

## Courts and Civil Procedures

The most important result of the 2008 session for the judiciary was what did not happen. Despite the state's budget woes, the courts' funding generally remained intact, even for the large number of new positions added in 2007. In fact, although the legislature slightly reduced the total judicial appropriation, it added more judicial positions. In other significant action, legislators restored recurring funding for the conferences of district attorneys and clerks of court, but they expressed their unhappiness with some prosecutors' activities by restricting lobbying by court officials. The back-and-forth regarding responsibility for the costs of a new telephone system—an issue that arose at the end of the 2007 session when a last-minute enactment obligated counties to pay for telephones—was resolved by restoring state responsibility and creating a new court fee to cover the costs. Several changes in the law will affect clerks of court, prompted by the problems in the housing and mortgage industries and the rising number of foreclosures. There were no substantial changes in the structure, procedures, funding, or administration of the Judicial Department, however.

### Budget

#### Appropriations, New and Eliminated Positions

In 2007 the General Assembly responded to long-standing needs of the court system by appropriating unprecedented amounts of new funds and creating nearly 400 new positions for fiscal year 2007–08 and almost 300 more for fiscal year 2008–09. Even though, as with the rest of the country, the state's financial position has darkened greatly since then, the legislature stuck with almost all of the court improvements. The 2007 General Assembly appropriated \$452 million to the Judicial Department for fiscal year 2008–09; when the 2008 session ended that number had been reduced by only about \$1.5 million.

The budget enacted in 2007 included twenty-eight new assistant district attorneys to be added in fiscal year 2008–09. The 2008 session preserved those positions and added three more. Most of the districts that will receive new positions will get only one additional assistant district attorney; Districts 11 (Harnett, Johnston, and Lee counties) and 14 (Durham County), however, are allotted two new hires, District 10 (Wake County) is allotted three, and District 26 (Mecklenburg County) is allotted five. Districts 10, 11, and 26 each will also receive another district judge. In January 2009 the next governor will appoint the new judges, who will serve until their successors are elected in 2010 for regular four-year terms. With these new positions Mecklenburg County will have twenty-one district court judges and fifty-eight assistant district attorneys; Wake County will have nineteen district judges and forty-two assistant prosecutors.

In addition to the state-funded positions, the General Assembly authorized the Mecklenburg County district attorney's office to fund eight "time-limited" assistant prosecutors with money from the county and the City of Charlotte. "Time-limited" means the positions are full-time and counted as permanent for benefits, but they will exist only for a limited time.

The district judges and assistant district attorneys are not the only new positions. Ten full-time magistrates also will be added in January 2009, with one each to go to Durham, Forsyth, Gaston, and Guilford counties; two to Wake County; and four to Mecklenburg County in line with the recommendations of the Administrative Office of the Courts (AOC). Three new district court judicial assistant positions also are added starting in 2009. Other new personnel added by the 2008 session include four deputy clerks, more supervisors for the guardian ad litem program, two positions for the Innocence Inquiry Commission, and another staff person for the Sentencing and Policy Advisory Commission. Eliminated

positions include a superior court judgeship that AOC did not request and the two judicial assistants that went with that judgeship, plus the budgets for three now-closed dispute resolution centers.

In 2007 the General Assembly appropriated funds to expand the number of Indigent Defense Services (IDS) offices in both fiscal year 2007–08 and fiscal year 2008–09. This year’s appropriations act eliminates the new offices for 2008–09, but it appropriates approximately the same amount of money to pay for private assigned counsel. The legislature added \$200,000 to the IDS budget to maintain grants for local sentencing service programs operated by nonprofits at the 2007–08 level. The funds came from a \$200,000 reduction in IDS’s budget for inflation, lodging, transportation, supplies, and so forth.

### Salaries

Like other state employees, all judicial branch officials and employees received fiscal year 2008–09 pay increases of the greater of 2.75 percent or \$1,100. The salary charts for clerks and magistrates were amended to reflect those increases. The one exception to the general salary increase is an additional increase of \$1,244 for the chief judge of the Court of Appeals to restore a salary differential that existed between the salary of the chief and other Court of Appeals judges until 1994; the difference is now also about the same as the difference between the chief justice and other justices on the North Carolina Supreme Court. The provision concerning the chief judge’s salary is in S.L. 2008-118 (H 2438).

