NORTH CAROLINA Judicial COLLEGE

Agenda

Training for New Clerks of Superior Court

January 8–10, 2013
School of Government, Chapel Hill, NC

Tuesday, January 8

10:45 a.m. **Welcome and Introduction**
Jim Drennan, School of Government

11:00 a.m. **Civil Matters: Exemptions**
Ann Anderson, School of Government

11:45 p.m. **Civil Matters: Default Judgment, Extensions of Time, and Confessions of Judgment**
Ann Anderson

12:30 p.m. **Lunch at the School of Government**

1:30 p.m. **Criminal Matters**
Todd Tilley, Clerk of Superior Court, Perquimans County
Jim Drennan

2:45 p.m. **Break**

3:00 p.m. **Introduction to Contested Hearings**
Ann Anderson

3:45 p.m. **Break**

4:00 p.m. **Introduction to Contested Hearings, cont'd**

4:45 p.m. **Adjourn**

Wednesday, January 9

9:30 a.m. **Ex Parte Communications**
Pamela W. Best, AOC Deputy Legal Counsel

10:15 a.m. **Dispensing Legal Advice**
Pamela Best

11:00 a.m. **Break**

11:15 p.m. **Decedents' Estates: Essential Terminology**
Amy L. Funderburk, AOC Assistant Legal Counsel

12:00 p.m. **Lunch at School of Government**

1:00 p.m. **Decedents' Estates: Essential Terminology, cont'd.**

1:45 p.m. **Break**

2:00 p.m. **Introduction to the Guardianship Process**
Mariah D. McKinney, Project Coordinator,
AOC-Organizational Development and Planning

3:00 p.m. **Break**

3:15 p.m. **Introduction to the Guardianship Process, cont'd.**

4:15 p.m. **Adjourn**

Thursday, January 10

9:30 a.m. **Introduction to Foreclosures**
Peter E. Powell, AOC Legal Counsel

10:45 a.m. **Break**

11:00 a.m. **Ethics, Fairness and Bias**
Jim Drennan
12:00: Lunch will be served during this presentation

1:00 p.m. **Dismiss**

TAB 1

Civil Matters: Exemptions

Designating Exemptions

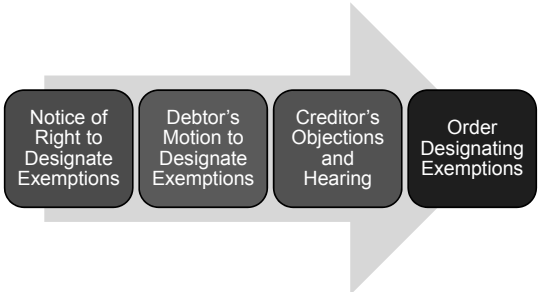
Ann M. Anderson
Training for New Clerks of Superior Court
January 8−10, 2013

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

What are exemptions?

- Judgment debtor's opportunity to keep certain property out of the hands of the judgment creditor.
- Certain property is exempt (free) from the creditor's grasp.

Overview of the Process



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Types of Exemptions

- Statutory
  - *By far* the most commonly used
- Constitutional
  - Typically only used if debtor waived statutory exemptions.

Statutory Exemptions

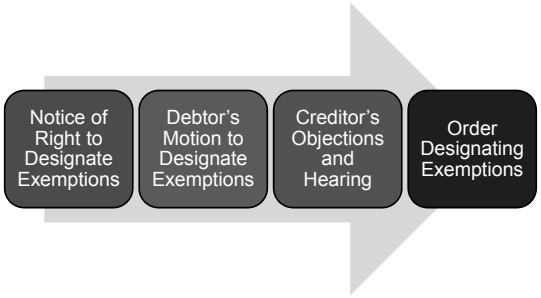
- G.S. § 1C-1601
- Clerk's Manual Chapter: "Setting Aside Exemptions"

Exemptions Available

- Residence – up to $35,000
- Motor vehicle – up to $3500
- Household goods and apparel – up to $5000 (plus $1,000 for each dependent)
- "Wild card" – up to $5000 of unused residence exemption
- Tools of trade – up to $2000
- Others: Life insurance, health aids, personal injury awards, IRAs and certain retirement, college savings plans, alimony and support

HOW EXEMPTIONS ARE CLAIMED

Overview of the Process



Clerk's Determination

- Judgment creditor asks for execution.
- Clerk determines if debtor is entitled to exemptions.
  - Debtor is individual
  - Debtor is North Carolina resident
  - Judgment is not for child support, alimony, or equitable distribution, state or local taxes, or to enforce lien under Chapter 44.

Clerk's Determination

- Clerk determines if exemptions have already been designated in that judgment (in an earlier execution).
  - Whether to issue new Notice of Rights to the debtor is a matter of policy in each clerk's office.
  - Policy should reflect allowing exemptions to be taken whenever possible.

Notice of Rights

- Notice of Rights issued to debtor.
- Forms:
  - Notice of Right to Have Exemptions Designated (AOC-CV-406)
  - Motion to Claim Exempt Property (Statutory Exemptions) (AOC-CV-415)*

*AOC-CV-407 if judgment before 1/1/06

Notice of Rights

- Clerk gives to creditor:
  - Original and copy of Notice of Rights.
  - Original and two copies of Motion.

  (Creditor usually brings these to the clerk with captions completed.)
- Original of Notice of Rights is for return of service. Copy is for service on debtor.
- Original and two copies of Motion are served on debtor.

Service on Debtor

- Creditor serves the Notice of Rights (with copies of Motion) on debtor.
  - Must first try rule 4 service (certified mail, Fed Ex/UPS, US mail signature confirmation, sheriff service)
  - If the attempt to serve by Rule 4 does not work, may serve by US mail.

Debtor's Claims

- Debtor must claim exemptions on time or waives them.
  - 20 days after sheriff's service
  - 20 days after certified mail delivery or receipt of Fed Ex/UPS delivery
  - 23 days after first class mail
- Clerk (or dist ct judge) may relieve waiver for mistake, surprise, excusable neglect any time before sale.

Debtor's Claims

- Debtor claims exemptions in 1 of 2 ways:
  - Filing the Motion to Claim Exemptions (AOC-CV-415)
    - Must also be served on creditor under Rule 5.
  - Requesting (in writing) a hearing before the clerk to claim exemptions
    - Clerk sets hearing and issues Notice of Hearing on Exempt Property (AOC-CV-408).
    - Clerk checks block one on form.

Debtor's Claims

- At the hearing:
  - Clerk goes through Motion form with debtor and helps debtor complete the Motion.
    - Does not make decisions for the debtor, but helps explain the exemptions and offer guidance in completing the form.
  - Creditor may attend the hearing, but does not have a right to object to debtor's valuations during the hearing.

Exemptions Available

- Residence – up to $35,000
- Motor vehicle – up to $3500
- Household goods and apparel – up to $5000 (plus $1,000 for each dependent)
- "Wild card" – up to $5000 of unused residence exemption
- Tools of trade – up to $2000
- Others: Life insurance, health aids, personal injury awards, IRAs and certain retirement, college savings plans, alimony and support

Residence Exemption

- Value of residence (real estate or mobile home) or burial plot up to $35,000
- $60,000 if:
  - unmarried,
  - 65 or older, *and*
  - previously owned home by entireties (or with right of survivorship) and co-owner is deceased.

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Residence Exemption

- "Entireties" property
  - If only one spouse is the debtor, and owns home with spouse as tenants by the entireties, a creditor cannot reach that asset. *No need to exempt.*
  - If both spouses are debtors, a creditor can reach the asset. The exemption is applicable, and they may claim the full exemption equally.
    - Up to $70,000 total

Example

- Debtor owns home worth $300,000.
- Home is subject to $275,000 mortgage. (Debtor has $25,000 equity.)
- What is the amount of debtor's exemption?
- What if debtor owes $200,000 on mortgage ($100,000 equity)?
  - How much is exemption?
  - What if debtor is married, and spouse is not a debtor?
  - What if spouse is also a debtor?

"Wild Card" Exemption

- Only used if there's "leftover" residence exemption.
- Debtor may claim up to $5000 in any property (real or personal) using remaining residence exemption value.

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"Wild Card" Examples

- Residence exemption taken: 35K
  Wild card available?
- Residence exemption taken: 31K
  Wild card available?
- Residence exemption taken: 20K
  Wild card available?
- Residence exemption not taken b/c spouse co-owns house (by entireties).
  Wild card available?

Motor Vehicle Exemption

- One motor vehicle.
- Debtor may exempt up to $3500 of its value.

Motor Vehicle Exemption

- May use "wild card" for value above $3500 (or another car).
- Example:
  Car valued at $6000.
  Auto exemption taken for $3500.
  Wild card taken for $2500.

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Household Goods Exemption

- Debtor may exempt up to $5000 in household goods.
  - Furnishings and other "goods" (televisions)
  - Wearing apparel
  - Appliances
  - Books
  - Animals
  - Crops
  - Musical instruments

Household Goods Exemption

- Debtor may exempt another $1000 in goods for each dependent, up to $4000 total.
- Total exemption is $9000 ($5000 + $4000), even if debtor has more than 4 dependents.

Tools of the Trade Exemption

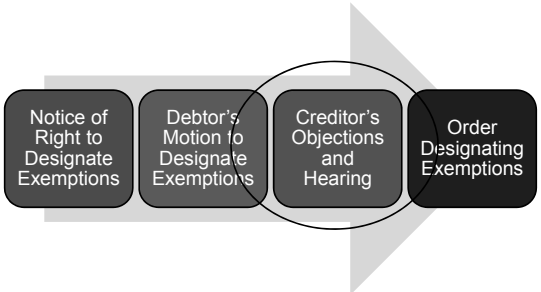
- Debtor may exempt $2000 in goods used as tools of his or her trade.

Other exemptions

- Life insurance, if spouse or children are sole beneficiaries
- Health aids
- Compensation for injury or death of person on whom debtor was dependent
- IRAs
- College savings plan up to $25K
- Certain out-of-state retirement benefits
- Alimony and support

EXERCISE

Overview of the Process



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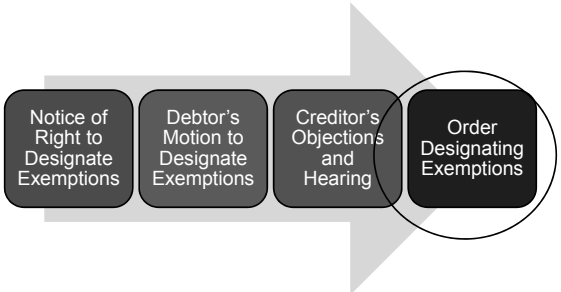
Creditor's Objections

- Creditor has 10 days from service of Motion *or* from date of hearing to object to exemptions.
- Creditor notifies clerk of objections.

Creditor's Objections

- If creditor objects, clerk sets hearing before district court judge.
- Next non-jury civil session.
- *Clerk* gives notice of hearing to debtor and creditor.
  - Notice of Hearing on Exempt Property (AOC-CV-408) (block two).

Overview of the Process



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The Order

- Clerk issues Order Designating Exempt Property (AOC-CV-409).
  - –May do so:
    - As soon as creditor fails to object to exemptions (10 days); or
    - When creditor requests issuance of execution (more common).

The Order

- If the case is heard by a district court judge (upon creditor's objection), the district court judge enters the Order Designating Exempt Property (AOC-CV-409).

Post-Order

- Clerk notes in judgment docket that exemptions were designated.

Appeal

- Appeal of clerk's Order is to the district court. (10 days)
- Appeal of district court's Order is to the Court of Appeals.

Constitutional Exemptions

- Generally used only if debtor waives statutory exemptions.
- May be claimed any time until the proceeds of sale are applied to the debt.

Constitutional Exemptions

- Exemptions:
  - $1000.00 in real property
  - $500.00 in personal property
- Motion to Claim Exempt Property (Constitutional Exemptions) (AOC-CV-411)

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Designating Exemptions
Orientation for New Clerks of Superior Court

January 8−10, 2013

Exemptions Exercise

Debtor, Age 43
Divorced
One son, Age 16

Possible Exemptions:

1. One House:
   Fair Market Value: $210,000
   Mortgage: $195,000
2. Antique grandfather clock - $500.00
3. 60” flatscreen television - $1500.00
4. Violin - $2000
5. Painting by Jane Filer - $1000
6. Viking professional refrigerator - $1000
7. Diamond earrings - $2000
8. Cars
   a. 2004 Toyota Camry - $4000
   b. 2010 Honda CR-V (FMV - $19,000; Liens - $14,000)
9. Antique Piano - $1000
10. Honda motorcycle - $4000
11. 1/5 interest in farmland inherited from grandmother (he and other heirs are tenants-in-common) - $5000
12. Diabetes monitoring system - $600
13. Laptop Computer ($1500) and Apple iPad ($300) and server ($800)
14. $8000 in fund for son (payments made to the fund monthly between 2005 and the present)

STATE OF NORTH CAROLINA

_____ County

File No.	Abstract No.
Judgment Docket Book And Page No.	
Date Judgment Filed	

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Plaintiff	NOTICE OF RIGHT TO HAVE EXEMPTIONS DESIGNATED G.S. 1C-1603
VERSUS	
Name Of Defendant	

TO: Name And Address Of Judgment Debtor 1	TO: Name And Address Of Judgment Debtor 2

NOTE: ***Attach a copy of AOC-CV-407 if the judgment was filed before 1/1/06. For judgments filed after 1/1/06, attach AOC-CV-415.***

A judgment has been entered against you in the case captioned above in which you have been ordered to
☐ pay money over to the judgment creditor. ☐ turn over various household belongings to the judgment creditor.

