis that combines a zuegma and an antanaclasis.

Miss Bolo rose from the table considerably agitated, and went straight home, in a flood of tears and a sedan-chair.20

The writer must be cautious not to torture the antanaclasis too much or risk losing the reader completely. For that reason, most legal writers would have better ways to spend their time than creating a syllepsis, which requires about as much effort as writing a passable haiku.

Asyndeton omits conjunctions in a list of words, phrases, or clauses. This device has several uses. It is effective for dramatically emphasizing the importance of a list of items.

We shall pay any price, bear any burden, meet any hardships, support any friend, oppose any foe to assure the survival and the success of liberty.21

An asyndeton can also convey movement, speed, concision.

I came, I saw, I conquered.22

Alternatively, this figure of speech might suggest equal synonymity among the words.

All is over. Silent, mournful, abandoned, broken, Czechoslovakia recedes into the darkness.23

An asyndeton might be used to indicate that the last word offered is intended as a substitute for the former. It can, however, also be employed to create a different effect by making the last word appear as merely an afterthought.

An asyndeton is sometimes used to lend a sense of spontaneity or suggest that the list provided is incomplete. One would not expect that these particular uses would not be common in legal writing.
Praeteritio or paraleipsis identifies a thought, perhaps as an aside, in order to omit it. This device allows the writer to introduce an idea while denying any association with it.

If you really want to hear about it, the first thing you'll probably want to know is where I was born, and what my lousy childhood was like, and how my parents were occupied and all before they had me, and all that David Copperfield kind of crap, but I don't feel like going into it, if you want to know the truth.24

Unfortunately, it is frequently used as mere pretext; a denial that is fully intended to present, for example, inflammatory facts.

A mild form of praeteritio is actually practiced quite frequently. When the phrase "not to mention, . . . " appears, the writer most certainly means to mention it.

But his table remained imperfect for all that, not to mention that we find in it some modes of pure sensibility, also an empirical concept, none of which can belong to this genealogical register of the understanding.25

In legal writing, it might be used effectively to politely remind the reader of a fact or, for example, to reflect that fact's actual status the fact is assumed arguendo. Additionally, it could be employed to present incidental facts that add context for more seminal facts.

Devices of Addition

Polysyndeton uses the repetition of conjunctions in a series of words, phrases, or clauses. Generally adhered to, grammatical rules require that two words or phrases are joined with a

conjunction and a list of more than two to have a comma separating each with the conjunction provided only for the last item. A polysyndeton uses a conjunction to join some or all the words in a list, which makes in some cases the opposite of asyndeton. Where an asyndeton can be used to quicken the reader; a polysyndeton might be employed to slow the reader and provide a sense of importance or dignity to the items listed.

Whatever this that I am, it is a little flesh and breath and the ruling part.26

My sheep hear my voice, and I know them, and they follow me: And I give them eternal life; and they shall never perish.27

Polysyndeton is also useful to convey a sense of building excitement.

I said, “Who killed him?” and he said, “I don’t know who killed him but he’s dead all right,” and it was dark and there was water standing in the street and no lights and windows broke and boats all up in the town and trees blown down and everything all blown and I got a skiff and went out and found my boat where I had her inside Mango Bay and she was all right only she was full of water.28

A polysyndeton can have the effect of persistence or to demonstrate an effort to be comprehensive. It can play to a contrary emotion by conveying the writer’s annoyance at the number of items involved or the length or degree to which one must go to obtain some objective.

Of course, rhetorical devices need not stand alone. For example, a polysyndeton and an anadiplosis can be combined to express not only the importance of each of a series of items, but also their interrelationship.

For this very reason, make every effort to add to your faith goodness; and to goodness, knowledge; and to knowledge, self-control; and to self-control, perseverance; and to perseverance, godliness; and to godliness, brotherly kindness; and to brotherly kindness, love.29

Hendiadys, a cousin of the polysyndeton, use two nouns separated by a conjunction, instead of a noun and its qualifier, to express a single idea.

I think it is apparent that any plan of legislative apportionment which could be shown to reflect no policy, but simply arbitrary and capricious action or inaction, . . . would be invalid under accepted Equal Protection Clause standards.30

The term “arbitrary and capricious” is one standard, not two; yet this standard almost always is expressed with these two terms. This device is a favorite of legal writers during the development of the civil law and our legal language carries that heritage perhaps too readily.

In any event, a hendiadys can be useful when one word does not adequately express a complex notion. For example, it might be argued that the arbitrary and capricious standard, while establishing a single standard of review, highlights aspects of the conduct under consideration that each word might not adequately express individually.

Pleonasmus uses unnecessary words to emphasize a point, add flavor to a dry statement, or restrict an over-generalized phrase.

They are impertinent, outrageous, and, for this moment in time, happy—happy to be candid in all directions.31

And lifting up their eyes, they saw no one, except Jesus Himself alone.32

Obviously, care must be taken with a pleonasm or the writing will appear superfluous. Well-formed pleonasms are not obvious; the unnecessary words merely adding sufficient color that they blend with those that are necessary.

Asterismos is a specific form of pleonasm that uses an unrelated word to draw particular attention to what follows. This device is common, occurring when one begins a statement with, “Listen, . . .” or “Hey, ...” A somewhat less dramatic form of asterismos can be incorporated into a phrase to draw the readers’ attention to what follows.

I have discovered that all human evil comes from this, man’s being unable to sit still in a room.33 The word “this” in the above passage is an example of an asterismos.

Of course, one should assume the reader is focusing on what is being read. The overuse of this device can be quite grating and the writer will be thought of as “crying wolf,” essentially losing credibility with the reader. Consequently, the use of asterismos should be occasional at best. Another use of asterismos might be to play upon the dual meaning of a word or a phrase. This form would rarely be useful in legal writing.

Paraprosdokian imposes an unexpected ending to a phrase. It can transform a trite phrase into one much more interesting and memorable.

He was at his best when the going was good.34

There but for the grace of God, goes God.35

He must be praised, decorated, tolerated.36

We are confronted by insurmountable opportunities.37

Unless done well and supportable, a paraprosdokian can sound snide, too cute, or inappropriately informal.

Antithesis places opposing or contrasting of words or ideas in a balanced or parallel construction allowing the further assertion of an idea by denial of its converse.

Extremism in defense of liberty is no vice; moderation in the pursuit of justice is no virtue.38

A man should be mourned at this birth, not his death.39

To err is human; to forgive, divine.—Pope40

That’s one small step for [a] man, one giant leap for mankind.41

An antithesis can highlight the fine distinctions between ideas or point out differences that may not be obvious to the reader.

In order that all men may be taught to speak truth, it is necessary that all likewise should learn to hear it.42

The benefit of antithesis is that it conveys a sense of completeness; implying that the statement covers all things. This avoids the apparent arbitrariness that is a common problem of arguments relying on a list.

These are figures of speech that the legal writer might use to develop persuasive style. Style is power over language43 and language is the lawyer’s only tool. That tool can no more be weak or dull or abused than the tools of any other craftsman. Only through interesting, understandable,

persuasive language can the lawyer reach through the cloud of distractions and into the conscious of the decision-maker. And so, while the terms laid out in this article will no doubt be quickly forgotten, the style they describe will hopefully remain and prove useful.