In response to efforts by bar officials to have a commission created to review and recommend judicial salaries, the legislature in S.L. 2008-181 (H 2431) established a new Study Commission on Compensation of the Governor’s Cabinet and State Elected Officials. The eighteen-member commission is to report to the General Assembly by January 15, 2009.

### Telephones

A contentious issue brewing since the end of the 2007 session was the responsibility for the cost of replacing courthouse telephone systems. Counties, of course, are responsible for providing court facilities, and the state pays for operating expenses of the court system. AOC generally has paid for computers and other equipment, but questions arise from time to time over whether a particular item instead ought to be considered part of the facility. At the end of the 2007 session, a last-minute budget amendment required counties to provide telephone systems in courthouses subject to AOC’s specifications. AOC did not request the legislation, had been providing phones for years, and recently had been working toward an upgrade to Voice over Internet Protocol (VoIP), a computer-based technology.

Counties reacted unfavorably to the 2007 legislation and its new financial obligation, and AOC itself was concerned about maintaining its goal of standardized VoIP telephones in all courthouses. The solution, in the appropriations act, is to return telephone responsibility to AOC and to impose a new one dollar fee on all cases. The proceeds from the new fee go to the Court Information Technology Fund and are to be used to pay for phone systems. There was general agreement between AOC and the counties before the 2007 legislation that counties are responsible for wiring of buildings for telephones and other uses, and that will remain the case.

### Other Fees

The only other court fee increase included in the appropriations act is a \$20 jump in the filing fee in divorce actions—from \$55 to \$75—with all of the new money going to the Domestic Violence Center Fund.

### Advancement of Fees by Local Governments

The 2007 appropriations act amended G.S. 7A-317 to remove the exemption for cities and counties from advancing most court costs. The change was to have taken effect July 1, 2008, but S.L. 2008-193 (S 2056) restored most of the exemption. The 2008 act returns the law to the existing practice that local governments do not have to advance the facilities fee, General Court of Justice fee, or the process fees in G.S. 7A-311. For the various miscellaneous fees imposed under G.S. 7A-308 (acknowledgement of oath, preparation of transcript of judgment, preparation of copies, and so forth), however, only actions brought by social services, such as child support and child abuse, are exempted from the advancement of those costs.

### Other Budget Directives

The appropriations act also includes several directives to judicial branch officials that only partially involve appropriations. IDS and AOC are directed to consult and report by March 1, 2009, on developing a statewide system to enable IDS to obtain information about indigent cases when counsel is first appointed. The act also authorizes IDS to spend up to \$25,000 for a pilot program on alternative court scheduling to reduce wait time for defense lawyers and prosecutors. Any pilot program will require agreement of the senior resident superior court judge, chief district judge, and district attorney.

The Sentencing and Policy Advisory Commission is to study how to measure the effectiveness of programs that receive Juvenile Crime Prevention Council grants. An interim report to the interested legislative committees is due by December 2008, and the final report is due by May 1, 2009.

In partial response to several high profile criminal cases involving probationers, the appropriations act requires AOC to use up to \$100,000 from the Court Information Technology Fund to connect the computer databases of the Department of Correction and AOC to provide probation officers with the most current information on arrests and pending charges against probationers.

The appropriations act amends G.S. 7A-474.3(b) to empower legal aid lawyers to assist indigent clients in cases involving predatory mortgage lending, broker and loan abuses, foreclosures, and related issues. For those purposes, the act directs \$200,000 to the State Bar to go to the Land Loss Prevention Project and Financial Protection Law Center.