The judgment creditor (person who has the judgment against you) is now seeking to collect this judgment and has asked me to give you notice of your rights. Under the Constitution and laws of North Carolina, you have the right to exempt from the collection of the judgment certain of your property (in other words, to keep it from being taken from you). If you wish to keep your exempt property, you MUST fill out the attached Motion To Claim Exempt Property and mail or take it to the Clerk of Superior Court at the address listed below. You MUST also mail or take a copy to the judgment creditor at the address listed below. The law gives you another option of requesting, in writing, a hearing before the Clerk to claim your exemptions. If you make a written request for a hearing, you will be notified of the time and place of the hearing when you may claim your exemptions.

It is important that you respond to this Notice no later than twenty (20) days after it was served on you because you will lose valuable statutory rights if you do nothing. If you do not respond, you will give up your right to statutory exemptions and the judgment creditor may be able to take any or all of your property to satisfy the judgment. **You have certain constitutional rights you may claim if you give up your statutory rights.** You may wish to consider hiring an attorney to help you with this proceeding to make certain that you receive all the protections to which you are entitled.

NOTICE TO JUDGMENT DEBTOR: ***THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED IN THE MOTION TO CLAIM EXEMPT PROPERTY THAT IS ENCLOSED WITH THIS NOTICE.*** *These exemptions may include social security, unemployment, and workers' compensation benefits and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property.*

Name And Address Of Judgment Creditor Or Attorney	Date	Signature
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	
	Address Of The Clerk Of Superior Court	
Telephone No.		

NOTICE TO THE JUDGMENT CREDITOR:
You may serve this Notice and the Motion To Claim Exempt Property by mailing a copy of each, registered or certified mail, return receipt requested, addressed to the judgment debtor. To prove service, you must file an affidavit (notarized by a notary public) with the Clerk asserting that (1) a copy of the Notice of Rights and Motion To Claim Exempt Property was deposited in the post office for mailing by registered or certified mail, return receipt requested; (2) it was in fact received as evidenced by the attached registry receipt or other evidence of delivery; and (3) the genuine receipt or other evidence of delivery is attached. You must attach the post office delivery receipt to the affidavit. Alternatively, you may choose to have this Notice and the Motion served by the sheriff. If you select this method, you must pay a service fee. If your attempted service by certified or registered mail or personal service by the sheriff fails, you may then serve the judgment debtor by mailing a copy of Notice and Motion to the judgment debtor at his/her last known address. To prove service, you must file a certificate with the Clerk that the notice and motion were served indicating why you used such service, the date the notice was mailed and the address to which it was mailed. Remember, you may NOT use service by regular first class mail until you have tried first to serve the judgment debtor personally or by certified or registered mail and such service was unsuccessful.

(Over)

RETURN OF SERVICE

I certify that this Notice and a copy of a Motion to Claim Exempt Property were received and served as follows:

JUDGMENT DEBTOR 1

Date Served	*Time Served* ☐ AM ☐ PM	*Name Of Judgment Debtor 1*

☐ By delivering to the judgment debtor named above a copy of this Notice and Motion To Claim Exempt Property.

☐ By leaving a copy of this Notice and Motion To Claim Exempt Property at the dwelling house or usual place of abode of the judgment debtor named above with a person of suitable age and discretion then residing therein.

Name And Address Of Person With Whom Copies Left

☐ Other Manner Of Service *(specify)*

☐ Judgment debtor WAS NOT served for the following reason:

Service Fee Paid	*Date Received*	*Name Of Sheriff (Type Or Print)*
$		
Paid By	*Date Of Return*	*County*
		Signature Of Deputy Sheriff Making Return

JUDGMENT DEBTOR 2

Date Served	*Time Served* ☐ AM ☐ PM	*Name Of Judgment Debtor 2*

☐ By delivering to the judgment debtor named above a copy of this Notice and Motion To Claim Exempt Property.

☐ By leaving a copy of this Notice and Motion To Claim Exempt Property at the dwelling house or usual place of abode of the judgment debtor named above with a person of suitable age and discretion then residing therein.

Name And Address Of Person With Whom Copies Left

☐ Other Manner Of Service *(specify)*

☐ Judgment debtor WAS NOT served for the following reason:

Service Fee Paid	*Date Received*	*Name Of Sheriff*
$		
Paid By	*Date Of Return*	*County*
		Signature Of Deputy Sheriff Making Return

(TYPE OR PRINT IN BLACK INK)

STATE OF NORTH CAROLINA

_____ County

File No.	Abstract No.
Judgment Docket Book And Page No.	
Date Judgment Filed	

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Judgment Creditor (Plaintiff)
VERSUS
Name Of Judgment Debtor (Defendant)

MOTION TO CLAIM EXEMPT PROPERTY (STATUTORY EXEMPTIONS)

(Use if judgment filed after 1/1/06)

G.S. 1C-1603(c)

NOTE TO JUDGMENT DEBTOR: *The Clerk of Superior Court cannot fill out this form for you. If you need assistance, you should talk with an attorney.* ***THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED BELOW.*** *These exemptions may include social security, unemployment, and workers' compensation benefits and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property.*

You must pay $20 to the Clerk of Superior Court to file this document. Payment can be made in cash, cashier's check or money order. If you cannot afford to pay this fee you can apply to the Clerk to file as an indigent by completing form "PETITION TO SUE/APPEAL/FILE MOTIONS" AOC-G-106.

I, the undersigned, move to set aside the property claimed below as exempt.

1. I am a citizen and resident of _____.
2. ☐ a. I am married to _____.
   ☐ b. I am not married.
3. My current address is _____.
4. The following persons are dependent on me for support:

Name(s) Of Person(s) Dependent On Me	Age	Relationship

5. I wish to claim as exempt *(keep from being taken)* my interest in the following real or personal property, or in a cooperative that owns property, that I use as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed $35,000.00 except that if I am unmarried and am 65 years of age or older, I am entitled to claim a total exemption in the residence and burial plots not to exceed $60,000.00 so long as the property was previously owned by me as a tenant by the entireties or as a joint tenant with rights of survivorship, and the former co-owner of the property is deceased.

Street Address Of Residence		
County Where Property Located	Township	No. By Which Tax Assessor Identifies Property

Legal Description (Attach a copy of your deed or other instrument of conveyance or describe property in as much detail as possible. Attach additional sheets if necessary.)

☐ I am unmarried and 65 years of age or older and this property was previously owned by me as a tenant by entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased.

Name(s) Of Owner(s) Of Record Of Residence	Estimated Value Of Residence (What You Think You Could Sell It For)
	$

(Over)

Amount Of Lien(s) And Name(s) And Address(es) Of Lienholder(s): *(How much money is owed on the property and to whom)*	Current Amount Owed
	$
	$
Location Of Burial Plots Claimed	*Value Of Burial Plots Claimed* $

6. I wish to claim the following personal property consisting of household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments as exempt from the claims of my creditors *(in other words, keep them from being taken from me)*. These items of personal property are held primarily for my personal, family or household use.

   I understand that I am entitled to personal property worth the sum of $5,000.00. I understand I am also entitled to an additional $1,000.00 for each person dependent upon me for support, but not to exceed $4,000.00 for dependents. I further understand that I am entitled to this amount after deducting from the value of the property the amount of any valid lien or security interest. Property purchased within ninety (90) days of this proceeding may not be exempt. *(Some examples of household goods would be TV, appliances, furniture, clothing, radios, record players.)*

Item Of Property	Fair Market Value *(What You Could Sell It For)*	Amount Of Lien Or Security Interest *(Amount Owed On Property)*	Name(s) Of Lienholder(s) *(To Whom Money Is Owed)*	Value Of Debtor's (Defendant's) Interest *(Fair Market Value Less Amount Owed)*
	$	$		$
	$	$		$
	$	$		$

7. I wish to claim my interest in the following motor vehicle as exempt from the claims of my creditors. I understand that I am entitled to my interest in one motor vehicle worth the sum of $3,500.00 after deduction of any valid liens or security interests. I understand that a motor vehicle purchased within ninety (90) days of this proceeding may not be exempt.

Make And Model	*Year*	*Name Of Title Owner Of Record*
Fair Market Value (What You Could Sell It For) $		*Name Of Lienholder(s) Of Record (Person(s) To Whom Money Is Owed)*
Amount Of Liens (Amount Owed) $		*Value Of Debtor's (Defendant's) Interest (Fair Market Value Less Amount Owed)* $

8. (This item is to claim any other property you own that you wish to exempt.) I wish to claim the following property as exempt because I claimed residential real or personal property as exempt that is worth less than $35,000.00, or I made no claim for a residential exemption under section (5) above. I understand that I am entitled to an exemption of up to $5,000.00 on any property only if I made no claim under section (5) or a claim that was less than $35,000.00 under Section (5). I understand that I am entitled to claim any unused amount that I was permitted to take under section (5) up to a maximum of $5,000.00 in any property. *(Examples: If you claim $34,000 under section (5), $1,000 allowed here; if you claim $30,000 under section (5), $5,000 allowed here; if you claim $35,000 under section (5), no claim allowed here.)* I further understand that the amount of my claim under this section is after the deduction from the value of this property of the amount of any valid lien or security interests and that tangible personal property purchased within ninety (90) days of this proceeding may not be exempt.

Item Of Personal Property Claimed	Fair Market Value	Amount Of Lien(s)	Name(s) Of Lienholder(s)	Value Of Debtor's (Defendant's) Interest
	$	$		$
	$	$		$
	$	$		$
	$	$		$

Real Property Claimed *(I understand that if I wish to claim more than one parcel, I must attach additional pages setting forth the following information for each parcel claimed as exempt.)*

Street Address		*Estimated Value Of Property (What You Could Sell It For)* $
County Where Property Located	*Township*	*No. By Which Tax Assessor Identifies Property*

Description (Attach a copy of your deed or other instrument of conveyance or describe the property in as much detail as possible.)

VERSUS	File No.	Abstract No.
Name Of Judgment Creditor (Plaintiff)	Judgment Docket Book And Page No.	Date Judgment Filed

Name And Address Of Lienholder	Current Amount Owed
	$
Name And Address Of Lienholder	Current Amount Owed
	$

(Attach additional sheets for more lienholders.)

9. I wish to claim the following items of health care aid *(wheelchairs, hearing aids, etc.)* necessary for ☐ myself ☐ my dependents.

Item	Purpose

10. I wish to claim the following implements, professional books, or tools (not to exceed $2,000.00), of my trade or the trade of my dependent. I understand such property purchased within ninety (90) days of this proceeding may not be exempt.

Item	Estimated Value *(What You Could Sell It For)*	What Business Or Trade Used In
	$	
	$	
	$	

11. I wish to claim the following life insurance policies whose sole beneficiaries are my spouse and/or my children as exempt.

Name Of Insurer	Policy Number	Beneficiary(ies)

12. I wish to claim as exempt the following compensation that I received or to which I am entitled for the personal injury of myself or a person upon whom I was dependent for support, including compensation from a private disability policy or an annuity, or compensation that I received for the death of a person upon whom I was dependent for support. I understand that this compensation is not exempt from claims for funeral, legal, medical, dental, hospital or health care charges related to the accident or injury that resulted in the payment of the compensation to me. *(Add additional sheets if more than one amount of compensation.)*

Amount Of Compensation	Method Of Payment Lump Sum Or Installments (If Installments, State Amount, Frequency And Duration Of Payments)
$	
Location/Source Of Compensation	

13. I wish to claim my individual retirement accounts, including Roth accounts, and individual retirement annuities (IRA's) that are listed below.

Name Of Custodian Of IRA Account	Type Of Account	Account Number
Name Of Custodian Of IRA Account	Type Of Account	Account Number

14. I wish to claim the following funds I hold in a college savings plan that is qualified under section 529 of the Internal Revenue Code, not to exceed $25,000.00. I understand that the plan must be for my child and must actually be used for the child's college expenses. I understand that I may not exempt any funds I placed in this account within the preceding 12 months, except to the extent that any contributions were made in the ordinary course of my financial affairs and were consistent with my past pattern of contributions.

College Savings Plan	Account Number	Value	Name(s) Of Child(ren) Beneficiaries
		$	
		$	

(Over)

15. I wish to claim the following retirement benefits to which I am entitled under the retirement plans of other states and governmental units of other states. I understand that these benefits are exempt only to the extent these benefits are exempt under the law of the state or governmental unit under which the benefit plan was established.

State/Governmental Unit	Name of Retirement Plan	Identifying Number

16. I wish to claim as exempt any alimony, support, separate maintenance, or child support payments or funds that I have received or that I am entitled to receive. I understand that these payments are exempt only to the extent that they are reasonably necessary for my support or for the support of a person dependent on me for support.

Type Of Support	Person Paying Support	Amount Of Support	Location Of Funds
		$	
		$	

17. The following is a complete listing of my property which I do **NOT** claim as exempt.

Item	Location	Estimated Value
		$
		$
		$

18. I certify that the above statements are true.

Date	*Signature Of Judgment Debtor/Attorney For Debtor (Defendant)*

19. A copy of this Motion was served on the judgment creditor (plaintiff) by: ☐ delivering a copy to the judgment creditor (plaintiff) personally ☐ delivering a copy to _____, the judgment creditor's attorney. ☐ depositing a copy of this Motion in a post-paid properly addressed envelope in a post office, addressed to the judgment creditor (plaintiff) at the address shown on the notice of rights served on me. ☐ depositing a copy of this motion in a post-paid properly addressed envelope in a post office, addressed to the judgment creditor's (plaintiff's) attorney at the following address: _____

Date	*Address And Phone Number Of Attorney For Debtor (Defendant)*
Signature Of Judgment Debtor/Attorney For Debtor (Defendant)	

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Judgment Creditor (Plaintiff)	**NOTICE OF HEARING ON EXEMPT PROPERTY**
VERSUS	
Name Of Judgment Debtor (Defendant)	

☐ The judgment debtor (defendant) in the above case has requested a hearing to claim his/her exemptions, which will be held before the Clerk of Superior Court at the date, time and location set out below. If the judgment debtor (defendant) does not appear at the hearing, the judgment debtor (defendant) gives up his/her right to statutory exemptions. The creditor (plaintiff) has ten (10) days after the hearing to file any objection to the exemptions claimed. If no objection is filed, the Clerk will enter an order designating the property claimed at the hearing as exempt.