Samuel Johnson's timeless wisdom was quoted early on and so ending with another of his thoughts seems to provide a certain balance. Johnson, seeking to nourish the importance of outstanding writing, wrote:

Whoever desires for his writings or himself, what none can reasonably condemn, the favor of mankind, must add grace to strength, and make his thoughts agreeable as well as useful. Many complain of neglect who never tried to attract regard. It cannot be expected that the patrons of science or virtue should be solicitous to discover excellencies which they who possess them shade and disguise. Few have abilities so much needed by the rest of the world as to be caressed on their own terms; and he that will not condescend to recommend himself by external embellishments must submit to the fate of just sentiments meanly expressed, and be ridiculed and forgotten before he is understood.44
Striving not to be ridiculed or forgotten before being understood. What better labor for a lawyer?

Craig D. Tindall is deputy city attorney for the city of Glendale, Arizona. He earned his JD at Southern Methodist University in 1991.

Endnotes
1. For an excellent overview of the history of classical rhetoric see Michael Frost, Introduction to Classical Legal Rhetoric: A Lost Heritage, 8 S. Cal. Interdisc. L.J. 613, 618 (1999).

2. Id.

3. Id.

4. Id., citing 3 Marcus Tullius Cicero, De Oratore at vi.24 (H. Rackham trans., 1942).

5. Samuel Johnson, The Rambler Essays, No. 7 (April 10, 1750).

6. Arthur Quinn, Figures of Speech 2 (1982).

7. See generally Quinn, id.; Richard Lanham, A Handlist of Rhetorical Terms (1991); Willard R. Espy, The Garden of Eloquence: A Rhetorical Bestiary (1983). There are also several websites devoted to the topic of rhetorical devices. Some of the better ones include the web pages of Dr. Henry Limouze, Wayne State University, www.cola.wright.edu/Dept/ENG/ limouze/ style711.htm; Dr. Robert Harris, www.virtualsalt.com/rhetoric.htm; Armstrong Atlantic State University; Dr. Grant Williams, Nipissing University, www.nipissingu.ca/faculty/ williams/ figofspe.htm; Dr. Gideon Burton, Brigham Young University, http://humanities. byu.edu/rhetoric/ silva.htm.

8. See e.g., Gerald Lebovits, Not Mere Rhetoric: Metaphors and Similes , New York State Bar Journal (June 2002); Gerald Lebovits, Not Mere Rhetoric: Metaphors and Similes—Part II , New York State Bar Journal (July/August 2002)Thomas R. Haggard, Rhetoric In Legal Writing, Part I, South Carolina Lawyer (May/June 1991)Thomas R. Haggard, Rhetoric In Legal Writing, Part II, South Carolina Lawyer (July/August 1991).

9. Francis Bacon, Of Great Place (1625).

10. Lugwig Wittgenstein, Tractatus Logico-Philosophicus 4.116 (1922).

11. Winston Churchill, Speech before Parliament, June 4, 1940, after the British's successful Dunkirk campaign.

12. Mark Twain, Following the Equator: A Journey Around the World (1897).

13. Franklin D. Roosevelt, broadcast from oval office, December 9, 1941.

14. Benjamin Franklin, comment to John Hancock, July 4, 1776, during the signing of the Declaration of Independence.

15. Benjamin Franklin, Poor Richard's Almanac (August 1739).

16. Attributed to Arthur Schopenhauer.

17. Francis Bacon, Of Studies in The Essays of Francis Bacon, 270 (eBook available at www.blackmask.com).

18. François duc de La Rochefoucauld, Réflexions ou sentences et maximes morales, Maxim 26 (1665), translated by Louis Kronenberger (1959).

19. Mats Berdal, International Security After the Cold War: Aspects of Continuity and Change, in Towards the 21st Century: Trends in Post-Cold War International Security Policy (1999), available at www.fsk.ethz.ch/documents/ Studies/volume_4/berdal.htm.

20. Charles Dickens, The Pickwick Papers (1837).

21. John. F. Kennedy, Inaugural Address, January 20, 1961.

22. Julius Cesar. In the Latin—veni, vidi, vici—the sentence is an example of another rhetorical device, the alliteration.

23. Winston Churchill, speaking on the Munich Agreement (1938).

24. J.D. Salinger, Catcher in the Rye (1951).

25. Immanuel Kant, Critque of Pure Reason, 230 (1896).

26. Marcus Aurelius Antoninus, The Meditations (167).

27. The Bible, John 10:27-28 (New American Standard Version).

28. Hemingway, After the Storm (1932).

29. The Bible, 2 Peter 1:5-7 (New International Version).

30. Lucas v. Forth-Fourth General Assembly of State of Colo., 377 U.S. 713, 754 (1964)(J.Stewart, dissenting).

31. Walter Kerr, Hippiness Can be Happiness, The New York Times (November 19, 1967).

32. The Bible, Matthew 17:8 (New American Standard).

33. Blaise Pascal, Pensées.

34. Alistair Cooke, commenting on the Duke of Windsor.

35. Winston Churchill, commenting informally in the House of Parliament on Sir Stafford Cripps, Britain's minister for aircraft production World War II.

36. Marcus Tillius Cicero commenting on Gaius Julius Caesar Octavian (In the Latin: Laudandus, ornandus, tollendus).

37. Commonly attributed to Water Kelly writing in the comic strip Pogo.

38. Commonly attributed to Barry M. Goldwater, although the actual author is unknown. Senator Goldwater, in his acceptance speech for the republican nomination for president on July 16, 1964, actually said: “I would remind you that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue.”

39. Charles de Secondat, Baron de la Brède et de Montesquieu, Persian Letters, No. 40 (1721).

40. Alexander Pope, An Essay on Criticism (1709).

41. Neil Armstrong, July 20, 1969, statement upon becoming the first man to step on the Moon. Armstrong omitted the article “a” and later corrected his statement. The intended meaning was always clear.

42. Samuel Johnson, The Ramble Essays, No. 96 (February 16, 1751) (1826).

43. “Style in painting is the same as in writing, a power over materials, whether words or colors, by which conceptions or sentiments are conveyed.” Sir Joshua Reynolds, 18th Century painter (1723-1792).

44. Samuel Johnson, The Rambler Essays, No. 106 (March 23, 1751).

The Public Duty Doctrine in North Carolina: A Duty to All is a Duty to No One

By Alan D. Woodlief Jr.

Various statutes have significantly limited the doctrine of sovereign immunity in North Carolina, and state and local governments are now generally subject to suit for their torts.1 However, the North Carolina courts have recognized another doctrine limiting the liability of governmental entities in certain circumstances, the "public duty doctrine."2 The public duty doctrine generally provides that a "governmental entity is not liable for injury to a citizen where liability is alleged on the ground that the governmental entity owes a duty to the public in general."3 This article will briefly discuss the North Carolina courts' adoption of the doctrine and its exceptions and the courts' application of the doctrine to the activities of local governments and state agencies.