## Lobbying by Court Officials

In the 2007 session the General Assembly appropriated funds for the Conference of District Attorneys and the newer Clerks of Superior Court Conference, but the dollars were categorized as a one-time expenditure and not part of the continuation budget. At the same time legislators asked for reports about the work of the two associations. The actions were seen as a message that legislators were unhappy with the amount of time employees of the conferences, particularly the staff of the district attorneys' organization, were spending lobbying legislators—and sometimes taking positions contrary to those of AOC.

At different times in the 2008 legislative budget process the funds for the two conferences were included in or omitted from the budget, but finally the money was restored as a recurring appropriation. To more directly address the lobbying issue, though, the General Assembly adds restrictions on judicial branch lobbying in S.L. 2008-213 (H 2542).

First, Section 31 of S.L. 2008-213 amends G.S. 120C-500 to declare that the chief justice is to designate at least one person, but no more than four, to serve as a liaison to the legislature for all the agencies within the court system. The change will keep the conferences of district attorneys and clerks from sending their staff to lobby the General Assembly unless those employees happen to be chosen by the chief justice as designated liaisons of the judicial branch. Individual prosecutors and clerks and other court system officials, though, may still contact legislators on their own because existing law, in G.S. 120C-700(3), exempts public officials and employees from the restrictions on lobbying “when acting solely in connection with matters pertaining to the office and public duties . . .”

Section 30 of S.L. 2008-213 also amends G.S. 120C-500, this time to prohibit any “constitutional officer” from contracting with an individual to lobby the legislature. The effect of this provision on court officials is unclear, however, because the statute does not define “constitutional officer.” While judges, district attorneys, and clerks of court certainly hold offices that are created by the North Carolina Constitution, the State

Government Ethics Act, which was enacted in 2006 in the same legislation that wrote the lobbying law in Chapter 120C, defines constitutional officer in G.S. 138A-3(8) to include only executive branch offices. If the same definition were applied to G.S. 120C-500, the prohibition on hiring lobbyists would not affect judges, district attorneys, or clerks.

## Autism Study

In response to a recommendation from the Joint Study Committee on Autism Spectrum Disorder and Public Safety, S.L. 2008-83 (H 2523) requires the UNC School of Government to study whether court personnel need additional training on the legal issues related to autism and appropriate responses to individuals who have autism. The School of Government is to consult with the Autism Society of North Carolina, UNC's Division TEACCH (Treatment and Education of Autistic and related Communications-handicapped CHildren), and other appropriate organizations. The report, which is due October 1, 2008, is to document how the training should be delivered and estimate the cost of the proposed training.

## Mediation

S.L. 2008-194 (H 545) amends the statutes concerning mediations in superior court (G.S. 7A-38.1), in actions before the clerk of court (G.S. 7A-38.3B), and in district court (G.S. 7A-38.4A) to state that a person who fails to attend a mediation or fails to pay the mediator's fee is subject to contempt as well as paying a fine, attorneys' fees, and the expenses and loss of earnings of others who attended. A party may move for sanctions to be imposed or the court may initiate the action on its own by entry of a show cause order. The changes take effect January 1, 2009.

## Adult Guardianship and Incompetency

### Guardian's Sale of Personal Property

Effective October 1, 2008, S.L. 2008-87 (H 2390) amends G.S. 35A-1251 and -1252 to increase to \$5,000 the amount of a ward's tangible personal property a guardian may sell without a court order and to allow that amount to be sold in each accounting period. The statute previously limited the amount to a maximum of \$1,500 for the duration of the estate.

### Loss of Driver's License

G.S. 20-17.1(a) requires the commissioner of motor vehicles to determine whether to revoke the driver's license of a person who has been adjudicated incompetent or involuntarily committed to a treatment facility for drug or alcohol addiction. Under S.L. 2008-182 (H 2391) the commissioner is to

consider, with respect to a person who has been adjudicated incompetent, the clerk of court's recommendation. The amendment applies to persons adjudicated incompetent under G.S. Chapter 35A on or after October 1, 2008.