☐ The judgment creditor (plaintiff) in the above case has objected to the exemptions claimed by the judgment debtor (defendant). A hearing to designate exemptions will be held by the district court judge at the date, time and location set out below.

Name Of Judicial Official			Date Issued
Date Of Hearing	Time Of Hearing	☐ AM ☐ PM	Signature
Location Of Hearing			☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

STATE OF NORTH CAROLINA

_____ County

File No.	Abstract No.
Film No.	Judgment Docket Book And Page No.

Name Of Judgment Creditor (Plaintiff)

VERSUS

Name Of Judgment Debtor (Defendant)

ORDER DESIGNATING EXEMPT PROPERTY

Upon notice and motion duly made, and for good cause shown, it is ORDERED that:

☐ all property listed in numbers 5 through 13 in the motion and schedule attached to this Order (AOC-CV-407) is designated as exempt property. *(For Judgments entered before 1/1/06)*

☐ all property listed in numbers 5 through 16 in the motion and schedule attached to this Order (AOC-CV-415) is designated as exempt property. *(For Judgments entered after 1/1/06)*

☐ the following property belonging to the debtor (defendant), of the value as shown, is designated as exempt property.

Item	Description	Debtor's Interest	Exemption Value
Residence			
Burial Plot			
Household goods, furnishings, appliances, etc.			
Interest in motor vehicle			
List any other exempt property			

☐ It is further ORDERED as follows:

☐ The motion to claim exempt property is denied. *(Give reasons.)*

Date	Signature	☐ Assistant CSC ☐ Clerk Of Superior Court

AOC-CV-409, Rev. 2/06

TAB 2

Civil Matters:

Default Judgment

**please note that
“Judgment” has only one
“e”

Civil Matters:
Default, Extending Time, Confessions of Judgment

Ann M. Anderson
New Clerks of Superior Court
January 8−10, 2013

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

Default

What is it?

When a defending party fails to respond to a pleading, the claimant may be able to obtain judgment in his favor without going through the litigation process – *judgment by default*.

Default

Rule of Civil Procedure 55

UNC SCHOOL OF GOVERNMENT

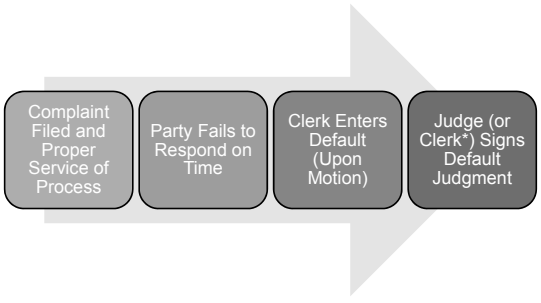
Default

- Applies when party fails to:
  - Answer complaint
  - Reply to counterclaim
  - Answer cross-claim
  - Answer third party claim

Default

- 2 steps
  - Entry of Default
  - Default Judgment

Default



*In certain circumstances

Entry

- Entry of Default
  - An official entry in the record that a party has failed to plead and allegations are deemed admitted
  - Claimant presents motion to clerk for entry
    - Must demonstrate that party was properly served and has not filed responsive pleading.
    - No affidavit required. Record before the court should demonstrate the relevant dates.
    - *If Rule 12 motion or motion for extension of time is pending, no entry of default.*

Default

- Default Judgment

  Clerk may sign when:
  - Entry of default has been made
  - Amount shown by verified pleading or affidavit
  - Defaulting party has never made appearance
  - Defaulting party not infant or incompetent, nor the State of North Carolina (or agency or officer)
  - Claim is for a "sum certain" or "can by computation be made certain"

Default Judgment

"Sum certain" or "can by computation be made certain"
- Where contract makes clear what is due and/or interest can be calculated easily
  - Promissory notes
  - Bills of sale
- Typically will not apply in tort actions (personal injury, defamation, fraud, etc.)

Default Judgment

"Debt buyers" must show, by authenticated business records:

(1) The original account number.
(2) The original creditor.
(3) The amount of the original debt.
(4) An itemization of charges and fees claimed to be owed.
(5) The original charge-off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated.
(6) An itemization of post charge-off additions, where applicable.
(7) The date of last payment.
(8) The amount of interest and the basis for the interest charged.

See AOC Legal Memorandum dated 9.25.09.

Default Judgment

When in doubt, send to judge.

Question

- Pro se plaintiff brings motion for entry of default and default judgment against her former husband.
- You check the record, and note that husband was properly served the complaint by publication.
- The complaint is verified and shows husband owes $8,000 under written contract.
- May you enter default? Default judgment?

Default Judgment

Service by publication

- Where the responding party is served by publication, clerk may not enter default judgment unless moving party posts bond as set by clerk.
- Bond should suffice to cover harm to responding party should default judgment later be set aside.

Question

- Attorney brings you a motion for entry of judgment and default judgment.
- Complaint is a declaratory judgment action against the NC DOT.
- Complaint seeks declaration that DOT does not have a right of way adjacent to Plaintiff's land.
- DOT has been duly served and has failed to respond within 60 days.
- Default judgment?

Default Judgment

- Only applicable to cases for affirmative relief, not to declaratory judgment actions.
- No default against State, agencies of State, and officers sued in official capacity.

Default Judgment

Multiple defendants

- If all have been served and all failed to respond: May enter default judgment against all.
- If all have been served, and at least one has answered:
  - Has complaint alleged joint liability or joint and several liability?
    - If J&S liability (most prom. notes), default judgment against non-responding party is allowed.
    - If J liability only, no default judgment against non-responding party until liability of the other defendants has been adjudicated.

Setting Aside

- Entry of default: Clerk may set aside entry of default "for good cause shown" if default judgment has not been entered.
- Default Judgment: Clerk may set aside default judgment if
  - Clerk entered default judgment (not a judge); and
  - Clerk holds hearing; and
  - Moving party shows grounds under Rule 60(b). (Excusable neglect, no actual notice; order is void, etc.)

Handout:

Default Judgment Exercise

Extending Time

Rule of Civil Procedure 6(b)

Extending Time

- Clerk may extend time for parties to perform certain acts beyond time allowed in Rules of Civil Procedure.
  - Most common: To answer complaint; to respond to discovery requests

Extending Time

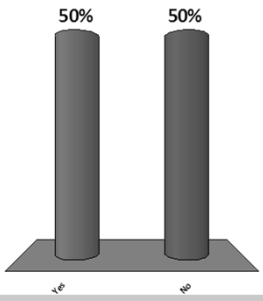
- Clerk may only extend time if deadline has not already passed.
- If it has passed, motion must go to judge for decision.
- No authority to extend deadlines in other statutes (outside the Rules of Civil Procedure).

Question

- Judge Smith has entered judgment against John after a bench trial.
- Rule 52 allows John 10 days to make a motion to Judge Smith to amend the judgment.
- On the 9th day, John files a motion for extension of time to make the Rule 52 motion to Judge Smith.

May you approve the request?

1. Yes
2. No



Extending Time

- Neither clerk nor judge (nor parties by agreement) may extend time to take action under Rules 50(b), 52, 59(b), (d), (e), and 60(b).

Confessions of Judgment

Rule of Civil Procedure 68.1

Confessions of Judgment

- What is a confession of judgment?
  - A person may "confess" to the court, without a lawsuit being filed, that he or she owes money to another.
  - Plaintiff must consent.

Confessions of Judgment

- Procedure:
  - Prospective signs sworn or verified statement authorizing entry of judgment against him or her in amount stated
  - Statement names prospective plaintiff, county of residence, defendant, county of residence, and states why the money is owed.
  - Upon proper filing, clerk enters judgment in amount confessed and dockets judgment as in other cases.

Confessions of Judgment

- Should only be entered in county where defendant resides or has real property or county where plaintiff resides.
- Filing fee: G.S. 7A-308(3).

New Clerks of Superior Court
January 8−10, 2013
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Default Judgment Exercise

Mary and Charles execute a promissory note with Community Bank in the original principal amount of $14,000. Community Bank sues Mary and Charles for failure to make payments. Mary and Charles are duly served the complaint and summons on **February 1**. The verified complaint states that the principal balance is $9,000.00 as of the date of filing. The complaint also states that payments are $500.00 on the first of each month, and that interest will continue to accumulate at the rate of 10% annually until the debt is satisfied. On **April 10**, Community Bank files a motion for entry of default and default judgment. Charles has filed an answer. Mary has not.

May you enter default against Charles? Mary?

If so, may you enter default *judgment* against Charles? Mary?

May your assistant clerk perform these tasks? Deputy clerk?

Assume you look in the file and see that Mary was granted an extension of time to answer the complaint (to **April 3**), but that she still has not filed an answer (by April 10).

May you enter default against her?

May you enter default *judgment* against her?

Noting that Mary's extension of time has recently passed, you believe she may soon file an answer. May you decline to enter default to allow her more time to answer?

Assume you enter default, and 10 days later Mary files a motion to set aside that entry. May you consider the motion? On what grounds may you grant it?

New Clerks of Superior Court
January 8–10, 2013
UNC School of Government

Civil Matters: Default, Extensions of Time, Confessions of Judgment

I. Entry of Default and Default Judgments. [Clerks' Manual Chapter 31]

A. Summary: The party obligated to respond to allegations has failed to respond, thus the allegations are deemed admitted, and claimant may obtain entry of default and default judgment without further litigation. Clerk enters default. Either clerk or a judge then enters default judgment, depending on nature of allegations.

B. Applicable Rule: Rule of Civil Procedure 55

C. Only applies where affirmative relief sought. Not for use in declaratory judgment actions.

D. Default judgments may not be entered against State of North Carolina, an agency of the State, or an officer sued in his or her official capacity.

E. Two Steps

1. Entry of Default:

a) Clerk has responsibility for entry of default

b) Essentially a notation on the record that one party has defaulted. Sets the stage for a default judgment.

c) Typically presented to clerk by motion (Motion for Entry of Default)

d) Affidavits sometimes accompany motions but are not required

e) Movant must demonstrate "default" – that a party obligated to respond has not responded to the pleading in the time permitted by the North Carolina Rules of Civil Procedure. This may include failure to:

(1) Answer complaint

(2) Reply to counterclaim

(3) Answer cross claim; or

(4) Answer third party complaint.

f) Time for response is typically 30 days from date of service (or Rule 6 extension) unless Rule 12(b) motion has been filed. See Rule12(a)(1).

(1) Responding party has 20 days to respond after court rules on Rule 12 motion.

g) Typically the record of the pleadings is adequate to demonstrate the relevant dates and the existence of default.

h) Remember: Record must show that responding party has been properly served per applicable rule of civil procedure.

i) If requirements for entry of default are met, clerk must enter default. Ministerial, not discretionary. Elected, assistant, and deputy clerks may perform this task. (A deputy clerk may not enter a default judgment.)

2. Default Judgment

a) Judge may sign any motion for default judgment. Clerk may sign in limited circumstances. When in doubt, send to judge.

b) Presented by motion (Motion for Default Judgment) along with affidavit or verified complaint. Motion may be combined with Motion for Entry of Default. When appropriate, they can be considered at the same time, but entry of default must precede default judgment.

c) Clerk may sign when:

(1) Entry of default has been properly made

(2) Claim is for a "sum certain" or "a sum which can by computation be made certain"

(3) Amount due is shown by affidavit or verified complaint. Unverified pleading alone is not sufficient.

(4) Defaulting party has never made an appearance (examples: filed answer, filed motion to extend time to answer, letter to court, appearance in court)

(5) Defaulting party is not an infant or incompetent or the State of North Carolina (or agency or official thereof)

d) "Sum certain" or ascertainable "by computation" usually involves situations where contract makes it clear and verified pleading/affidavit clearly alleges the amount due (promissory notes, contracts for goods or services sold and delivered)

(1) Caution: Not every contract action will give rise to "certain" damages. Warranties are contracts, but amounts due under breach of warranty are seldom certain. Also, tort and personal injury actions do not lend themselves to "sum certain" pleadings.

(2) Note: When in doubt, ask attorney moving for a copy of the contract if this will help you determine whether the amount due is certain. This is not required, however, and the allegations of the verified pleading or affidavit *may* suffice.

e) Service by publication: Where defaulting party was served by publication, moving party must post bond before clerk may enter default judgment. Bond should suffice to provide compensation for defaulted party should default be set aside and that party incur harm.

f) An assistant clerk may sign a default judgment. A deputy clerk may not.

g) Debt Buyers. Where the plaintiff is a "debt buyer" (a party who purchases delinquent consumer debt for collection purposes), that party must make the following additional showings, by authenticated business records, in order to obtain default judgment:

(1) Original account number

(2) Original creditor

(3) Amount of original debt

(4) Itemization of charges and fees claimed to be owed

(5) Original charge-off balance, or, if the balance has not been charged off, and explanation of how the balance was calculated

(6) Itemization of post charge-off additions, where applicable

(7) Date of last payment

(8) Amount of interest claimed and basis for interest charged. G.S. 58-70-155.

F. Setting Aside Entry of Default and Default Judgment

1. Typically upon motion of the defaulted party

2. Setting aside entry

a) Clerk or judge may set aside <u>entry</u> of default "for good cause shown" per Rule 55(d).

b) Entry may be set aside if default judgment has not yet been entered. If default judgment has been entered, default judgment should be set aside first.

3. Setting aside default judgment

a) Per rule 60(c), clerk may set aside default judgments they have entered (not ones a judge has entered).

b) Clerk holds hearing after notice to party that obtained the default.

c) Party moving to set aside default judgment must show grounds as stated in Rule 60(b).

II. Extending Time to Respond

A. Summary: Clerk has authority to extend time for parties to perform certain acts beyond the limits provided under Rules of Civil Procedure.