The General Rule and Its Exceptions

In Braswell v. Braswell,4 the North Carolina Supreme Court first recognized the public duty doctrine, stating that "[t]he general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals."5 Under the doctrine, the governmental entity is held to owe no duty to a specific individual and, therefore, an essential element of actionable negligence, the existence of a legal duty, is lacking.6 Thus, "the public duty doctrine bars claims of gross negligence, recklessness, and willful and wanton conduct, and only ceases to apply 'where the conduct complained of rises to the level of an intentional tort.'"7

The Court in Braswell also recognized two circumstances where the public duty doctrine would not bar recovery and the governmental unit would be held to owe a duty to a specific individual: "(1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) 'when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.'"8 In Braswell, the Court concluded that the "special duty exception" did not apply since the plaintiff had not alleged an actual promise by police which would create a special duty, that this promise was actually relied upon by the plaintiff, or that this reliance was causally related to the injury ultimately suffered by the plaintiff.9 Later courts have examined the "special relationship exception" and have explained that its applicability "depends on 'representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed.'"10 The North Carolina courts have tended to apply these exceptions narrowly11 and have resisted the call to adopt other exceptions.12

The Doctrine's Application to Cities, Counties, and other Local Governments

In Braswell, the Supreme Court applied the public duty doctrine in the law enforcement context.13 However, in the nine years following Braswell, the court of appeals extended the doctrine's application to several other governmental functions.14 Accordingly, local governments in North Carolina and their attorneys asserted the public duty doctrine in a variety of settings seeking to have negligence actions against them dismissed. While cloaked under a different name, the public duty doctrine threatened to in essence restore local governments' sovereign immunity for negligence actions, despite the local governments' statutorily approved waiver of their immunity by the purchase of liability insurance.

The first retreat from the court of appeals' broad application of the doctrine came in Isenhour v. Hutto.15 In Isenhour, the Supreme Court concluded that the public duty doctrine did not shield a city and a school crossing guard from liability where a child was struck and killed as a result of the crossing guard's alleged negligence in directing the child to cross the street.16 The court reasoned that there is a "meaningful distinction between application of the public duty doctrine to

the actions of local law enforcement, as in Braswell . . . and the application of the doctrine to the actions of a school crossing guard."17 In rejecting application of the doctrine, the court stated that "[t]he city, by providing school crossing guards, ha[d] undertaken an affirmative, but limited, duty to protect certain children, at certain times, in certain places. . . . [And,] [t]he rationale underlying the public duty doctrine [was] simply inapplicable to the allegations set forth in plaintiff's complaint."18 While refusing to apply the public duty doctrine under the facts of that particular case, the court in Isenhour did not go so far as to limit the doctrine's general applicability to local governments.

A year later, however, the Supreme Court issued two decisions specifically limiting the scope of the public duty doctrine to cases involving a local government's provision of police protection or law enforcement services.19 In rejecting the doctrine's application to local government activities other than law enforcement, Justice Orr explained that the Supreme Court had "never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public."20 Based on the Supreme Court's decisions in Lovelace and Thompson, the court of appeals has rejected recent attempts by local governments to assert the public duty doctrine in contexts outside of law enforcement.21

After Lovelace and Thompson, it appeared settled that local governments could only invoke the public duty doctrine against claims alleging negligence in the provision of police protection or law enforcement services.22 However, in Wood v. Guilford County,23 the Supreme Court indicated that the doctrine would be applicable in cases where the local government provides a service "analogous to police protection to the general public."24 The Court determined that the county's provision of security at its courthouse through hired security contractors was analogous to the police protection provided to the general public in Braswell and, thus, concluded that the public duty doctrine foreclosed the plaintiff's negligence claim against the county arising from her assault in the county courthouse.25

After the Supreme Court's decisions in Lovelace, Thompson, and Wood, it appears that the public duty doctrine is available to local governments only in cases involving the negligent provision of police protection to the general public or some analogous protective service.26 Accordingly, in an effort to convince the courts to apply the public duty doctrine, local governments and their attorneys in future cases will likely attempt to draw analogies between the government services involved in those cases and the provision of police protection.

The Doctrine's Application to the State and State Agencies

The public duty doctrine applies in actions brought against state agencies under the State Tort Claims Act.27 Interestingly however, in cases against the state, the Supreme Court has not limited the doctrine's applicability to the provision of police protection or law enforcement services. Rather, the Court has applied the doctrine to limit the liability of state agencies that are charged with conducting safety inspections.28

In Stone, the Supreme Court reasoned that the doctrine should apply to actions against the Department of Labor for negligence in workplace inspections since the failure to apply the doctrine would be "to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees."29 In Hunt, the Court again applied the doctrine to the actions of the Department of Labor in inspecting amusement rides and devices, reasoning that to do otherwise "would be tantamount to imposing liability on defendant . . . solely for inspecting the [amusement devices] and not discovering them to be in violation of the [Department's Safety] Code."30 At this point, it is unclear to what other agencies or state government activities the public duty doctrine will be applied.31

Conclusion

In the context of suits against local governments, the public duty doctrine has lost much of its vitality, and local governments can successfully assert the doctrine only against claims based on the negligent provision of police protection, law enforcement services, or some other analogous service. However, the doctrine still has the potential to dramatically impact negligence claims against the state and its agencies, particularly those alleging negligence in safety inspections. Accordingly, it can be expected that in future cases state agencies will raise the public duty doctrine in an attempt to bar plaintiffs' negligence claims. As was the case with the doctrine's applicability to local governments, the next several years of appellate decisions will more specifically delimit the public duty doctrine's applicability to the state and its agencies.

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

Endnotes

1. For instance, the state is subject to suit for its negligence pursuant to the State Tort Claims Act. See N.C. Gen. Stat. § 143-291 et seq. In addition, the legislature has authorized cities, counties, and various other local government units to waive their sovereign immunity through the purchase of liability insurance. See e.g., N.C. Gen. Stat. § 115C-42 (local boards of education); 122C-152 (area mental health authorities); 130A-37 (district boards of health); 153A-435 (counties); and 160A-485 (cities).

2. See Braswell v. Braswell, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991) ("Although we have not heretofore adopted the doctrine with its exceptions, we do so now.").

3. John H. Derrick, Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory that Only General, Not Particular, Duty Was Owed Under Circumstances, 38 A.L.R.4th 1194, 1196 (1985). See also David C. Kresin, Protecting the Protectors: The Public Duty Doctrine, 67 Kan. B. Ass'n J. 22, 22 (October 1998) (noting that the doctrine provides that "the duties of a governmental entity are owed to the public at large, not to any particular individual"). See John C. McMillan, Government Liability and the Public Duty Doctrine, 32 Vill. L. Rev. 505, 509 (1987) (noting that the doctrine traces its roots to the United States Supreme Court's decision in South v. Maryland, 59 U.S. (18 How.) 396, 403 (1855), where the Court concluded that a sheriff could not be held liable for not securing the plaintiff's release from kidnappers since his "duty to keep the peace [was a] 'public duty'").

4. 330 N.C. 363, 410 S.E.2d 897 (1991) (citing Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2 (1988)).

5. Id. at 370-71, 410 S.E.2d at 901 (concluding that the public duty doctrine applied to plaintiff administrator's claim that the sheriff had negligently failed to protect the deceased who was fatally shot by her estranged husband). "For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits." Id. at 371, 410 S.E.2d at 901-902 (explaining that the doctrine "recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act").