## Foreclosures

### Suspension of Foreclosure Proceeding upon Notice of Violation

S.L. 2008-228 (H 2463) requires mortgage servicers to be licensed and regulated by the commissioner of banks under the same provisions as mortgage brokers. Mortgage servicers receive scheduled periodic payments from a borrower pursuant to the terms of a loan, including amounts for escrow accounts, and make the payments of principal and interest and such other payments from the borrower under the terms of the loan.

S.L. 2008-228 also amends G.S. 53-243.12 to provide that if the commissioner of banks has evidence that a material violation of law has occurred in the origination or servicing of a loan in foreclosure, and that the violation would affect the validity or enforceability of the underlying contract or right to foreclose, the commissioner may notify the clerk of court. The clerk must then enter an order suspending the foreclosure for sixty days from the date of notice. The deadlines under the foreclosure statute are tolled during the suspension period. At the end of the sixty-day period the trustee may proceed with the hearing by providing written notice of a new hearing date not less than ten days before the hearing. If the order of suspension occurs after the clerk has authorized the foreclosure but before the expiration of the ten-day upset bid period, the trustee is not required to hold a new hearing but must advertise and hold the sale as provided in G.S. Chapter 45. If the violation is cured before the sixty-day period, the commissioner must notify the clerk so that foreclosure may resume. These new provisions affect foreclosure proceedings filed on January 1, 2009, or later.

### Foreclosures of Subprime Loans

S.L. 2008-226 (H 2623) adds to G.S. Chapter 45 a new article, the Emergency Program to Reduce Home Foreclosures Act, in response to the flood of home foreclosures due to subprime loans. The new law applies to loans originated after January 1, 2005, and before December 31, 2007, that meet the definition of a rate spread home loan in G.S. 24-1.1F(a)(7). The legislation also creates the State Home Foreclosure Prevention Project to seek solutions to avoid home foreclosures in individual cases. Key provisions of the new article, which takes effect November 1, 2008, and expires October 31, 2010, include the following.

**Pre-foreclosure notice requirement.** At least forty-five days before filing a notice of hearing in a foreclosure proceeding, a mortgage servicer of a subprime loan must mail a pre-foreclosure notice to the borrower giving the borrower information about the availability of resources to avoid foreclosure. The mortgage servicer must also electronically file information about the borrower with AOC within three days of mailing the pre-foreclosure notice to the borrower. AOC must develop an internal database of such borrower information for access by the commissioner of banks, the clerks of court, and the newly created State Home Foreclosure Prevention Project. The AOC database and its contents are not public records.

**Extension of time for foreclosure filings.** The commissioner of banks may extend the time for filing a foreclosure proceeding on a primary residence for thirty days beyond the date set in the pre-foreclosure notice and also may notify the borrower and AOC if the commissioner determines that there is a reasonable prospect of avoiding foreclosure in a given case. This thirty-day period is designed to facilitate a negotiation period between the lender and borrower as to terms that might prevent the foreclosure.

**Certification of pre-foreclosure notice.** The act also amends G.S. 45-21.16 to provide that in any foreclosure filed November 15, 2008, or later, the notice of hearing must contain a certification that the pre-foreclosure notice was provided and that the periods of time in the statute have expired. Inclusion of a materially inaccurate statement in the certification is cause for dismissal of the foreclosure filing without prejudice and for payment by the filing party of the "costs of borrower in defending the foreclosure proceeding." It is unclear what costs would be payable by the filing party under the current costs and expenses provisions of G.S. Chapters 6 and 7A.

**New fifth finding in all foreclosures.** The act amends G.S. 45-21.16(d) to require the clerk of court to make a fifth finding in all foreclosure hearings in addition to the existing findings of valid debt, default, right to foreclose, and proper notice. The clerk must find either that the underlying mortgage debt is not a subprime loan or, if it is a subprime loan, that the pre-foreclosure notice was provided in all material respects and that the periods of time established under the act have elapsed. The clerk has access to the AOC database to confirm the information provided to borrower.

## Matters of Particular Interest to Clerks

### No Name Change for Sex Offender

S.L. 2008-218 (S 132) creates G.S. 142-02.6 and amends G.S. 101-6 to prohibit a registered sex offender from obtaining a name change.