B. Applicable Rule: Rule of Civil Procedure 6(b)

C. Most common requests: Additional time to answer complaint (respond to counterclaim, etc.) and to file responses to discovery

D. Clerk may only extend time if deadline has not already passed. Otherwise, request must go to judge.

E. No authority to extend deadlines set by statutes other than the Rules of Civil Procedure.

F. No authority to extend time to make motions under Rules 50(b), 52, 59(b), (d), (e), and 60(b), except as those rules specify.

III. Confessions of Judgment [Clerks' Manual Chapter 30]

A. Summary: Allows a person to "confess" to the court that he or she owes money without a lawsuit being filed. Confession of judgment has same force and effect of regular judgment if procedure is followed.

B. Applicable Rule: Rule of Civil Procedure 68.1

C. Procedure:

1. Prospective defendant signs a sworn or verified statement authorizing the entry of judgment against him or her in the amount stated. Plaintiff must consent.

2. Statement must name the prospective plaintiff, county of residence, name of defendant, county of residence, and shall state why the defendant is liable to plaintiff (briefly).

3. May be entered only in county where defendant resides or has real property or county where plaintiff resides.

4. Upon proper filing by either prospective plaintiff or defendant, clerk enters the judgment in the amount confessed and dockets the judgment as in other cases.

TAB 3

Criminal Matters

Selected Issues in Criminal Cases

Jim Drennan and Todd Tilley
New Clerks School
Jan. 2013
UNC School of Government

1. Overview of Clerks Jurisdiction

2. Vehicle Seizure in DWI cases

3. Bonds in Criminal Cases

4. Determining Jail Credit

5. Criminal Record Checks

6. Public Record Requests

7. Expunctions

8. Handling Evidence

9. Conducting Initial and First Appearances

NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

EXPUNCTION GUIDE FOR CLERKS

October 2010
Prepared by Court Services

Table of Contents

0.0. Introduction

This document is intended to be a basic guide for clerks of superior court about the processes for expunction of records of the clerk, pursuant to the statutes authorizing expunction of those records.

Revision History
Appendix A provides the revision history for this guide. As changes are made to the guide's content to account for new legislation, updated business processes, or changes to automated systems, a brief summary of changes in each edition will be included in the revision history. With each edition, the guide will be reproduced in full, so prior editions should not be relied upon after publication of a new edition.

Replacement of Prior Expunction Documentation
This guide replaces prior presentations and handouts, generally titled "All About Expunctions," published by the North Carolina Administrative Office of the Courts (NCAOC). Prior versions of that document should not be relied upon as authoritative, because they are now outdated. In particular, the statutes for expunction of criminal case records were amended significantly by the passage of three legislative acts in 2009 and 2010:

- Session Law 2009-510 (Senate Bill 262, Expunctions/Purge Online Databases)
- Session Law 2009-577 (House Bill 1329, Consolidate Expunction Statutes)
- Session Law 2010-174 (House Bill 726, Clarify Expunctions)

The latter act, Session Law (S.L.) 2010-174, reconciled conflicting provisions of the two prior acts and made minor technical changes to the overall expunction process.

Effective Dates
Unless otherwise specified, the processes and statutes described in this guide apply as of **October 1, 2010**, the effective date of both S.L. 2009-510 and S.L. 2010-174.

Questions
Questions about the guide or expunction procedures should be directed to the Records Officer of the NCAOC's Court Services Division at (919) 890-1341

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NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

1.0. Expunction In General

1.1. Authority for Expunction

The clerk of superior court is the custodian of the records of the courts, and is required to keep records of "civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and all other records required by law to be maintained," according to rules prescribed by the Director of the Administrative Office of the Courts.[1]

Except where made confidential by statute, the clerk's records are public records, open to inspection of the public during regular office hours.[2] As public records, no person may "destroy, sell, loan, or otherwise dispose of" the clerk's records without the authorization of the N.C. Department of Cultural Resources.[3] In fact, unauthorized destruction or removal of the court's records is a crime, prosecutable under several statutes.[4]

This general prohibition on the destruction or removal of records applies to the courts. While the courts "have the inherent power and duty … to make their records speak the truth, they are without authority to annul or expunge an accurate record, or the records of another agency of government, absent the authority of statute."[5] Therefore the court may not destroy its own records except as specifically authorized by statute, such as in the various expunction statutes.

1.2. Legal Questions about Expunction

This guide does not attempt to give a comprehensive explanation of the criteria required for each type of expunction. Persons with questions about what records qualify for expunction should be directed to review the statutes or to consult with an attorney. **Neither the clerk nor the NCAOC can provide legal advice on this topic.** Ultimately, whether or not a record may be expunged is to be decided by the judge ruling on the petition.

1.3. Access to Information about Expunged Cases

When a case is expunged, it is as if the case (or the portion expunged) never existed. The clerk and the NCAOC should not acknowledge that there was ever any such record, even if presented with copies of the record made prior to its expunction. However, this presents problems for former petitioners who later need records documenting their prior expunctions.

1.3.1. Copies of Expunction Orders for Petitioners

As described below in the sections for the different types of expunctions, the NCAOC strongly recommends that any petitioner obtain a certified copy of an order expunging the record. After the clerk's destruction of the file, there is almost no circumstance in which a copy of the order may be produced.

1.3.2. Requests for Verification of Expunction

Pursuant to G.S. 15A-151(a), the NCAOC can not acknowledge a prior expunged case, except:

- to the judge hearing a new petition for expunction, when determining whether or not the petition is barred by a prior expunction;
- to the petitioner as provided in G.S. 15A-152; and
- in response to a subpoena or other court order issued in a civil action under G.S. 15A-152.

---

[1] G.S. 7A-109. *See also* G.S. 7A-180(3) and 7A-343(3).
[2] G.S. 7A-109(a). *See also* G.S. 132-6.
[3] G.S. 121-5(b).
[4] *See*, *e.g.*, G.S. 121-5(b) and G.S. 14-76.
[5] Opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, Oct. 13, 1995, citing *State v. Bellar*, 16 N.C. App. 339, 192 S.E.2d 86 (1972). Available online at: http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Criminal-Law-and-Procedure;-Expungement.aspx

A civil action under G.S. 15A-152 occurs when a person whose record was expunged sues a private entity in the business of providing criminal background checks, when that private entity's disclosure of the expunged case has caused the person some injury (*e.g.*, being denied a job). As evidence of the expunction, the person may apply to the NCAOC (*not* to the clerk) for verification of the prior expunction.

If a petitioner asks how to obtain verification of a prior expunction from the NCAOC, direct them to or provide a copy of the AOC-G-260, Application For Certificate Of Verification Of Prior Expunction. The form may be found on the NCAOC's forms website at http://www.nccourts.org/Forms/FormSearch.asp.

1.4. Summary of Expunction Statutes and Forms

Table 1 on the next page summarizes the expunction statutes for records of the court. Most expunction statutes concern criminal records of persons prosecuted as adults in the district and superior courts. A few statutes, listed at the end of the table, concern the expunction of certain records of juvenile proceedings and involuntary commitments of minors. The columns of the table are:

- **Statute (N.C.G.S.)** – the statute under which a particular type of expunction is authorized.
- **Records to Which Statute Applies** – a general description of the types of records or cases covered by the expunction statute.
- **AOC Form** – The form number of any pre-designed petition and order for expunction under the listed statute. NCAOC forms may be found online by searching with the form number on the NCAOC's forms website: http://www.nccourts.org/Forms/FormSearch.asp

  Several of the petition forms listed have an accompanying instruction sheet. The form number for the instruction sheet is the same as the petition, with the letter "I" added to the end. (*e.g.*, AOC-CR-264I.) When searching for the petitions by form number on the website, above, both the petition form and the instruction sheet will be listed as search results. Petitioners should be instructed to print *both* forms, so they will have a copy of the instructions for completing the petition and obtaining a hearing. The forms with instruction sheets are the AOC-CR-264, -266, -267, -268 and -269.
- **Fee** – The fee that must be paid to the clerk of superior court prior to a hearing on the expunction petition. The fee does not apply if the petitioner is allowed to petition as an indigent.[6]

[6] G.S. 15A-145(e) and G.S. 15A-145.2(d).

Statute (N.C.G.S.)	Records to Which Statute Applies	AOC Form	Fee
Expunctions of Criminal Records			
15A-145(a)	Misdemeanor convictions	AOC-CR-264	$125.00
15A-145(d1)	Misdemeanor larceny convictions (older than 15 years)	AOC-CR-267	$125.00
15A-145.1	Gang offenses	AOC-CR-269	None
15A-145.2(a)	Drug offenses dismissed after conditional discharge under G.S. 90-96(a) or (a1)	AOC-CR-266	$65.00
15A-145.2(b)	Drug offenses, dismissed or defendant acquitted	AOC-CR-266	$65.00
15A-145.2(c)	Drug or drug paraphernalia convictions	AOC-CR-266	$65.00
15A-145.3(a)	Toxic vapors offenses dismissed after conditional discharge under G.S. 90-113.14(a) or (a1)	AOC-CR-268	None
15A-145.3(b)	Toxic vapors or drug paraphernalia offenses, dismissed or defendant acquitted	AOC-CR-268	None
15A-145.3(c)	Toxic vapors convictions	AOC-CR-268	None
15A-146(a)	Criminal charge (or alcohol infraction before 12/1/1999), dismissed or defendant acquitted	AOC-CR-264	None
15A-146(a1)	Multiple criminal charges, dismissed or defendant acquitted	AOC-CR-264	None
15A-147	Convictions or charges resulting from identity theft	AOC-CR-263	None
15A-148	DNA records upon appellate reversal of conviction or upon pardon of innocence	None	None
15A-149	Conviction after pardon of innocence	AOC-CR-265	None
Other Expunction Statutes			
7B-3200 - 3202	Juvenile delinquency/undisciplined records	AOC-J-903M AOC-J-904M AOC-J-905M AOC-J-906M AOC-J-909M	None
122C-54(e)	Mental health commitment of minors	None	None

Table 1 – Summary of Expunction Statutes and Forms

The older AOC-CR-237, Request And Reports Convictions/Expunctions Dismissals And Discharge, is no longer accurate and was discontinued in 2009. Parties filing petitions for expunction should be directed to the current forms on the NCAOC's forms search page: http://www.nccourts.org/Forms/FormSearch.asp

2.0. Expunction of Criminal Records

All statutes concerning the expunction of criminal records are found in Article 5 of Chapter 15A of the North Carolina General Statutes.[7] This section addresses the clerk's processes for the filing, hearing, and disposition of petitions for expunction under the statutes in that article.

2.1. Criminal Expunction Petitions – Filing

Expunction of any record pursuant to Article 5 of Chapter 15A requires the filing of a petition for expunction by the person whose record is to be expunged (the "petitioner," hereafter), either *pro se* or through counsel. This section discusses the processes for the filing of the petition, any required filing fees, and the steps required prior to a hearing on the petition.

2.1.1. Expunction Forms

The forms for each expunction statute in Article 5 are listed with each statute in Table 1 earlier in this guide. For certain expunctions, the petitioner *must* use the official NCAOC form to petition for expunction. The expunctions for which the NCAOC form is required are listed in Table 2.

For Expunction Under…	… Petitioner Must Use:
G.S. 15A-145(a)	AOC-CR-264
G.S. 15A-145(d1)	AOC-CR-267
G.S. 15A-145.1	AOC-CR-269
G.S. 15A-145.2(a)	AOC-CR-266
G.S. 15A-145.3(a)	AOC-CR-268

Table 2 – NCAOC Forms Required for Certain Expunctions

The NCAOC forms are required because each of the listed statutes contains a requirement that the petitioner's application for expunction include an "application on a form approved by the Administrative Office of the Courts" for a criminal record check and a search of the NCAOC's prior expunction records. There is no form "approved by the Administrative Office of the Courts" for this purpose other than the expunction petition forms listed above.

The same expunction provisions listed in Table 2 above also require various affidavits by the petitioner (*e.g.*, that he has been of good behavior since the offense to be expunged) and other persons (*e.g.*, affidavits of the petitioner's good character and reputation in the community). There are no NCAOC forms for the affidavits.

For other expunction provisions, there is no statutory requirement that a petitioner use the NCAOC form. However, petitioners should be urged to use the NCAOC forms, because each form contains the necessary allegations, instructions, and orders for the corresponding statute.

2.1.2. Expunction Fees

Only two expunction statutes require the payment of filing fees: G.S. 15A-145 and G.S. 15A-145.2. The fees apply to any petition filed under the listed statute, so a petition under G.S. 15A-145 requires the payment of the fee, whether the petition is filed under subsection (a) (expunction of youthful misdemeanor convictions) or subsection (d1) (old misdemeanor larceny convictions).

Expunction Statute	Required Fee
G.S. 15A-145	$125.00
G.S. 15A-145.2	$65.00

Table 3 – Expunction Fees

The filing fees are not required if the petitioner is permitted to proceed as an indigent. G.S. 15A-145(e) and 15A-145.2(d). The clerk should evaluate a request to petition for expunction as an indigent in the same way that the clerk evaluates requests to sue as an indigent in civil cases under G.S. 1-110.

[7] Article 5 can be found online at: http://www.ncleg.net/gascripts/Statutes/StatutesTOC.pl?Chapter=0015A

2.1.3. Filing Venue

Some of the expunction statutes specify the venue in which the petition must be filed; others do not. As a general rule, the clerk should schedule the hearing in the trial division in which the case was disposed, *i.e.*, petitions in superior court cases should be set before the superior court; petitions in district court cases should be set before the district court. For the two statutes that require filing fees, there is no difference in the filing fee based upon the trial division in which the petition is filed or heard.

2.1.4. Where to House Petitions

When the expunction petition is filed, the original file may have already been destroyed pursuant to the Retention Schedule. If so, the clerk should create a replacement file solely for housing the petition and any reports returned from the SBI and the NCAOC.