6. See Tise v. Yates Constr. Co., 122 N.C. App. 582, 586, 471 S.E.2d 102, 106 (1996) ("[A] municipality and its agents are deemed to act for the benefit of the general public and not for a specific individual when exercising its statutory police powers, and thus, ordinarily, no duty is

owed, and there can be no liability to specific individuals."), modified and aff'd, 345 N.C. 456, 480 S.E.2d 677 (1997) (declining to decide the issue of whether the public duty doctrine actually applied in the case and affirming the court of appeals on another basis).
Because the public duty doctrine is distinct from the defense of sovereign immunity, even if "a negligence claim survives application of the public duty doctrine, the municipality may nonetheless be insulated from liability by virtue of governmental immunity." Vanasek v. Duke Power Co., 132 N.C. App. 335, 338, 511 S.E.2d 41, 44 (1999). See also Stafford v. Barker, 129 N.C. App. 576, 583-84, 502 S.E.2d 1, 5-6 (1998) (noting that, while a municipality may waive its defense of governmental immunity by purchasing liability insurance, the purchase of insurance and waiver of immunity does not negate the application of the public duty doctrine and does not create a duty or a cause of action where none previously existed).

7. Vanasek, 132 N.C. App. at 337, 511 S.E.2d at 43 (quoting Clark v. Red Bird Cab Co., 114 N.C. App. 400, 406, 442 S.E.2d 75, 79 (1994)). See also Leftwich v. Gaines, 134 N.C. App. 502, 515, 521 S.E.2d 717, 727 (1999) (concluding that the public duty doctrine did not apply where the city official was alleged to have "deliberately misled" the plaintiff and, thus, the alleged tort was intentional, as opposed to grossly negligent).

8. Braswell, 330 N.C. at 371, 410 S.E.2d at 902. Although most North Carolina decisions have addressed the "special duty" and "special relationship" exceptions as separate and distinct exceptions, some decisions have noted that the "'special relationship' exception is actually a subset of the 'special duty' exception." Vanasek, 132 N.C. App. at 338 n.1, 511 S.E.2d at 44 (noting that "a 'special relationship' is one basis for showing the existence of a 'special duty'" and explaining that "[a] 'special duty' may also exist by virtue of a 'special relationship,' such as that between 'a state's witness or informant . . . [and] law enforcement officers'").

9. Braswell, 330 N.C. at 371, 410 S.E.2d at 902. "[A] 'special duty' may [also] be created by statute; provided there is an express statutory provision vesting individual claimants with a private cause of action for violations of the statute." Vanasek, 132 N.C. App. at 338-39, 511 S.E.2d at 44. See Clark v. Red Bird Cab Co., 114 N.C. App. at 405, 442 S.E.2d at 78 (concluding that the applicable city code provisions did not create a special duty which the police officers would owe to taxicab customers over and above the duty owed to the general public and did not identify a particular class of persons being singled out for protection by the city).

10. Lane v. City of Kinston, 142 N.C. App. 622, 625, 544 S.E.2d 810, 813-14 (2001) (concluding that allegations that a police officer "refused to aid a person in obvious peril who requested the aid of a police officer" did not sufficiently allege the special relationship exception). See also Frazier v. Murray, 135 N.C. App. 43, 50, 519 S.E.2d 525, 530 (1999) (noting that the special relationship exception must be specifically alleged and is not created merely by a showing that the state undertook to perform certain duties).

11. See e.g., Sellers v. Rodriguez, 149 N.C. App. 619, 624, 561 S.E.2d 336, 339 (2002) (noting that, while "[a]rguably, a special relationship existed between [the plaintiff] and defendants, as [the plaintiff] allege[s] that he was injured while in police custody, . . . [the plaintiff] failed to specifically allege a 'special relationship' sufficient to invoke this exception to the public duty doctrine"); Lane, 142 N.C. App. at 627, 544 S.E.2d at 814 (concluding that the officer's promise to call the intoxicated plaintiff a taxi was merely gratuitous and was not sufficient to constitute an actual promise of safety).

12. See e.g., Lane, 142 N.C. App. at 625, 544 S.E.2d at 813-14 (explaining that there is no exception recognized for failure to act where an officer knew or should have known that the plaintiff would be exposed to an unusually high risk if care was not taken); Vanasek, 132 N.C. App. at 339, 511 S.E.2d at 45 (rejecting a "high risk" exception that would allow a negligence claim to proceed where a plaintiff shows that officials knew or should have known that the plaintiff or a member of her class would be exposed to an unusually high risk if care was not taken by the officials); Parker v. Turner, 122 N.C. App. 381, 384, 469 S.E.2d 569, 571 (1996) (rejecting the

plaintiff's argument for the adoption of a "third exception to the public duty doctrine, . . . that the doctrine [should] not apply if law enforcement officials know when, where, and by whom a violent crime is going to be committed but make no effort to protect or assist the intended victim(s)").

13. As mentioned earlier, Braswell involved claims asserted against a sheriff and, in discussing the public duty doctrine, the Supreme Court specifically described the doctrine as eliminating "liability for the failure to furnish police protection to specific individuals." Braswell, 330 N.C. at 370, 410 S.E.2d at 901 (emphasis added).

14. See e.g., Derwort v. Polk County, 129 N.C. App. 789, 501 S.E.2d 379 (1998) (holding that the public duty doctrine applied to protect the county from liability for failing to accurately certify and approve plaintiff's plats and maps); Simmons v. City of Hickory, 126 N.C. App. 821, 823-35, 487 S.E.2d 583, 586 (1997) (concluding that the public duty doctrine applied to bar claims against the city for negligently inspecting homes and issuing building permits); Davis v. Messer, 119 N.C. App. 44, 55-56, 457 S.E.2d 902, 909 (1995) (holding that the public duty doctrine applied to a claim against a fire chief, a fire department, a town, and a county for negligence in their failure to complete their effort to extinguish a fire in the plaintiff's home), overruled by Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652 (2000).

15. 350 N.C. 601, 517 S.E.2d 121 (1999).

16. Id. at 607-08, 517 S.E.2d at 126 (noting that the public duty doctrine would potentially shield a local government's agent from liability for claims asserted against her in her official capacity). See also Willis v. Town of Beaufort, 143 N.C. App. 106, 110, 544 S.E.2d 600, 604 (2001) (noting that "official-capacity suits are merely another way of pleading an action against the governmental entity").

17. Isenhour, 350 N.C. at 607-08, 517 S.E.2d at 126.

18. Id. at 608, 517 S.E.2d at 126 (noting that imposing liability for the alleged negligence of the crossing guard did not implicate the concern of subjecting the city to an overwhelming burden of liability and that, rather than providing police protection to the general public, the crossing guard provides a protective service to an identifiable group of children and is engaged in a personal and direct relationship with the children, where the dangers are immediate and foreseeable).

19. See Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652 (2000) (limiting the public duty doctrine as it applies to local governments to the facts in Braswell; declining to extend the doctrine in a case where plaintiff alleged that the city 911 system operator's delay in notifying the fire department of a fire breached a special duty and promise of protection and caused plaintiff's daughter's death); Thompson v. Waters, 351 N.C. 462, 526 S.E.2d 650 (2000) (holding that the public duty doctrine did not bar plaintiff's claim against Lee County for the negligent inspection of plaintiff's private residence).

20. Lovelace, 351 N. C. at 461, 526 S. E. 2d at 654 (stating that "the public duty doctrine, as it applies to local government, is limited to the facts of Braswell").