### **Additional Checks for Firearm Purchasers and Owners**

In response to the Virginia Tech murders, the General Assembly passed S.L. 2008-210 (S 2081), effective December 1, 2008, to create an additional check on who may purchase or possess a firearm in North Carolina. The act amends G.S. 122-C54 to require the clerk of court “in the county where the judicial determination was made” to report any involuntary commitment for mental illness to the National Instant Criminal Background Check System (NICS) so the information can be accessed in determining eligibility to purchase or possess a gun. The law applies to orders both for inpatient and outpatient commitment for mental illness, but then specifies that for outpatient commitment the report is to be made only if the individual is found to be a danger to self or others. Because North Carolina law does not require a finding of dangerousness for outpatient commitment, in practice the law is likely only to apply to inpatient commitment. The act also requires the clerk to notify NICS when a defendant is found not guilty by reason of insanity, or mentally incompetent to proceed in a criminal trial.

In addition, G.S. 122C-54.1 now sets out a procedure for a person to petition the district court for the removal of the mental commitment bar to firearm purchase and possession if the person no longer suffers from the relevant condition. The petition must be filed in the county in which the most recent judicial determination of commitment was made or in which the petitioner lives. The clerk of court will then schedule a hearing with notice to the petitioner and the district attorney in that county. Notice must also be served on the director of the inpatient treatment facility and the district attorney in the petitioner’s current county of residence if different from the county of filing. The burden is on the petitioner to prove that he or she no longer suffers from the condition that resulted in the commitment and no longer poses a danger to self or others for the purposes of purchasing or possessing a firearm. The district attorney may present evidence to the contrary. The district court must find facts and decide whether the petitioner continues to suffer from the relevant condition and poses a danger to self or others. Appeal is de novo to superior court. After denial of the petition by the superior court, the petitioner may not file another petition for at least one year. If the petition is granted, the clerk of court must forward the order to NICS.

### **Monitoring Fees Accepted by Randolph Clerk**

By S.L. 2008-20 (H 2762), the General Assembly authorized the Randolph County clerk of court to accept fees ordered by the court for pretrial electronic monitoring by the sheriff and to pay that money to Randolph County.

## **Civil Procedure**

### **Electronic Receipts in Service of Process**

Subsection (j) of Rule 4 of the North Carolina Rules of Civil Procedure allows service by designated private delivery service on many types of parties. In each instance, the serving party must obtain a delivery receipt. The rule was amended by S.L. 2008-36 (H 2287), which allows the receipts to be in electronic or facsimile form. This new provision is effective for receipts given on or after October 1, 2008. The bill also adds a new subsection (j6) to make explicit that nothing in subsection (j) authorizes service by electronic mailing.

### **Public Duty Doctrine**

There has been some confusion in recent years within the case law on governmental liability about the extent of the public duty doctrine. S.L. 2008-170 (H 1113) sets rules for use of the public duty doctrine as a defense by state agencies, generally codifying the existing case law. The act applies to claims arising October 1, 2008, or later.

To summarize complicated legal issues in the simplest terms, a governmental body may be liable for injuries caused by its employee when the employee is engaged in a proprietary function (for example, operating a golf course or hospital) but have immunity from liability when the employee is serving a governmental function (for example, police protection, garbage collection). Governmental bodies may, and often do, waive their immunity. The state has waived its immunity and accepted liability up to certain limits by enactment of the State Tort Claims Act, and the legislature has specified that local governments waive the governmental immunity defense by purchasing insurance, up to the amount of the insurance. Still, even when liability otherwise might exist it may be barred by the public duty doctrine.