If the original file still exists at the time of the filing of the petition, place the petition and any reports returned from the SBI and the NCAOC in the original file.

Any reports from the SBI and the NCAOC are confidential, and therefore must be kept under seal, whether in the original file or a replacement file. The actual petition is not confidential, and therefore does not need to be kept under seal.

2.1.5. "Screening" Expunction Petitions

As custodian of the record, the clerk's function in the expunction process is to receive petitions for filing, collect any necessary fees, schedule the petitions for hearing when required, and then file (and possibly carry out) any order entered by the court.

Questions such as whether or not a particular matter qualifies for expunction, whether or not the correct form has been used, and whether or not any affidavits or other materials required by a particular expunction statute have been included are not of concern to the clerk's office. The court before which the petition is heard must determine any questions of its adequacy.

If the petitioner or his attorney has any questions about a petition's adequacy or what is required for a particular petition, the clerk should not give legal advice about the expunction process. Instead, direct the questioner to the General Statutes. Similarly, the clerk should not express to the court an opinion about the validity of any expunction petition. Advocacy in favor of a petition for expunction must be by the petitioner or his attorney; advocacy against a petition is the purview of the district attorney.

2.1.6. Sending Petitions to the SBI and NCAOC

Certain expunction provisions require a criminal record check and a search by the NCAOC of the confidential index of prior expunctions prior to a hearing on the petition. Some of those provisions refer explicitly to a search by the NC Department of Justice (DOJ), which is performed by the State Bureau of Investigation (SBI), and by the NCAOC. Others merely condition the expunction upon a clean criminal history and having no prior expunction, both of which require a criminal record check and a search of the expunctions file (even though those provisions do not refer explicitly to DOJ or the NCAOC).

When a petition must be sent to the SBI and NCAOC, a judge must initiate the process by signing a request for the record searches. A section for this request is provided on each of the NCAOC expunction forms for the statutes that require it.

After a judge has signed the request, the petition must be sent first to the SBI, who will then send it to the NCAOC. The clerk should inform the petitioner or his attorney of the local process for sending the petition to the SBI. Some clerks send the petitions to the SBI, while others require that the petitioner do so.

SBI/NCAOC Checks Required	Request By Judge Provided On…	SBI/NCAOC Checks NOT Required
G.S. 15A-145(a)	AOC-CR-264	G.S. 15A-145.2(b)
G.S. 15A-145(d1)	AOC-CR-267	G.S. 15A-145.3(b)
G.S. 15A-145.1	AOC-CR-269	G.S. 15A-147
G.S. 15A-145.2(a) and (c)	AOC-CR-266	G.S. 15A-148
G.S. 15A-145.3(a) and (c)	AOC-CR-268	G.S. 15A-149

Table 4 – Petitions Routed to the SBI/NCAOC

When routing petitions to the SBI and NCAOC, **send only one copy**. The clerk should urge petitioners who route their own petitions to the SBI to do the same. The past practice in several counties and by certain attorneys of sending multiple copies of a petition to the SBI and NCAOC has resulted in significant delays in processing the petitions.

2.2. Criminal Expunction Petitions – Scheduling Hearings

Almost all expunctions require a hearing before the court. For expunction petitions sent to the SBI and NCAOC for record checks, the clerk should not schedule the hearing until the petition has been returned by the NCAOC and the petitioner requests a hearing.

For expunctions that do not require record checks, the clerk should schedule the hearing upon filing of the petition and collection of any fees (if required for the expunction in question). Upon scheduling the hearing, the clerk should notify both the petitioner and the district attorney of the hearing date.

For petitions under G.S. 15A-145(a), -145(d1), and -145.1, the district attorney must have at least ten (10) days from service of the petition in which to object to the petition. The procedure for such objections is not provided in the statutes, but this requires that the hearing on petitions under those statutes be scheduled at least ten days after service upon the district attorney.

For petitions under G.S. 15A-146 that include a request to expunge DNA records under subsection (b1) of that section[8], the hearing must be scheduled at least twenty (20) days after service of the petition on the district attorney.

The other expunction statutes do not specify a waiting period, so the hearing can be scheduled at any time that affords both parties reasonable notice.

The only exceptions to the requirement of a hearing are:

- G.S. 15A-148, for the expunction of DNA records when the petitioner's conviction was reversed and dismissed by the appellate division or when the petitioner received a pardon of innocence; and
- G.S. 15A-149, for expunction of the entire case record when the petitioner has received a pardon of innocence from the Governor.

For a petition filed under either section, the clerk must verify whether the appellate division's final opinion dismissing the case or the Governor's warrant of the pardon has been filed with the clerk. The clerk should then provide the petition and the verification to the court for a ruling. There is no hearing.

[8] Note that this is different from a petition to expunge DNA records under G.S. 15A-148, which applies only when the petitioner's conviction was reversed and the case dismissed by the appellate division or when the petitioner received a pardon of innocence from the Governor. A request under G.S. 15A-146(b1) appears to be incident to a petition to expunge the entire charge under 15A-146, generally.

2.3. Criminal Expunction Petitions – Processing Orders

2.3.1. Petition Denied

When an expunction petition is denied, the clerk should retain the order denying the petition and all materials associated with the expunction until the period for the petitioner to appeal the court's order has expired.

2.3.1.1. Retain All Petition Material Pending Appeal

The expunction statutes do not specify the procedure or deadline for appeals from expunction orders, so it is unclear whether such appeals follow the appellate rules for criminal cases or for civil cases. If criminal, it is further unclear whether or not an appeal from an expunction order entered in district court is appealed to the superior court for a *de novo* hearing or directly to the appellate division.[9]

Because it is unclear what set of appellate statutes or rules apply to appeals from orders on expunction petitions, the clerk should retain a denied petition and all attachments for thirty (30) days after filing of the court's order with the clerk. Thirty days is the longest of the regular appeal deadlines from the trial division.[10] Upon clarification of the applicable deadline by either the appellate division or the General Assembly, this guide will be updated accordingly.

Until the period for appeal has expired, any attached documentation for the petition should be retained under seal and made available only to the court, the petitioner (and his attorney), and the State, upon request. Many expunction petitions will have attached criminal history reports from the SBI and prior expunction reports from the NCAOC. Neither of those attachments is a public record, and so the material must be withheld from public inspection. The order denying the expunction, itself, is a public record.

2.3.1.2. Retain Order Denying Expunction but Destroy All Associated Documentation

When the period for appeal has expired, the clerk should remove the order denying the petition from all attachments. The order denying the expunction is to be placed in the case file. All associated documentation, including the SBI's criminal history, the NCAOC report of prior expunctions, and any affidavits by the petitioner, are to be destroyed.[11]

If the case type required microfilming, and the original physical case file was already microfilmed or destroyed before the expunction petition was filed, film the order denying the petition via the active microfilming method[12] and destroy the paper copy. If the case type did not require microfilming, and the original physical case file was already destroyed before the expunction petition was filed, destroy the order denying the expunction along with its attachments.

2.3.2. Petition Granted

When a petition for expunction is granted, the clerk must perform a number of actions:

- expunge all record of the case from the court's records;
- notify State and local agencies of the expunction by certified copy of the order; and
- provide a certified copy of the order to the NCAOC.

This section describes the steps necessary to expunge all records of the case, as well as considerations for records outside of the regular criminal case file and some special situations for particular expunctions.

Note: Occasionally, a court may enter an order for expunction that appears questionable on its face. When an order for expunction has been entered, if the order directs the expunction of a record that clearly does not

[9] At least one case before the N.C. Court of Appeals involved an appeal of an expunction order entered in the district court. *In re Robinson*, 172 N.C. App. 272, 615 S.E.2d 884 (2005). However, that case was heard upon the State's petition for writ of certiorari after the State "failed to timely appeal the order of the trial court." *Id* at 273. It was not a direct appeal, and the Court did not indicate whether jurisdiction would have lay with the appellate division had the State timely filed it as a direct appeal.
[10] N.C. Rule of Appellate Procedure 3(c).
[11] AOC Rule of Recordkeeping 9.5, Comment D.
[12] AOC Rule of Recordkeeping 2.6.

qualify for expunction (*e.g.*, expunction of an unpardoned murder conviction), the clerk may wish to confirm with the judge who entered the order that the order is what the court intended. If the judge indicates that the order is as intended, then the clerk should carry the order out.

2.3.2.1. Expunging the Court's Records

I. Do not delay expunction pending appeal.

Unlike a denied expunction petition, the clerk should not wait the entire period for appeal before carrying out a granted expunction order. Upon entry of the order, the petitioner is entitled to immediate expunction of the record. The clerk should delay carrying out an expunction order only when there is another order staying the execution of the expunction order during any appeal.

II. Copy of the Order for Petitioner

Upon entry of an expunction order, the NCAOC strongly advises petitioners to obtain a certified copy of the order for their records. The fee for certification under G.S. 7A-308 should be assessed for each copy.[13]

III. Expunging the Physical Case File

A. Remove the case file and all of its contents from the public shelves. Do not create a "dummy" shuck to take its place; there should be no placeholder on the shelves to indicate that the case ever existed.

B. If the case has a card in the former card file of the "Index to Criminal Actions," place the card in the case file.

C. Place the expunction petition and all associated material in the case file.

D. Place the case file in a secured location accessible only to the clerk of superior court.

1. Although the court's order to expunge is to be carried out immediately, the State still may appeal the court's order. If the State is successful in any appeal or other proceeding that reverses the order, the clerk must be able to reconstruct the original record.

2. For that reason, the NCAOC advises that the clerk retain the original case file for a reasonable period of time in order to be sure that the order will not be reversed. Many clerks' offices hold expunged case files for a period of 3-6 months.

3. If the clerk retains an expunged file in this manner, it is not a public record and may not be disclosed to anyone. The clerk should treat the file as if it had already been destroyed. The file should be disclosed only:

a. to the State or petitioner for the purpose of preparing the record on appeal;

b. if the expunction order is reversed, in which case the file becomes public again; or

c. in compliance with an order of the court to produce the file or some portion thereof.

E. Upon expiration of that period, if there is no appeal of the order pending, destroy the case file.

F. An expunged case file must be destroyed by burning, shredding, or burial.[14]

IV. Purging the Electronic Record

A. **Before deleting the electronic record**, write all microfilm numbers for the case in the "Microfilm No(s)." field of the expunction order. If the expunction order was not entered on an NCAOC form, add the numbers to the order and clearly label them "Microfilm."

B. All electronic record of the criminal proceeding must be deleted immediately.

[13] Note that some clerks take the position that the petitioner is entitled to one free certified copy of the order pursuant to G.S. 7A-308(b), "as a part of the regular disposition of [the] action." The NCAOC defers to the judgment of the elected clerk on this issue.
[14] NCAOC Rule of Recordkeeping 9.5. Note that burial does not guarantee that others can not obtain the physical file. For that reason, burning or shredding is strongly recommended.

C. Automated Criminal/Infraction System (ACIS)

1. Delete the case on the Clerk's Secured Menu with a reason code of "E" (expunction).

2. The deletion in ACIS will cause the automatic deletion of the case record in the NC Automated Warrant Repository (NC AWARE).

D. Financial Management System (FMS)

1. Replace the petitioner's name on all receipts or other financial records with "John Doe," plus the date of removal in DD-MM-YYYY format (*e.g.*, "John Doe 31-10-2010").

2. The bookkeeper should complete this replacement within 24 hours of receiving a copy of the expunction order from the criminal clerk. Note the completion of the replacement on the copy of the order and return it to the criminal clerk.[15]

V. Related Civil Records Not Expunged

A. An order of expunction generally applies **only** to the criminal case and its incidents (*e.g.*, a law enforcement agency's record of the arrest).

B. There is limited expunction of civil records in G.S. 15A-145 and -146, which allow the expunction of civil revocations of drivers licenses for certain offenses. This is the *only* civil record expunged under the expunction statutes of Chapter 15A.

C. **Do not** expunge or alter civil records outside of the criminal case file.

1. Civil judgment abstracts and index entries for attorney fees, restitution, bond forfeitures, or fines and costs docketed as civil judgments must remain undisturbed.

2. The paper records associated with those judgments (*e.g.*, attorney fee applications and appearance bonds) are to be expunged along with the criminal file.

VI. Other Case Records and Special Situations

A. Criminal Index Books.

1. If the case was recorded in the former criminal index books and the books are still in the clerk's office, the physical entry for the case must be obliterated by marking it out entirely in the book.

2. If the index book has previously been microfilmed, the clerk must contact the State Records Center to arrange the expunction of the entry from the microfilmed version. To do so, contact Becky McGee-Lankford at (919) 807-7353.

B. Index to Criminal Actions (ICA) Cards

1. As noted above, if an ICA index card exists for the case, it should be placed in the physical case file for destruction.

2. If the ICA card has been microfilmed, contact the NCAOC's Micrographics Department at (919) 890-1371 to arrange removal of the card image from the film.

C. Microfilmed/Scanned Records

1. Microfilm records do not require physical expunction. Deletion of the ACIS case with its microfilm reference effectively expunges it from access by the public.

2. Scanned records on CD must be expunged. To do so, contact the NCAOC's Micrographics Department at (919) 890-1371.

D. Minutes

Minutes do not need to be expunged. The inability to search them effectively makes it difficult to locate an expunged case, and their retention schedule ensures their destruction.

[15] NCAOC Rule of Recordkeeping 9.5.

E. Change of Venue/Transfer Cases.

1. When a case has been transferred from one county to another, *both* counties must expunge the record.

2. The clerk in the county in which the expunction order was entered must send a certified copy of the expunction order to the clerk in the other county, who will carry out the order for that county's copy of the record(s).

F. One Charge Expunged, Another Not

1. When the court orders expunction of one charge within a case, but does not order expunction of the entire case, the clerk must expunge only the charge affected by the order.