21. See Willis v. Town of Beaufort, 143 N.C. App. at 110, 544 S.E.2d at 604 (rejecting application of the public duty doctrine to a local government's provision of fire protection services); Block v. County of Person, 141 N.C. App. 273, 283, 540 S.E.2d 415, 422 (2000) (rejecting application of the public duty doctrine to bar claims against a county, its health department, and employees, "[b]ecause plaintiffs have not alleged that defendants negligently failed to protect them from a crime"); Huntley v. Pandya, 139 N.C. App. 624, 626, 534 S.E.2d 238, 239-40 (2000) (concluding that a city housing authority is a local government agency that does not provide police protection and thus is not shielded from liability by the public duty doctrine); Cucina v. City of Jacksonville, 138 N.C. App. 99, 105-06, 530 S.E.2d 353, 357 (2000) (concluding that, because the plaintiff had not alleged that the city negligently failed to protect her from a crime, the public duty doctrine did

not bar the plaintiff's claim that the city was negligent in failing to repair a stop sign); Hargrove v. Billings & Garrett, Inc., 137 N.C. App. 759, 762, 529 S.E.2d 693, 695 (2000) (concluding that the public duty doctrine did not apply to shield the city from liability for its alleged negligence in constructing a sewer line).

22. The court of appeals has interpreted the decisions in Lovelace and Thompson narrowly to limit the doctrine's application to the failure to furnish police protection and the failure to prevent a criminal act. See Moses v. Young, 149 N.C. App. 613, 618, 561 S.E.2d 332, 335 (2002). In Moses, the court rejected application of the public duty doctrine to claims brought against police officers involving vehicular accidents. Id. In doing so, the court concluded that a police officer's steering of his vehicle into an occupied lane is not the type of discretionary governmental action shielded by the public duty doctrine. Id. (noting that imposing liability for negligence in vehicular accidents is not contrary to "the purpose of the public duty doctrine, which is to 'shield [] the state and its political subdivisions from tort liability arising out of discretionary governmental actions'"). The court further observed that the public duty doctrine does not "operate as a blanket defense to bar all claims based on acts of negligence by police officers," since "[s]uch a blanket defense . . . would not be consistent with the purpose of the public duty doctrine." Id.

23. 355 N. C. 161, 558 S. E. 2d 490 (2002).

24. Id. at 167, 558 S.E.2d at 495 (emphasis added) (acknowledging that it had "previously delineated the boundaries of the public duty doctrine—as applied to local government—to the provision of police protection" and defining the issue as "whether the [c]ounty, in providing security at the courthouse, was providing a service analogous to police protection to the general public").

25. Id. at 168-69, 558 S.E.2d at 496 (rejecting the court of appeals' conclusion that the doctrine did not apply since the county was not acting in a law enforcement capacity or exercising its general duty to protect the public by providing security to the courthouse, but was acting as the owner and operator of the courthouse). The Supreme Court's decision in Wood also appears to overrule the court of appeals' decision in Doe v. Jenkins, 144 N.C. App. 131, 547 S.E.2d 124 (2001), which had held that the public duty doctrine was not applicable to a claim asserted by a courthouse visitor who was raped and assaulted in the courthouse restroom.

26. See Jefferson v. County of Vance, 570 S.E.2d 154, 2002 WL 31306555, COA01-1370 (Oct. 15, 2002) (unpublished opinion) (rejecting the plaintiff's argument that the public duty doctrine did not apply since the county's 911 operators, not a police officer, failed to dispatch assistance in a timely manner).

27. See Hunt v. North Carolina Dep't of Labor, 348 N.C. 192, 499 S.E.2d 747 (1998) (concluding that the Tort Claims Act incorporates the existing common law rules of negligence, including the public duty doctrine); Stone v. North Carolina Dep't of Labor, 347 N. C. 473, 482,495 S.E.2d 711, 716 (1998) (concluding that "the legislature intended the public duty doctrine to apply to claims against the State under the Tort Claims Act").

28. See Stone, 347 N.C. 473, 495 S.E. 2d 711 (concluding that the public duty doctrine barred plaintiff food processing plant employees' claims against the Department of Labor alleging that the department negligently failed to inspect the processing plant for workplace safety violations); Hunt, 348 N.C. 192, 499 S.E.2d 747 (concluding that the public duty doctrine barred plaintiff's claim against the Department of Labor alleging that the department was negligent in its inspection of the seat belt on an amusement ride and breached its duty under Article 14 of the North Carolina General Statutes).

29. See Stone, 347 N.C. at 481, 495 S.E.2d at 716 (explaining that the "government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers . . .

to liability for failures of omission in its attempt to enforce them" and that "[i]t is better to have such laws, even haphazardly enforced, than not to have them at all").

30. Hunt, 348 N.C. at 198-99, 499 S.E.2d at 751 (rejecting the special relationship and special duty exceptions). See also Stone, 347 N.C. at 481, 495 S.E.2d at 717 (concluding that the statutes charging the commissioner of labor with the duty of inspecting workplaces do not implicate the special relationship or special duty exceptions).

31. Perhaps plaintiffs and their attorneys asserting negligence claims against state agencies can take heart from the following quote from the majority opinion in Stone, responding to the dissent's assertion that the decision eviscerated the Tort Claims Act and barred all negligence claims against the state.

A myriad of reported and unreported cases, covering a great variety of fact situations, have allowed recovery against the State under the Tort Claims Act. Nothing in this opinion even hints at the overruling of those cases. Absent legislative change, the Act functions and will continue to function as it has for almost half a century. We simply hold, with sound reason and substantial grounding in the law of both this and other jurisdictions, that in this limited new context, not heretofore confronted by this Court, the Act was not intended to and does not apply absent a special relationship or special duty.

Stone, 347 N.C. at 483, 495 S.E.2d at 717 (emphasis added).

“You’d Make a Good Lawyer”

Remarks by Dr. John Wells Kuykendall

My preparation for this occasion took a rather unusual turn this past Thursday afternoon. Our committee meeting was over—at long last—and we were making for the door. “You’d make a good lawyer,” she said. “She” is my friend and fellow-trustee, Virginia: a lawyer herself, and darn good one, too, I’m told. But her statement took me by surprise. I blushed (I’ll bet), and ducked my head, and would have dug a hole in the dirt with the toe of my shoe if we’d been outside; probably said something like “Aw shucks, ma’am” as Gary Cooper might have done. And it wasn’t until a while later that I found myself wondering what she’d meant. So I asked point-blank at the reception before dinner, and she said something nice about my contribution to the meeting—a compliment appreciated if undeserved—and I walked away feeling better than I probably had any right to feel.

But the encounter set me to more wondering: Why did I need to ask? And what was I looking for, apart from a possible pat on the back, which most—or all—of us treasure from time to time? Why is it, when someone speaks of a profession or vocation—any vocation, I hasten to add—we feel the need to ask, “What did you mean by that?”

You’d make a good preacher.

“What did you mean by that?”

You’d make a good doctor, or teacher, or administrator; you’d be a fine politician, or reporter, or engineer.

“What does that mean?”

Criticism or compliment? Fitness report or fightin’ words? Assessment of motivation and skills, or perhaps evaluation of character.

“You’d make a good lawyer,” she said.

And at my age, it shouldn’t be considered career counseling. But other than that, what does it mean, in our day and time, to be told that you could “make a match” with some certain profession? How could I have made a proper response to such words—albeit kind words—from a friend like Virginia?
Maybe I should write her a letter.

Perhaps before we’re done, I’ll let you look over my shoulder as I draft an answer:

“Dear Virginia,….” (That has a nice ring to it, doesn’t it; maybe because Christmas is already on the shelves at CVS!)