Under the public duty doctrine a governmental body may not be held liable for a failure to protect an individual from harm. Although the government may undertake to protect the public at large, that duty does not extend to individuals. For local governments, the courts have held, the public duty doctrine can be used as a defense only when the victim’s claim is based on a law enforcement officer’s failure to protect the person. *Lovelace v. City of Shelby*, 351 N.C. 458 (2000). For state government, the courts have extended the public duty doctrine defense beyond law enforcement to agencies that conduct health and safety inspections, allowing the defense to be used, for example, to protect the Department of Labor from liability to the victims of the Hamlet chicken processing plant fire for the department’s negligent failure to conduct proper safety inspections. *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, cert. denied, 525 U.S. 1016 (1998). More recently, though, the scope of the public duty

doctrine defense has been narrowed by the courts' willingness to find an exemption because a government agency has made an actual promise to protect an individual or created a special relationship in which such protection is expected. In *Multiple Claimants v. N.C. Dep't of Health and Human Servs.*, 361 N.C. 371 (2007), for example, the Supreme Court would not allow the public duty doctrine to be used by the state jail inspection office as a defense to claims of victims of the Mitchell County jail fire based on negligent failure to inspect the facility.

S.L. 2008-170 essentially codifies the case law which has developed concerning the use of the public duty doctrine by state agencies. The act adds a new Article 31 to G.S. Chapter 143 specifying that the public duty doctrine may be used as an affirmative defense only when liability is sought for the negligent failure of a law enforcement officer to protect or the negligent failure of an officer or employee to perform a health or safety inspection required by statute. The public duty doctrine may not be used when a special relationship has been created, a special duty is owed to and relied upon by the victim, or when the failure to perform the health or safety inspection was the result of gross negligence. The act specifies that it is addressing only the use of the public duty doctrine by state agencies, not local governments.

## Studies

The comprehensive legislative studies bill, S.L. 2008-181 (H 2431), includes a number of potential studies of interest to court officials. As is always the case, though, the legislation only authorizes the studies: Some will be carried out, but others will not.

Among the topics the Legislative Research Commission is authorized to study are whether executions of individuals with severe mental disability should be prohibited, the felony murder rule and streamlining the determination of whether a first degree murder case may be tried as a capital case, whether denials of pistol permits should be reported to the State Bureau of Investigation for entry into its database, expunction of criminal records for youthful offenders, and timing issues in renewal of permits to carry concealed handguns. Also authorized for study are the standards to be applied in child custody cases, including whether there should be a presumption of joint custody.

The Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse is authorized to study whether appropriate supervision is provided when an individual is ordered to be examined for involuntary commitment.

Several new study committees are created, and the topics they are to consider are largely self-evident from the committees' names. One is a Joint Legislative Study Committee on Civil Commitment of Sexual Predators Who Are Determined to be Incapable of Proceeding to Trial, which will review whether current laws adequately address public safety issues when a defendant who is charged with a sex offense against a child is found incapable of proceeding to trial but does not meet the criteria for involuntary commitment. The Partition Sales Study Committee is to look at the effect of partition sale procedures on the economic use and loss of inherited property and farmland by heirs. The Joint Legislative Study Commission on State Guardianship Laws is to study a wide range of topics concerning guardianship statutes.

A separate act, S.L. 2008-4 (H 2189), requires law enforcement officers to provide additional information to domestic violence victims, as discussed below, and also directs the Domestic Violence Commission to study the adoption of an automated statewide system to notify victims who have received protective orders of critical dates such as when the respondent will be released from custody.

## Miscellaneous

S.L. 2008-12 (H 724) amends G.S. 50-13.4 to remove the requirement that a child support order include the Social Security numbers of the parties.

Under G.S. 15A-831 law enforcement officers are required to provide certain information, including the availability of medical services and contract information for prosecutors, to victims of specified domestic violence felonies and misdemeanors. S.L. 2008-4 amends that statute to include in the information to be provided to the victim the informational sheet developed by AOC under G.S. 50B-3(c1) listing services for domestic violence, sexual assault, victims compensation, legal aid and address confidentiality, and the right to apply for a concealed handgun permit. The informational sheet needs to be provided only if the victim and accused are within a personal relationship.

Changes concerning the public financing of judicial election campaigns are discussed in Chapter 8, "Elections." Changes in the law concerning class actions for tax refunds based on the unconstitutionality of tax statutes are included in the appropriations act and discussed in Chapter 26, "State Taxation."

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