2. In all physical records of the case (*e.g.*, original criminal process, release orders, judgments), obliterate all reference to the expunged charge by marking it out entirely.

3. In ACIS, the entire case must be deleted. Then re-add the case from scratch under the same case number, including only the charge(s) that was not expunged.

4. If the charge(s) that was not expunged is an infraction, and no criminal charge remains on the case, then re-add the case to ACIS using an IF file number from the same calendar year. Be sure that the case is not flagged for reporting to the Division of Motor Vehicles (DMV).

2.3.2.2. Notifying State and Local Agencies and the NCAOC

Effective October 1, 2010, G.S. 15A-150(b) requires that the clerk send a certified copy of any expunction order to all of the following:

- the sheriff, chief of police, or other arresting agency;
- the Division of Motor Vehicles (DMV) and Department of Correction (DOC); and
- any State or local agency identified by the petition as bearing a record of the offense that has been expunged.

The requirement to notify all of the listed agencies applies to **all** expunction orders entered on or after October 1, 2010. It does not matter when the petition was filed.

The clerk must send the certified copies of all expunction orders to **all** of the listed agencies, regardless of whether or not the clerk thinks the agency has a record of the case. There will be expunctions for which the receiving agency has no record, but G.S. 15A-150 requires that the clerk send the order to all of the listed agencies. Each agency will determine whether or not it has a record to expunge.

The same statute requires that the listed agencies expunge their records of the case, when applicable, and that the arresting agency notify the SBI and Federal Bureau of Investigation (FBI).[16]

I. <u>Notifying State and Local Agencies</u>

A. Copies of expunction orders sent to other State and local agencies must be certified copies.

B. Arresting agency copies should be sent to the agency and address listed on the petition. The NCAOC's most commonly-used expunction forms have provided a field for identification of the arresting agency and its address since their revision of December 1, 2009.

C. Copies to DMV and DOC should be sent to the following addresses:

NC Department of Correction
Combined Records
4226 Mail Service Center
Raleigh, NC 27699-4226

NC Division of Motor Vehicles,
Driver and Vehicle Services, Driver Assistance Branch
Attn: Hearings/Adjudication Unit
3118 Mail Service Center
Raleigh, NC 27699-3118

[16] There is a limited exception for DMV, which is prohibited by federal law and regulation from expunging certain records concerning commercial drivers licenses and motor carrier safety.

D. Copies to any other agency should be sent to the agency name(s) and address(es) exactly as provided by the petitioner on the expunction petition, or as ordered by the court.

II. Notifying the NCAOC

A. A certified copy of **all** criminal expunction orders must be sent to the NCAOC at the address below. Prior to October 1, 2010, some expunction statutes did not require notice to the NCAOC, but copies of **all** expunction orders entered on or after that date must be sent to the NCAOC, regardless of when the petition was filed.

NC Administrative Office of the Courts
Records Officer - Court Services Division
P.O. Box 2448
Raleigh, NC 27602
COURIER BOX: 56-10-50

B. On the copy sent to the NCAOC, the clerk must certify both that (i) the copy is a true and complete copy of the original, and (ii) certified copies of the order were provided to the necessary State and local agencies, as described above.

1. The expunction petition forms provided by the NCAOC, revised October 2010, include the necessary certification when the clerk dates, signs and seals the "Certification By Clerk" on Side Two of the form.

2. For orders entered on or after October 1, 2010, but which do not include a pre-printed certification of the clerk's notice to the necessary agencies, the clerk should certify the order as entered. As part of that certification, the clerk should hand-write "Notice of order mailed to DOC, DMV and agencies listed on petition on <DATE>," writing the actual date notice was sent to the affected agencies in place of <DATE>.

3. The NCAOC will return expunction orders without the necessary certification to the clerk for re-certification. The clerk's certification of notice to affected agencies is necessary in order for the NCAOC to provide future verification under G.S. 15A-152(d) (on the clerk's behalf) that the clerk notified all agencies as required by G.S. 15A-150.

4. If the clerk's seal is an embossed (raised) seal, please be sure to press firmly when sealing the certified copy to the NCAOC. The NCAOC will scan the final order for long-term retention, rubbing any embossed seal with a light pencil so that it will be captured on the scanned image. For the pencil rubbing to be effective without obscuring any signature or text under it, it must stand out significantly from the page.

3.0. Expunction of Juvenile Records

Unlike the many and varied expunction statutes for criminal records, a single statute sets out the procedure for expunging juvenile delinquency/undisciplined records: G.S. 7B-3200 in Article 32 of Chapter 7B of the General Statutes.[17] However, there are some additional aspects of juvenile expunction, such as additional notices to the court counselor and to the former juvenile when an expunction order is entered.

Unlike the statutes for criminal expunctions in Chapter 15A, for which the statutes were revised significantly in 2009 and 2010, Article 32 of Chapter 7B has not been amended since 2001, so there are no recent legislative changes to the existing procedures described below.

3.1. Juvenile Expunction Petitions – Filing

Like criminal expunctions, the juvenile expunction process requires the filing of a petition for expunction by the person whose record is to be expunged (the "petitioner," hereafter). This section discusses the processes for the filing of the petition and the steps required prior to a hearing on the petition.

3.1.1. Expunction Forms

The forms for petitions to expunge juvenile delinquency/undisciplined records are listed in Table 5 below. All of the forms listed in this section of the guide can be found on the NCAOC's forms website at http://www.nccourts.org/Forms/FormSearch.asp.

Statute (N.C.G.S.)	Records to Which Statute Applies	AOC Form
7B-3200(a) or (b)	Expunction of adjudication of delinquent/undisciplined status	AOC-J-903M
7B-3200(a) or (b)	Affidavits of good character	AOC-J-904M
7B-3200(h)	Expunction of dismissed delinquency/undisciplined petition	AOC-J-909M

Table 5 – Juvenile Expunction Petition Forms

The AOC-J-904M, Affidavit of Good Character (Expunction of Juvenile Record), is not an actual petition form. Petitions for expunction of adjudications of delinquent/undisciplined status under subsections (a) and (b) require two affidavits of good character from persons unrelated to the petitioner; the petitioner may provide the AOC-J-904M to those persons as a template for the affidavit.

3.1.2. Expunction Fees

There are no fees required for a petition to expunge juvenile records.

3.1.3. Filing Venue

The petition must be filed in the juvenile court of the county in which the petitioner was adjudicated undisciplined (subsection (a)), adjudicated delinquent (subsection (b)), or in which the dismissed delinquency/undisciplined petition was filed (subsection (h)). In other words, the petition must be filed in the county in which the juvenile proceeding occurred.

3.1.4. Where to House Petitions

When the expunction petition is filed, the original JB file may have already been destroyed pursuant to the Retention Schedule. If so, the clerk should create a replacement file solely for housing the petition.

If the original JB file still exists at the time of the filing of the petition, place the petition in the original file.

[17] The expunction process for juvenile delinquency/undisciplined records is rarely used, because many such records are destroyed according to the NCAOC Records Retention and Disposition Schedule, except when destruction or expunction is explicitly prohibited (*e.g.*, class A - E felony adjudications, per G.S. 7B-3200(b)).

3.1.5. "Screening" Expunction Petitions

As custodian of the record, the clerk's function in the expunction process is to receive petitions for filing, schedule the petitions for hearing when required, and then file (and possibly carry out) any order entered by the court.

Questions such as whether or not a particular juvenile case qualifies for expunction, whether or not the correct form has been used, and whether or not any affidavits or other materials required by the expunction statute have been included are not of concern to the clerk's office. The court before which the petition is heard must determine any questions of its adequacy.

If the petitioner or his attorney has any questions about a petition's adequacy or what is required for a particular petition, the clerk should not give legal advice about the expunction process. Instead, direct the questioner to the General Statutes. Similarly, the clerk should not express to the court an opinion about the validity of any expunction petition. Advocacy in favor of a juvenile's petition for expunction must be by the petitioner or his attorney; advocacy against a petition is the purview of the district attorney or the chief court counselor.

3.1.6. Sending Petitions to the SBI and NCAOC

Petitions for expunction of juvenile records are not to be sent to the SBI or NCAOC. Although a petitioner's lack of subsequent adjudications or convictions is a criterion of expunction of an adjudication of delinquency under G.S. 7B-3200(b), there is no directive or authority in the statute for a criminal background check by the SBI. Further, prior expunctions have no bearing on a subsequent petition for expunction, so there is no need for a prior expunctions report from the NCAOC.

3.2. Juvenile Expunction Petitions – Scheduling Hearings

All petitions for expunction of an adjudication of delinquent/undisciplined status require a hearing. For a petition to expunge the record of a dismissed petition, a hearing may not be required. When a hearing is required, it may not be scheduled for a date sooner than 10 days after the petition has been served on the appropriate party, as described below.

When a hearing must be scheduled, it must be recorded as with other juvenile hearings.

3.2.1. Expunction of Adjudication of Delinquent/Undisciplined Status

This petition requires a hearing, the petitioner must serve the district attorney with a copy of the petition. The hearing must be scheduled at least 10 days after that service. The AOC-J-903M includes a certificate of service.

If the petition is presented to the clerk for filing prior to service, the clerk should determine when the petitioner or his attorney asserts service will be complete, and complete the hearing section of the form prior to filing. Provide the petitioner or his attorney with three copies (showing the hearing information): one for service on the district attorney, one for the petitioner, and one for re-filing once service is complete. The petitioner or his attorney should return with a completed copy, showing the certificate of service, for filing with the clerk. When the copy with the completed certificate of service has been filed, the clerk may destroy the original copy filed.

If the petition is presented to the clerk for filing after service, the clerk should complete the hearing section of the form and file it. Provide a copy of the filed version to the petitioner, and send a copy to the district attorney as notice of the hearing date.

3.2.2. Expunction of Dismissed Delinquency/Undisciplined Petition

A petition for expunction of a dismissed petition of delinquent/undisciplined status requires a hearing only if the chief court counselor objects to the petition in writing or if the court directs that a hearing be held.

The petitioner must serve a copy of the petition to expunge a dismissed petition of delinquent/undisciplined status on the chief court counselor. When the petitioner or his attorney files such a petition, a certificate of service must be provided. The AOC-J-903M includes a certificate of service.

The clerk should wait ten (10) calendar days after the service of the petition. If the chief court counselor has not filed a written objection within 10 days, deliver the petition to the court for a ruling.

If the chief court counselor files a written objection to the petition, or if the judge directs that a hearing be held after a petition without objection has been delivered to the court for a ruling, the clerk should schedule a hearing and notify both the petitioner and the chief court counselor of the date and location.

3.3. Juvenile Expunction Petitions – Processing Orders

3.3.1. Petition Denied

When a juvenile expunction petition is denied, the clerk should retain the order denying the petition and all materials associated with the petition until the period for the petitioner to appeal the court's order has expired.

3.3.1.1. Retain All Petition Material Pending Appeal

The expunction statutes in Article 32 of Chapter 7B do not specify the procedure or deadline for appeals from juvenile expunction orders, so it is unclear whether such appeals follow the appellate rules for civil cases or the process for appeal of delinquency/undisciplined matters under Article 26 of Chapter 7B.[18]

Because it is unclear what set of appellate rules or statutes apply to appeals from orders on juvenile expunction petitions, the clerk should retain a denied petition and all attachments for thirty (30) days after filing of the court's order with the clerk. Thirty days is the longest of the regular appeal deadlines from the trial division.[19] Upon clarification of the applicable deadline by either the appellate division or the General Assembly, this guide will be updated accordingly.

Unlike denied orders for expunction in criminal cases, there is no need for the clerk to retain the denied petition and materials "under seal" while waiting for the appeal deadline to expire. Because the juvenile file is confidential, the clerk merely should retain the expunction petition and associated materials in the file.

3.3.1.2. Retain Order Denying Expunction but Destroy All Associated Documentation

When the period for appeal has expired, the clerk should remove the order denying the petition from all attachments, and destroy all of the attachments, such as affidavits by the petitioner and other persons. The order denying the expunction is to be placed in the juvenile case file. The order may be destroyed along with the records of the delinquency/undisciplined allegation and disposition when the clerk receives NCAOC approval to destroy them pursuant to the retention schedule for juvenile files. If the original documentation was destroyed prior to the filing of the expunction petition, the order denying the petition may be destroyed upon NCAOC approval.

3.3.2. Petition Granted

When a petition for expunction of juvenile records is granted, the clerk must perform a number of actions. These are similar to the steps for expunction of a criminal record, but there are some minor variations. In general, the clerk must:

- expunge all record of the specific allegation or adjudication (which may result in expunction of the entire case file) from the court's records;
- notify only the arresting agencies of the expunction by certified copy of the order; and
- provide a certified copy of the order to the NCAOC.

Note: Occasionally, a court may enter an order for expunction that appears questionable on its face. When an order for expunction has been entered, if the order directs the expunction of a record that clearly does not qualify for expunction (*e.g.*, expunction of adjudication of a Class A - E felony, prohibited by G.S. 7B-3200(b)),

[18] G.S. 7B-2602 provides that review of any "final order of the court" in a juvenile matter may be had by giving notice of appeal in open court at the time of the hearing or in writing within 10 days after entry of the order. However, the statute further defines a "final order" in a way that makes its application to expunction orders unclear.
[19] N.C. Rule of Appellate Procedure 3(c).

the clerk may wish to confirm with the judge who entered the order that the order is what the court intended. If the judge indicates that the order is as intended, then the clerk should carry the order out.

3.3.2.1. Expunging the Court's Records

I. Do not delay expunction pending appeal.

Unlike a denied expunction petition, the clerk should not wait the entire period for appeal before carrying out a granted expunction order. Upon entry of the order, the petitioner is entitled to immediate expunction of the record. The clerk should delay carrying out an expunction order only when there is another order staying the execution of the expunction order during any appeal.