But before I write my “Dear Virginia,” perhaps we should return to a more elementary topic. Let’s take a few minutes to revisit the current plight of professionalism in American life. It’s not a new topic, to be sure, nor yet one unconsidered in present company. I’ve done it more than once myself. Fifteen years ago just now (same tuxedo, suspenders, and shirt—though the underwear is clean!) I gave a talk to your annual meeting entitled “The Ten Commandments of Professionalism.” (I considered, briefly, the idea of just repeating that speech, and, like the old preacher caught reusing a well-worn sermon, just commenting that none of you seemed to understand the first time, so I figured I’d just repeat ‘til you do. But that would never do with this audience.)

At any rate, the burden of that talk was that the capital of appreciation and respect traditionally assigned to professions in our society has radically diminished in our generation. There were many reasons for that, then as now. But my “Ten Commandments” (more like ten suggestions) were intended to encourage all “professionals” to recover a sense of calling, to pursue such virtues as competence and accessibility, to be responsive to current demands and expectations without abandoning traditional values, and so on and so on. Fifteen years ago it seemed to me, as I recall, that the task was “do-able” and could be accomplished, if not by “main strength and ignorance,” then certainly by high standards, self-discipline, and good will.

Quite honestly, though, as I have glanced back over the things I said on that occasion it seems manifestly clear that many opportunities for self-directed, constructive change have simply passed us by. In our current circumstance we have ample reason to be far less sanguine about the prospects for easy and substantial change. Precious few things have happened in this interim that afford reason for optimism; and there are many things (some, but not all, admittedly beyond anyone’s control) which have militated to the contrary. For example, not long after I received your kind invitation to make this speech, Missy handed me an article from the Charlotte Observer entitled “Will You Ever Trust Again?” the burden of which should be altogether obvious.

Thesis: Ours is a society built upon trust.

Issue: How does one reckon in that context with the hammer blows of our very recent past?

The newspaper’s list from late spring feels like ancient history, but maybe you remember “…revelations about the FBI not heeding terrorists’ warnings, Catholic priests abusing children and winning protection from bishops, accountants fudging the books for corporations and disclosures that executives [of a giant corporation] falsely reported billions in expenses.” (Charlotte Observer, June 30, 2002) Well, golly, that was just a few months ago, and the list feels obsolete only because recent developments in virtually every field of professional endeavor can match if not trump every one of those particulars. Speaking, for example, only of the professions I “profess,” we hear of an academic administrator who directs the alteration of academic records in circumstances which, whatever his motivation, quite obviously yields advantage to the athletic ambitions of his institution. We hear of scholars who fake experimental results in crucial and sophisticated scientific explorations, and others of wide renown who fail to make proper acknowledgement of scholarly work which is not their own. We hear of a prominent tall-steeple minister who over months and years has preached sermons taken lock, stock, and barrel off a website, then printed them up for circulation to his flock as his very own. (They’ve always said that all work and no plagiarism makes Jack a dull preacher, but this certainly stretches the point!)

Now you be the judge—no pun intended—about the current health of your own profession. I say those passing words of distress and lament only for my own “callings,” but I confess that I have anxious feelings about the repute of the whole universe of vocations in this society and prospects for their future utility and probity. While I’d prefer not to wax apocalyptic on a pleasant occasion such as this gathering, the ominous words of Yeats’ poem “The Second Coming” recurred as nigh-litany as I wrote this:

Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

Perhaps we have placed burdens upon our vocations which they are unable to bear.

Perhaps we have sown the very seeds of our undoing as those who have presumed professional prerogatives based upon the critical nature of what we do.

Perhaps we have been guilty of asking questions of meaning that we are unable to answer through our life-callings.

Recently I have been reading with some profit William May's book entitled Beleaguered Rulers (subtitle: The Public Obligation of the Professional). The "professional," May asserts, is one who "…professes something (a body of knowledge and experience); on behalf of someone (or some institution); and in the setting of colleagues." (May, p. 7) Knowledge is power; and we use that power in behalf of someone (or a community of "someones") in the context of a "peer group" with whom we can properly evaluate and apply what we know. So far, so good. Then the book surveys the current circumstances of a variety of callings—not just the historic "big three" ministry, medicine, and law, but teaching, engineering, politics, and corporate leadership, and even contemporary callings of note such as media professionals and celebrities. The burden of the analysis in each instance is that professionals are people who live with the "blessing-curse" of a double vocational identity. Our chosen fields of endeavor are at one and the same time a means to a livelihood and what Roscoe Pound describes as "…a common calling in the spirit of public service." (quoted in May, p. 14)

Sometimes this duality of calling raises the sorts of problems which are reminiscent of Garrison Keillor's recent joke about what happens when you cross a pit bull with a collie:

You get a dog who bites you on the ankle and then runs to get help.

That is to say, it's a delicate balance; one which May suggests can be upset when professional "status" is challenged. (May, pp. 1-22) And the challenges come from a variety of quarters. Our failings, such as the sorts I've mentioned heretofore, are often obvious to all and therefore subject to criticism; but it is also often our considerable successes, such as new ideas and insights, discoveries and technologies, which generate the impression—or the reality—that our professional efforts are under siege. In such cases, the part of the double identity which inevitably suffers is not the one which has to do with our livelihood, though it is certainly not entirely unaffected; The point of impact is our "professional" duties as public servants. Thus, says William May, those who have ears to hear, let them hear. Or at least that's the nutshell book report; or perhaps I should say, as we used to do in our book reports at Dilworth School in Charlotte, "and if you will read this book, you'll find out how it turns out!"

But let me not let you go quite so easily quite so "…gentle into that dark night."

I'd reckon there are some fairly serious things at stake according to this analysis, both for your chosen profession and for mine: basic things such as how we prepare for the calling, how we recruit our prospective colleagues, and how we confirm and empower them; such things as how we regulate and discipline ourselves, and make our services available with fairness and equity—whole hosts of issues in every calling which are always and at once complicated, and controverted, and consumptive of time and talent and temper. Those practical matters are surely at stake, and there's always more. We deal not only with the reputation of the calling, we deal with questions of its immediate and ultimate value to the circumstances and time beings of our lives. That, I believe, is where the matter of our "public obligation" comes home to roost. It has to do with who we are; not just what we do in our day jobs.

What is there about your job that is fulfilling? Why did you get into this "bidnis" in the first place, and what is it, when all is said and done, that makes you stay?

Fred Buechner in a wonderful little essay entitled "The Calling of Voices" comments that the things we should spend our life doing are things which ultimately make us glad, and he even suggests that there is a certain magnetic mystery which summons us to the enterprise. "We can speak," he writes, "of a [person] choosing a vocation, but perhaps it is at least as accurate to speak of a vocation's choosing a [person], of a call's being given and a [person's] hearing it, or

not hearing. And maybe that is the place to start: the business of listening and hearing." (Buechner, The Hungering Dark, p. 27)
How do we reemphasize—or in some cases recover—what we "heard?" How can we resurrect those things pertaining to what we do with our hours and days that drew us into this profession in the first instance. And how do we make sure that those things—those qualities of our callings—are properly put at the disposal of the common weal?

These are the sorts of questions which may lead to renewal—to recovery of the intellectual, moral, and institutional balance which properly belongs to professional life. These are surely the sorts of questions which will maintain and enhance the profession—any and all professions—for our time being and times being yet to come.

Which brings me back to task: I have yet one more bit of work to be done, and I've already solicited your oversight (if not advice) as I try to write my thank-you note.