II. Notice of Expunction to Petitioner

A. Unlike expunction of a criminal record, for which the clerk has no particular duty to notify the petitioner, the clerk is required by statute to give notice of the expunction of a juvenile record to the petitioner.[20]

B. When an order is entered to expunge records of an adjudication of delinquency/undisciplined status, prepare and send the AOC-J-906M, Notice of Expunction of Juvenile Record, to the petitioner at his last known address.

C. If an order to expunge a dismissed petition of delinquency/undisciplined status was entered on the AOC-J-909M, the clerk may send a certified copy of that order to the petitioner. That form contains the required notice to the petitioner.

The petitioner or his attorney also may wish to obtain a certified copy of the order for their records. The fee for certification under G.S. 7A-308 should be assessed for each copy.[21]

III. Expunging the Physical Case File

A. Expunction of Specific Allegations/Adjudications Versus Expunction of the Entire File

1. Because all delinquency/undisciplined records in the county for a single juvenile are kept in a single case file (the "JB" subfolder) for the juvenile, an expunction order may require the expunction of only certain allegations or adjudications, but not others.

2. If the expunction order concerns only specific allegations or adjudications in the juvenile's file, but not others, the clerk should remove from the file all documents relating to the specific allegation/adjudication expunged, but retain the overall file. Do not remove the juvenile's name from the index to juvenile actions.[22]

3. If the expunction order concerns the sole allegation/adjudication in the JB subfolder, the entire JB subfolder must be expunged. If the JB subfolder constitutes the juvenile's entire file for the county, the entire file must destroyed and the juvenile's name must be removed from the index to juvenile actions.[23]

B. Place the expunction petition and all associated material in the case file.

C. Retain the expunged material/file until expiration of the State's deadline to appeal.

1. Although the court's order to expunge is to be carried out immediately, the State still may appeal the court's order. If the State is successful in an appeal or other proceeding that reverses the order, the clerk must be able to reconstruct the original record.

2. For that reason, the NCAOC advises that the clerk retain the original case file for a reasonable period of time in order to be sure that the order will not be reversed. Many clerks' offices hold expunged case files for a period of 3-6 months.

[20] G.S. 7B-3202.
[21] Note that some clerks take the position that the petitioner is entitled to one free certified copy of the order pursuant to G.S. 7A-308(b), "as a part of the regular disposition of [the] action." The NCAOC defers to the judgment of the elected clerk on this issue.
[22] NCAOC Rule of Recordkeeping 12.6, Comment A.
[23] *Id.*

3. Although juvenile files are not public records and there is little risk of public disclosure of expunged allegations/adjudications even when the expunged material remains in the juvenile file until the period for appeal has expired, the clerk should remove the expunged portion (or the entire file, if applicable) from storage with the regular juvenile files. The expunged material may not be made available to anyone, including officials who normally have access to the juvenile files (*e.g*. court counselors or guardian *ad litem*). The clerk should treat the expunged material/file as if it had already been destroyed. The expunged record should be disclosed only:

    a. to the State or petitioner for the purpose of preparing the record on appeal;

    b. if the expunction order is reversed, in which case the file becomes part of the regular juvenile case files again; or

    c. in compliance with an order of the court to produce the file or some portion thereof.

D. Upon expiration of the State's period for appeal, if there is no appeal pending, destroy the expunged material/file.

E. Expunged juvenile records must be destroyed by burning, shredding, or dissolving.[24]

IV. Purging the Electronic Record

A. All electronic record of the juvenile proceeding must be deleted immediately.

B. JWise

1. If the expunction order concerns only specific allegations or adjudications in the juvenile's file, but not others, the clerk should delete the JWise records only for those allegations/adjudications.

2. The clerk should be careful to delete any events related to the expunged allegation/adjudication in the "Event History" tab.

3. If the expunction order concerns the sole allegation/adjudication in the file, the entire JB record must be deleted.

C. Financial Management System (FMS)

1. Although a juvenile's name never should appear on any financial record associated with the case, it occasionally happens by error, and so the bookkeeper should check the case record in FMS to make sure the juvenile's name does not appear on any receipts or other financial records in the system.

2. The juvenile clerk should hand-deliver a copy of the expunction order to bookkeeping in order to review of the FMS records.

3. If the juvenile's name appears in FMS, replace the name on all receipts or other financial records with "John Doe," plus the date of removal in DD-MM-YYYY format (e.*g.*, "John Doe 31-10-2010").

4. Do not replace the names of the parents/guardians on FMS records, such as for payment against attorney fee judgments.

5. The bookkeeper should complete this replacement within 24 hours of receiving a copy of the expunction order from the juvenile clerk. Note the completion of the replacement on the copy of the order and return it by hand delivery to the juvenile clerk.

V. Related Civil Records Not Expunged

A. An order of expunction generally applies **only** to the juvenile case file and its incidents (*e.g.*, law enforcement records of the arrest).

[24] The NCAOC's Records Retention and Disposition Schedule, "About This Records Schedule," p. iv, provides that "[f]or confidential records the clerk must maintain physical control of the records through the disposal process until they reach the point where they are illegible." Because burning, shredding and dissolving (reducing the paper to pulp) are the only approved methods of destruction that render the records "illegible" while still within the clerk's physical control, other methods such as burial or selling to a waste paper recycler are not acceptable.

B. **Do not** expunge or alter civil records outside of the juvenile case file.

1. Civil judgment abstracts and index entries, such as attorney fee judgments against the juvenile's parents, must remain undisturbed.

2. Pursuant to Rule of Recordkeeping 12.7,[25] paper records associated with those judgments (*e.g.*, attorney fee judgments) are to be retained even after the destruction of the juvenile file, in a separate, confidential file, until the associated judgment is satisfied.

VI. Other Case Records and Special Situations

A. Juvenile Index Books.

If the case was recorded in the former (green) juvenile index book and the book is still in the clerk's office, the physical entry for the case must be obliterated by marking it out entirely in the book.

B. Minutes

Because the minutes of juvenile court are not open to public inspection, there is no need to expunge the entries related to the juvenile case from the minutes.[26]

C. Verbatim Record of Hearings

1. The verbatim recording of any hearings for the expunged allegation/adjudication also should be destroyed.

a. If the recording is co-mingled on the same CD with recordings from other cases, only the portion related to the expunged case is to be destroyed. For technical assistance, contact the Court Services Analyst (CSA) for your county.

b. It is possible that such records already were destroyed prior to the expunction pursuant to a court order under G.S. 7B-3000(d).

2. Because the hearing on the expunction petition was recorded, that recording also must be destroyed.

D. Change of Venue/Transfer Cases.

1. When a case has been transferred from one county to another, or when adjudication and disposition occur in different counties, *both* counties must expunge the record.

2. The clerk in the county in which the expunction order was entered must send a certified copy of the expunction order to the clerk in the other county, who will carry out the order for that county's copy of the record(s).

3.3.2.2. Notifying Law Enforcement Agencies and the NCAOC

Unlike expunctions of criminal cases, the clerk notifies only certain agencies of a juvenile expunction.

I. Notifying State and Local Agencies

A. Copies of juvenile expunction orders sent to other State and local agencies must be certified copies.

B. The clerk must send a certified copy of **all** juvenile expunction orders to the sheriff, chief of police, or other law enforcement agency involved with the allegation/adjudication expunged.

C. Notice to chief court counselor.

[25] Adopted by the Rules of Recordkeeping Committee but not yet published as of the initial publication of this guide. Notice of the newly-adopted Rule will be provided by the NCAOC's Court Services Division when the rule is published.

[26] The minutes of juvenile court are destroyed after three years, so there is even less likelihood of disclosure of an expunged juvenile case, even to officials like the court counselors who have access to juvenile court records. NCAOC Records Retention and Disposition Schedule VII.3.

1. For expunction of a dismissed petition of delinquency/undisciplined status pursuant to G.S. 7B-3200(h), the statute specifically requires that the clerk give a certified copy of the order to the chief court counselor.
2. For expunction of an adjudication of delinquency/undisciplined status, there is no statutory requirement to notify the court counselor, and the court's order is directed only to the clerk's records and to law enforcement.
    a. Records of the Department of Juvenile Justice and Delinquency Prevention (DJJDP) in the custody of court counselors are "retained or disposed of as provided by the Department," so the expunction order apparently does not apply to their records.
    b. The clerk should consult with the chief district court judge and chief court counselor as to whether or not DJJDP wishes to receive copies of expunction orders for adjudicated cases.

II. Notifying the NCAOC

A certified copy of **all** juvenile expunction orders must be sent to the NCAOC at the address below.

NC Administrative Office of the Courts
Records Officer - Court Services Division
P.O. Box 2448
Raleigh, NC 27602
COURIER BOX: 56-10-50

4.0. Expunction of Mental Health Commitment Records for Minors

G.S. 122C-54(e) provides the following for records of mental health commitments of minors under Article 5 of Chapter 122C:

> "Upon the request of the legally responsible person or the minor admitted or committed, and after that minor has both been released and reached adulthood, the court records of that minor made in proceedings pursuant to Article 5 of this Chapter may be expunged from the files of the court. The minor and his legally responsible person shall be informed in writing by the court of the right provided by this subsection at the time that the application for admission is filed with the court."

That is the only statutory provision concerning expunction of such records. There are no procedures or other criteria for such expunctions beyond the text quoted above. For that reason, the NCAOC has developed no forms or official procedures for this process. The information below is provided only as basic guidance for the processing of any petition for expunction under G.S. 122C-54(e). In the event such a petition is filed, the clerk should contact the Court Services Analyst (CSA) for your county for assistance.

- **Forms** – There are no NCOAC forms for G.S. 122C-54(e).
- **Fees** – There are no fees or other costs for expunction under this section.
- **Venue** – Because commitment proceedings under Article 5 of Chapter 122C are before the district court, a petition for expunction under this section should be presented to a district court judge.
- **Hearing** – There is no provision for a hearing under G.S. 122C-54(e). If a petition is filed, consult the chief district court judge for guidance as to whether or not the petition in question requires a hearing.
- **Orders denied** should be included in any SPC case file already established for the minor.
- **Orders granted** should result in destruction of all records related to the commitment proceeding. Because G.S. 122C-54(e) provides only for expunction of "court records," the clerk should **not** notify other agencies (*e.g.*, law enforcement agencies that may have transported the minor) of the expunction. Further, the clerk should not send a copy of the expunction order to the NCAOC.

5.0. Expunction-Related Topics

This section covers topics related to expunctions, but which are not directly part of any expunction process.

5.1. Conditional Discharges and Dismissals

Several statutes provide for a process known as “conditional discharge” of certain criminal charges, specifically for:

- gang offenses, G.S. 14-50.29;
- drug and drug paraphernalia offenses, G.S. 90-96; and
- toxic vapors (“huffing”) offenses, G.S. 90-113.14.

When a defendant has been found guilty of or pled guilty to a charge(s) covered by a conditional discharge statute, the court may, with the defendant’s consent and without entering a judgment of conviction, place the defendant on probation. If the defendant complies with all of the conditions of probation, he is discharged (it is no longer “conditional”) and the charge(s) is dismissed.

There are two NCAOC forms for placing a defendant on probation pursuant to a conditional discharge. Both may be found on the NCAOC’s forms website at: http://www.nccourts.org/Forms/FormSearch.asp.

- AOC-CR-619, Conditional Discharge Under G.S. 90-96(a); or
- AOC-CR-621, Conditional Discharge Under G.S. 14-50.29 (Gang Offenses).
- **Note:** There is no form currently for G.S. 90-113.14.

When a charge(s) is dismissed at the end of a conditional discharge, the clerk must notify the NCAOC of the dismissal. G.S. 15A-150(a). This applies to any dismissal entered on or after October 1, 2010, pursuant to a conditional discharge. It does not matter when the defendant’s probation under the conditional discharge began. The clerk should notify the NCAOC **only** after the case has been dismissed upon the defendant’s successful completion of the process; there is no need to notify the NCAOC when the defendant is placed on probation at the beginning of the conditional discharge.

When notifying the NCAOC of a dismissal pursuant to conditional discharge, the clerk should send to the NCAOC certified copies of **both**:

- the order that placed the defendant on the conditional discharge; and
- the final order discharging the defendant and dismissing the charge(s).

Appendix A: Revision History

This section lists the history of revisions of this guide, with a brief description of changes made with each edition. Questions about the guide should be directed to the Records Officer of the NCAOC's Court Services Division at (919) 890-1341.

Edition	Published	Revision Notes
1	September 24, 2010	• Initial edition. Replaces all prior versions of the "All About Expunctions" handout/presentation.

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of the COURTS

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MEMORANDUM

TO: Clerks of Superior Court

FROM: Troy D. Page
Associate Counsel

DATE: September 24, 2010

RE: 2010 Expunction Changes and New/Amended Forms

In its 2009 and 2010 sessions, the General Assembly enacted a number of changes to the statutes for expunction of criminal records. This memorandum describes:

- Changes to the expunction statutes and their effective dates;
- Changes to expunction procedures for the clerk of superior court; and
- Changes to the current forms for expunctions and the creation of three new forms.

There were no legislative changes to the process for expunction of non-criminal records (*e.g.*, juvenile delinquency records under G.S. 7B-3200), so this memorandum concerns only expunction of criminal records under Article 5 of Chapter 15A of the General Statutes.