Virginia said, "You'd make a good lawyer." In so doing, she set me off on a train of thought which led to this verbal pilgrimage. So here's a first cut at a proper reply:

Dear Virginia,

I feel as though you paid me a rare compliment last Thursday when you said, "You'd make a good lawyer." Last time that was said to me was probably 40-odd years ago, when my dear Mama was so outdone by my special pleadings—"closing argument," I suppose—for something I wanted but didn't need that she chose those words to end the conversation. Not necessarily a compliment in that circumstance, but that by itself wouldn't have deterred me from the quest, had my gifts and instincts been otherwise.

She said it all in good fun; even if it really meant "Shut up, Johnny, and eat your eggs!"

But, Virginia, you obviously have a broader and deeper appreciation for your vocation; thus I have flattered myself to believe that you may have had something more positive in mind. So don't take offense if I ask that we revisit the question. When you say, "You'd make a good lawyer…."

· Do you mean someone who feels led to the calling because of the vital significance of what there is to be done?

· Do you mean someone who appreciates the goodly inheritance of the tradition of ordering human society in ways that serve the best interests of all?

· Do you mean someone who treasures the prospect of collegiality with like-minded and like-spirited people, drawn together by common values and commitments, who properly revere the privilege of being "an officer of the court?"

· Do you mean someone who respects and cares about people; who knows by intuition and conviction that there is no human being on this earth who is simply a means to an end; someone who intends life, liberty, and happiness for each and for all.

· Do you mean someone who strives upon every occasion to understand the meaning of the word "justice," and also the word "mercy," and is willing to work to see how the two can coincide?

· Do you mean someone who uses objectivity as a tool rather than a weapon, who seeks the blessing of "sweet reason" in circumstances where feelings and antipathies may run high?

· Do you mean someone who understands both the benefits and the limitations of adversarial action, who can mediate as well as litigate, who would strive to draw people together in community rather than isolate them on islands of self-interest?

· Do you mean someone who never ceases to learn and to seek that alchemical transformation of knowledge into wisdom, not for personal gain or advantage, but for the common good?

· Do you mean someone who knows the difference between toil and work, between billable hours and disciplined accomplishments, who is so engaged in doing right and doing good that doing well or looking good are not at all a matter of priority?

· Do you mean someone who would genuinely believe that there is no better compliment to be paid to another human being than to say, “You’d make a good lawyer?”
If that’s what you mean, Virginia, (and, goodness, I hope you do) then perhaps the best I can say in response is, “I’ve never had a more gracious compliment. Thank you very much.”

Sincerely your friend,
John K.

After serving as the interim campus pastor at Princeton University and as an instructor-associate professor and department head at Auburn University, Dr. Kuykendall returned to Davidson College in 1984 as the president and professor of religion. In 1997 he became Davidson’s president emeritus and in 2000 was appointed to the position of Samuel E. and Mary West Thatcher Professor.

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 Attorneys

Judge K. Edward Greene, North Carolina Court of Appeals Mediation Program Under Way, 17 Dispute Resolution & The Intermediary 1 (Nov. 2002): Beginning 01 August 2002, the court of appeals began a voluntary appellate mediation program applicable to all civil cases except termination of parental rights and juvenile cases. Judge Greene here outlines the program, and points lawyers with further questions to Mr. Frank Dail, administrative counsel of the court of appeals, at 919-733-3561.

Patricia T. Bartis & Kristi E. Kessler, Independent Contractor or Employee?, 21 Labor & Employment 1 (Oct. 2002): In discussing the issue of whether a worker is an independent contractor or an employee, the authors lay out the eight-factor test in North Carolina enunciated in Hayes v. Board of Trustees of Elon College, 224 N.C. 11, 15 (1944), the 10-factor test found in the Fourth Circuit cases Bender v. Suburban Hosp. Inc., 159 F.3d 186 (4th Cir. 1998) and Cilecek v. Inova Health Sys. Servs., 115 F3d 256 (4th Cir. 1997), and the 20-factor test applied by the Internal Revenue Service (see Rev. Rul. 87-41, 1987-1 C.B. 296). They assert that "[a]lthough the IRS test is more detailed than the tests defined by North Carolina and federal courts, the premise and the goal are still the same—to try to determine, on a case-by-case basis, which party retains the greatest amount of control over the method and the manner of work."

David M. Lawrence, The Court of Appeals Addresses Closed Sessions Held to Consider the Purchase of Real Property, 104 Local Gov't Law (Oct. 2002): Professor Lawrence discusses Boney Publishers, Inc. v. Burlington City Council, which held that "in the circumstances of this case, the name of the landowner, the location of the property, and the city's proposed use of the property were not material terms of a contract to acquire the property and that consequently the city was obliged to disclose those facts in open session." The statute at issue in Boney was N.C.G.S. sec. 143-318.11(a)(5).

Thomas Lee Hazen, Silencing the Shareholders' Voice, 80 N.C. L. Rev. 1897 (2002): Professor Hazen criticizes recent North Carolina legislation that dilutes shareholder rights, and "objects to the legislature's propensity to respond to certain private interests rather than balance the competing interests involved in corporate governance issues."

John F. Graybeal, Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina, 80 N.C. L. Rev. 1927 (2002): "This article points out that many section 75-1.1 decisions fail to identify the specific component of the statute found to be violated, that others identify the 'wrong' part of the statute as the basis for the decision, and that these errors have adversely affected the analysis and even the outcome of cases." "The author urges that the 'unfair methods of competition' component of the statute should be viewed simply as an antitrust statute," and suggests methods for controlling the reach of the other components of the statute as well.

Symposium: Empirical Approaches to Proving the Standard of Care in Medical Malpractice Cases, 37 Wake Forest L. Rev. (2002): "The medical malpractice standard of care, as classically understood, is, at its core, a purely empirical question matter. Juries are asked to decide what physicians usually do, or what physicians think should be done, in similar circumstances. . . . Yet, from time immemorial, medical custom has been established in court only through ad hoc, subjective adversarial expert opinion. . . . This Symposium arose from the desire of its organizers

to explore this rather stark dichotomy." Authors include three doctors, two judges, and a wide array of academics.

Judge Julian L. Bush, Argument and Logic, 67 Mo. L. Rev. 463 (2002): "Closing argument, of course, is argument, and much of the law of closing argument that has developed over the centuries by common law judges finds its analogue in the principles of valid argument developed by logicians over these same centuries." "Many of the arguments that the law condemns as improper commit what logic calls a fallacy." The judge describes these seven fallacies: Argument ad Ignorantiam, Argument ad Verecundiam, Argument ad Hominem, Argument ad Populum, Argument ad Misericordiam, Argument ad Baculum, and Ignoratio Elenchi.

Emery G. Lee III, Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases, 33 Univ. Toledo L. Rev. 581 (2002): "Despite the statement in Dickerson that 'we have always required a departure from precedent to be supported by some 'special justification,' even in constitutional cases, the [US Supreme] Court has only recently adopted this approach to stare decisis in constitutional cases. In fact, my research has been unable to locate the term 'special justification' used in this way before the 1984 case of Arizona v. Rumsey. Far from a long-standing requirement, this 'special justification' approach represents a break with the Court's historical approach to stare decisis in constitutional cases. Under that traditional approach, stare decisis was given little weight in cases involving constitutional interpretations. As Justice Reed observed in Smith v. Allwright, 'when convinced of formal error, this Court has never felt constrained to follow precedent.' In developing the 'special justification' approach, the Court has changed its 'overruling rhetoric' and, in the process, apparently increased the weight given considerations of stare decisis in constitutional cases.'"

Jan Wiltold Baran, Judicial Candidate Speech after Republican Party of Minnesota v. White, 39 Court Rev. 12 (Spring 2002)

David B. Rottman, The White Decision in the Court of Opinion: Views of Judges and the General Public, 39 Court Rev. 16 (Spring 2002): An associate director of the National Center for State Courts describes the results of "the first national opinion survey devoted entirely to judicial selection issues."

Samuel J. Astorino, Roman Law in American Law: Twentieth Century Cases of the Supreme Court, 40 DuQ. L. Rev. 627 (2002): "One of the most enduring problems of the legal history of the West concerns the influence of Roman law on the development and nature of subsequent legal systems. This article examines cases decided roughly in the twentieth century by the United States Supreme Court in order to evaluate the manner, and extent, that that tribunal used Roman law." At one point in his survey, the author describes the views of Oliver Wendell Holmes on the study of Roman law: "In the early 1870's, when Holmes first delved into legal history, he became deeply interested in Roman law. He quickly came to question the value of the study of Roman law for American practicioners because he believed that whereas the common law, Teutonic in origin, begins and ends with particular cases, the civil law followed general principles, and he feared contamination by the latter."

II. Jurisprudence Beyond Our Borders

Sanchez v. Hillerich & Bradsby Co., 104 Cal. App. 4th 703, 128 Cal. Rptr. 2d 529 (2002): The plaintiff, a pitcher, was seriously injured when he was struck by a line drive hit by an aluminum bat. He filed suit against the bat manufacturer and others alleging that the design and use of this particular bat significantly increased the inherent risk in the sport of baseball that a pitcher would be hit by a line drive. Pre-trial, one of appellant's coaches testified that he saw the incident, he had seen other pitchers hit by batted balls before, and that the risk of a pitcher being hit by a batted ball is inherent in the sport of baseball. Additionally, at the time of the injury, plaintiff and all of his team members were using metal bats, and plaintiff had used a metal bat in organized baseball games since he was six years old. The bat was made in compliance with NCAA

standards. However, the designer of the new bat (the Air Attack 2), declared that the invention allowed a batter to hit a ball at speeds in excess of that which would have given a pitcher time to avoid being hit. As a result, he opined that the Air Attack 2 substantially increased the risk of a pitcher being hit by what he termed a “come backer.” Defendants moved for summary judgment. The trial court granted summary judgment when it concluded that appellant would be unable to prove that his injuries resulted from the alleged increased risk the particular bat posed to pitchers. Plaintiff appealed and the appellate court reversed noting that there was sufficient evidence to establish that use of this particular bat significantly increased the inherent risk that a pitcher would be hit by a line drive and that the unique design properties of this bat were the cause of his injuries.

State v. Coonrod, 652 N.W.2d 715 (Ct. App. Minn. 2002): Defendant Coonrod was charged with soliciting a child to engage in sexual conduct following an internet child-exploitation sting operation that caught Coonrod communicating in a chat room with “Jaime14,” a fictitious persona created by a US postal inspector. After Coonrod had sent a number of sexually explicit e-mail messages to “Jaime14,” police arranged a face-to-face meeting, using an adult female undercover officer. When Coonrod appeared at the arranged meeting site and approached the officer, he was arrested. The jury found Coonrod guilty as charged. On appeal, Coonrod argued that the statutory language requiring solicitation of a “specific person” required solicitation of an actual person and therefore precluded criminal liability for soliciting a fictional persona such as “Jaime14.” The appellate court rejected Coonrod’s argument, noting that there was “no language in the statute, or in the case law, that excludes a fictional persona such as ‘Jaime14’ from the definition of a ‘person,’ or a ‘specific person.’ . . . . The purpose of the child-solicitation statute is ‘to prohibit any persuasive conduct by adults that might entice children to engage in sexual activity.’” . . . . “Sending e-mails and chat room ‘whispers’ to a specifically identified computer persona with the aim of engaging that person in sexual activity fits within the purpose and language of the statute. The legislature, by requiring that the solicitation be to a ‘specific person,’ intended to exclude general messages broadcast to wider audiences, such as personal ads or bona fide media content. There is no reason to believe, however, that the legislature, having forbidden ‘solicitation’ by computerized means, intended to exclude messages directed at a specific computer identity or ‘persona’ that a defendant believed represented a person who was underage.”

In re Julie Anne, 121 Ohio Misc. 2d 20, 2002 Ohio 4489, 780 N.E.2d 635 (Ct. Common Pleas, Lake Cnty., Juv. Div., Ohio 2002): At a hearing on custody and visitation, the trial court, on its own initiative, issued a restraining order against the custodial parent mother and her significant other with whom she and her healthy eight-year-old daughter lived, restraining them from smoking in the presence of the healthy child, to protect the child from having her health compromised by being forced to breathe secondhand smoke. The tobacco smokers had responded that the court’s prohibition against smoking around the child would place a strain on their relationship and violated their right to privacy. They appealed. In a case of first impression, the appellate court upheld the trial court, concluding that: “A considered analysis of the facts and law of this case leads to the inescapable conclusion that a family court that fails to issue court orders restraining persons from smoking in the presence of children under its care is failing the children whom the law has entrusted to its care.”

U.S. v. Bello, 310 F.3d 56 (2nd Cir. 2002): Defendant Bello pleaded guilty, without a plea agreement, to conspiracy to use stolen credit cards—Bello and a co-conspirator had schemed to steal credit cards from lockers at a New Jersey health club and use the stolen cards to make unauthorized purchases. Bello was sentenced to five years of probation, the first ten months of which were to be spent in home detention. As a condition of probation, the court imposed sua sponte a television bar on Bello during his home detention. The trial court explained that the television restriction was designed to force “deprivation and self-reflection,” and thus encourage Bello to “conquer the habit of recidivism that has marred his life.” The court reasoned that the removal of a likely diversion would encourage a salutary self-reflection and remorse. Bello challenged the television viewing bar, arguing that: (1) it is not reasonably related to the nature

and circumstances of the offense, the history and characteristics of the defendant, protection of the public, or the other statutory goals of sentencing; (2) there is no nexus between the offense conduct (stealing credit cards from gym lockers) and television; (3) he can avoid self-reflection by finding other entertainments at home, such as radio and the internet; and (4) because the condition is unusual and implicates expressive rights, it is subject to "a particularly searching scrutiny" that requires a "clear and obvious" relationship (lacking here) between the condition and the offense conduct. The appellate court agreed with Bello: "[L]acking is a sufficient relationship between the television restriction and the abatement of Bello's criminality. Even if contemplation is deemed somehow more beneficial for this defendant than for most others (for reasons not clear from the record), we are inclined to agree with Bello that because other amusements are available to him at home, there is no reason to assume that in the absence of televised entertainment he will tend to his conscience. Bello cites radio and the internet as ways he might spend his time at home without resort to silent introspection. He could add crosswords and jigsaw puzzles, not to mention light reading. For all the record shows or the district court has found, Bello is as likely to occupy his mind by planning his next crime as anything else. . . . We do not suggest that a district court is prohibited from imposing conditions of probation that restrict a defendant's access to household amusements and comforts, including television. Conditions designed to limit a defendant's access to luxury at home might further the purposes of home detention, which by law serves as a "substitute for imprisonment."