Legislative Background

The changes to the expunction statutes were enacted over a series of three session laws: two in 2009, and one in 2010:

- S.L. 2009-577 (House Bill 1329, consolidate expunction statutes), effective December 1, 2009 http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1329v7.pdf
- S.L. 2009-510 (Senate Bill 262, expunctions/purge online databases), effective October 1, 2010 http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S262v7.pdf
- S.L. 2010-174 (House Bill 726, clarify expunctions), effective October 1, 2010 http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H726v5.pdf

Session Law (S.L.) 2009-577 (HB 1329) did what its short title says: it consolidated all criminal expunction statutes under Article 5 of Chapter 15A by re-codifying expunction provisions from other chapters of the General Statutes.[1] The bill also made some minor substantive changes to the affected statutes, such as clarifying G.S. 15A-145(a) to provide that eligibility for expunction depends on the petitioner's age at the time of the commission of the offense, rather than the age at the time of conviction. Finally, HB 1329 added an entirely new expunction proceeding for certain old misdemeanor larceny convictions, G.S. 15A-145(d1).[2]

[1] G.S. 14-50.30 (gang expunctions), G.S. 90-96 (certain drug expunctions) and G.S. 90-113.14 (toxic vapors expunctions). Note that the conditional discharge provisions for gang and drug offenses remain in G.S. 14-50.29, 90-96, and 90-113.14. Only the expunction provisions were re-codified.
[2] Form AOC-CR-267 was adopted effective December 1, 2009, for petitions under G.S. 15A-145(d1).

S.L. 2009-510 (SB 262) made more extensive changes to the expunction statutes. Most of the changes in that act were drafted in an attempt to address the proliferation of criminal records in the private sector, and particularly the disclosure of previously expunged records by private companies that are in the business of providing criminal background checks for employment, housing, educational admission, etc. Specifically, S.L. 2009-510 made the following changes, effective October 1, 2010:

- Consolidating the clerks' process for reporting expunctions and conditional discharges to the Administrative Office of the Courts (NCAOC) under a single statute, G.S. 15A-150, including a requirement that the clerk report *all* expunctions to the NCAOC.
- Expanding the scope of expunction orders to cover agencies not previously required by statute to expunge their records, notably the Department of Correction and the Division of Motor Vehicles. G.S. 15A-150(b). S.L. 2010-174 added an exception for certain DMV records for which expunction would be prohibited by federal law. G.S. 15A-151(c).
- Requiring expunction by certain private background-checking companies that receive criminal justice data from State or local agencies. G.S. 15A-152(a).
- Creation of a civil cause of action against certain background-checking companies for persons injured by the disclosure of a previously-expunged case. G.S. 15A-152(c).
- Allowing a person with a prior expunction to receive verification of the prior expunction from the NCAOC and other agencies (as part of a civil action against a background-checking company). G.S. 15A-152(d) (and (e), enacted by S.L. 2010-174).

S.L. 2009-577 and S.L. 2009-510 were ratified on the same day, but neither act accounted for changes made by the other. In addition, a late-session drafting error caused a number of provisions that were adopted in committee for S.L. 2009-510 to be omitted from the final version.

To reconcile the two bills and to enact the provisions omitted from S.L. 2009-510, the General Assembly passed S.L. 2010-174 (HB 726) in the short session of 2010.[3] S.L. 2009-510, as amended by S.L. 2010-174, makes procedural changes to almost every expunction statute in Chapter 15A. Both acts are effective October 1, 2010. As a result, all of the NCAOC's expunction forms have been revised, and three new forms have been adopted.

With one exception, the legislative changes taking effect on October 1, 2010, do not change the substantive aspects of expunction. There are no changes to the offenses that may be expunged, to the effect of prior convictions on expunctions, or to any other criterion for expunction.

The one exception was a technical correction to the new misdemeanor larceny expunction of G.S. 15A-145(d1). As enacted by S.L. 2009-577, G.S. 15A-145(d1) contained conflicting criteria for how many years must have passed before the petitioner could petition for expunction. Some parts of the subsection specified a period of 15 years since conviction, but other parts specified that the court needed to find a period of good behavior for only 10 years in order to grant the petition. S.L. 2010-174 amended subsection (d1) to correct the 10-year references to 15 years.

The remainder of this memorandum discusses the procedural changes for expunctions that take effect on October 1, 2010, and the changes to NCAOC forms and processes to account for the legislative changes.

[3] S.L. 2010-174, § 16, also contained a technical change to a provision for sex offender registration for certain out-of-state convictions. That change has nothing to do with the expunction process, and therefore is not discussed further in this memorandum. For information on the change to sex offender registration, *see* Jamie Markham, 2010 Legislation Affecting Sentencing, Corrections, and Detention (UNC School of Government, August 2010), at the following link: http://sogweb.sog.unc.edu/blogs/ncclaw/wp-content/uploads/2010/08/2010-Legislation-Affecting-Sentencing-Corrections-and-Detention-21.pdf.

Expunction Changes Effective October 1, 2010

This section describes changes to the filing and routing of petitions, the processing of orders when those petitions are granted, and NCAOC's verification of prior expunctions.

This section describes only the changes to the current expunction process as a result of the recent legislation. This memo does not explain the entire expunction process in detail. As a more comprehensive guide, the NCAOC's Court Services Division (CSD) has published a new "Expunction Guide for Clerks," which incorporates the procedural changes described below.[4] Clerks with specific questions about the processes covered by that guide should contact their Court Services Analyst (CSA) or the NCAOC's Records Officer at (919) 890-1341.

Note that the changes to the petition filing process are effective for petitions filed on or after October 1, 2010. Changes for granted expunction orders apply to orders entered on or after October 1, 2010, regardless of when the petition was filed. These effective dates are noted below in each section.

I. Petition Filing and Pre-Hearing Process

Effective Date: The changes described here for filing and processing of an expunction petition apply to **all expunction petitions filed on or after October 1, 2010**.[5]

A. Clerk/law enforcement affidavits have been replaced by SBI/NCAOC record checks

1. Prior to October 1, 2010, several expunction statutes required affidavits by the clerk of superior court, sheriff, and chief of police (when applicable), that the petitioner had no subsequent criminal activity since the offense that was the subject of the expunction petition.

   Effective October 1, 2010, the affidavits by the clerk, sheriff, and chief will no longer be required. They will be replaced by a criminal record check by the Department of Justice's State Bureau of Investigation (SBI) and a search of the confidential record of expunctions by the NCAOC:

   > "An application on a form approved by the Administrative Office of the Courts requesting and authorizing a name-based State and national criminal record check by the Department of Justice using any information required by the Administrative Office of the Courts to identify the individual and a search of the confidential record of expunctions maintained by the Administrative Office of the Courts. The application shall be forwarded to the Department of Justice and to the Administrative Office of the Courts, which shall conduct the searches and report their findings to the court."[6]

2. Only certain statutes require SBI/NCAOC record checks.
   The record checks described above are required for expunction petitions under the following statutes. The "application" for the record checks is pre-printed on the corresponding NCAOC form for each provision.

For Expunction Under…	… Petitioner Must Use:
G.S. 15A-145(a)	AOC-CR-264
G.S. 15A-145(d1)	AOC-CR-267
G.S. 15A-145.1	AOC-CR-269
G.S. 15A-145.2(a)	AOC-CR-266
G.S. 15A-145.3(a)	AOC-CR-268

3. NCAOC form is required for expunctions that require SBI/NCAOC record checks.
   The amended statutes require that the application be "on a form approved by the Administrative Office of the Courts" and include "any information required by the Administrative Office of the

[4] The guide is posted on the NCAOC intranet at: https://cis1.nccourts.org/intranet/aoc/clerks/records.jsp. The guide can be reached on the NCAOC intranet (https://cis1.nccourts.org) by selecting the "Clerks of Court" link from the menu column on the left side of the homepage, and then the "Records and Recordkeeping" link from the menu column on the left side of the subsequent page.
[5] S.L. 2010-174, § 17.
[6] G.S. 15A-145(a)(4a), 15A-145(d1)(4a), 15A-145.1(a)(4a), 15A-145.2(a)(3a), and 15A-145.3(a)(3a).

Courts to identify the individual."[7] Other than the forms listed in the table above, there is no form "approved by the Administrative Office of the Courts" for this purpose.

For other expunction provisions, there is no statutory requirement that a petitioner use an NCAOC form. However, petitioners should be urged to use the NCAOC forms, because each form contains the necessary allegations, instructions, and orders for the corresponding expunction statute.

4. Other affidavits are still required.
Other affidavits required by certain expunction statutes, such as affidavits of good character, are still required. The SBI and NCAOC record checks replace **only** the affidavits of the clerk, sheriff, and chief of police. There are no NCAOC forms for the other affidavits.

B. Send only one copy to the SBI and NCAOC.
For petitions that must be routed to the SBI and NCAOC, **send only one copy**. The clerk should urge petitioners who route their own petitions to the SBI to do the same. In the past, a common practice in some counties and by certain attorneys has been to send multiple copies of a petition to the SBI and NCAOC. This has resulted in significant delays in processing expunction petitions.

II. Processing Granted Expunction Orders

Effective Date: The changes described here apply to **all expunction orders granted on or after October 1, 2010**, regardless of when the petition was filed.[8]

A. Expunction orders are sent to multiple agencies.

1. As enacted by S.L. 2009-510 and amended by S.L. 2010-174, the new G.S. 15A-150 provides that, upon the entry of an order to expunge, the clerk must provided a certified copy to the following agencies, each of which must expunge their records of the expunged case or charge:

   a. the sheriff, chief of police, or other arresting agency;
   b. the Division of Motor Vehicles (DMV)[9] and Department of Correction (DOC); and
   c. any State or local agency identified by the petitioner on the petition form as bearing a record of the offense that has been expunged.

2. The clerk must send the certified copies of all expunction orders to **all** of the listed agencies, regardless of whether or not the clerk thinks the agency has a record of the case. Each agency will determine whether or not it has a record to expunge as a result of the order.

3. The arresting agency will notify the SBI, which will in turn notify the Federal Bureau of Investigation (FBI) of the expunction.[10]

4. The clerk does **not** notify private entities like background-checking companies, even if named on the petition. The private entities will be notified by the State and local agencies that provide them with criminal justice data.

B. Send copies of all expunctions to NCAOC.

Effective October 1, 2010, the clerk must provide a certified copy of **all** granted expunction orders to the NCAOC.[11] Prior to October 1, 2010, some expunction statutes did not require that the NCAOC keep a record of those expunctions in its confidential index. That is no longer the case; as of October 1, 2010, every expunction in the State must be reported to the NCAOC and retained in the confidential record of expunctions granted.

C. Clerk's certification of notice to other agencies is required.

[7] *Id.*
[8] S.L. 2010-174, § 17.
[9] As noted earlier, the DMV may not expunge records for which expunction would be prohibited by federal law. G.S. 15A-151(c).
[10] G.S. 15A-150(c).
[11] G.S. 15A-150(a).

1. Prior to October 1, 2010, the NCAOC's expunction forms have provided space for the clerk to certify only that an order is a true and complete copy of the order entered. For orders entered on or after that date, merely certifying the order as a true copy will be insufficient.

2. For orders entered on or after October 1, 2010, the clerk must provide to the NCAOC certification that (i) the copy is a true copy, and (ii) that notice was given to all of the agencies described above, in compliance with G.S. 15A-150. This additional certification of notice to the affected agencies is necessary in order for the NCAOC to provide verification of that notice on the clerk's behalf. See section III, below.

3. All of the NCAOC's expunction forms have been amended so that the clerk's certification section provides the necessary certification of notice to the affected agencies. For expunction orders entered on older expunction forms (which lack the pre-printed fields for certification of notice to other agencies), see section 2.3.2.2. of "Expunction Guide for Clerks."[12]

4. Because the certification of notice to other agencies is required by statute, the NCAOC will return to the clerk for re-certification any expunction order that lacks a complete certification and the clerk's seal.

III. Verification of certain expunctions can be requested from NCAOC.

A. As enacted by S.L. 2009-510 and amended by S.L. 2010-174, the new G.S. 15A-152(d) allows certain persons with prior expunctions to apply to the NCAOC for verification of their expunctions.

B. G.S. 15A-152(d) also requires that the NCAOC provide verification "that notice of the expunction was made in accordance with G.S. 15A-150," which includes the clerk's notice to other agencies to expunge their records. Because the clerk will destroy the original expunction order along with the expunged file, the certified copy sent to the NCAOC will be the only record that such notice was given. The NCAOC can provide this verification on the clerk's behalf only if the clerk has provided certification of notice to the affected agencies, as described above.

C. Verification of an expunction can be provided **only** in certain situations involving disclosure of the expunction by a private background-checking company. Verification can **not** be provided for other purposes, like immigration applications, for delivery to other agencies that were not named in the original order, or just for the petitioner's personal records.

D. Citizens asking how to obtain verification of prior expunctions should be directed to form AOC-G-260 on the NCAOC website (see below). Side Two of the form includes instructions for its use.

Amended Expunction Forms Available October 1, 2010

To account for the legislative and procedural changes described above, the NCAOC's Forms Committee has amended all of the current forms for expunction of criminal records and has adopted three new forms required by the new and amended expunction statutes. All of the forms listed below will be available on the NCAOC's website on October 1, 2010, and may be found by searching by the form number at http://www.nccourts.org/Forms/FormSearch.asp.

Expunction Statute (N.C.G.S.)	AOC Form	Expunction Statute (N.C.G.S.)	AOC Form
15A-145(a)	AOC-CR-264	15A-145.3	AOC-CR-268
15A-145(a) (instructions)	AOC-CR-264I	15A-145.3 (instructions)	AOC-CR-268I
15A-145(d1)	AOC-CR-267	15A-146	AOC-CR-264
15A-145(d1) (instructions)	AOC-CR-267I	15A-146 (instructions)	AOC-CR-264I
15A-145.1	*AOC-CR-269	15A-147	AOC-CR-263
15A-145.1 (instructions)	*AOC-CR-269I	15A-148	None[13]
15A-145.2	AOC-CR-266	15A-149	AOC-CR-265
15A-145.2 (instructions)	AOC-CR-266I	15A-152(d)[14]	*AOC-G-260

* New form.

[12] On the NCAOC intranet at: https://cis1.nccourts.org/intranet/aoc/clerks/records.jsp.
[13] G.S. 15A-148 applies only to a limited and rare circumstance for expunction of certain DNA records, so no form has been developed.
[14] This is the new form for verification of a prior expunction. This form is submitted to the NCAOC, not to the clerk.

As shown in the table above, several of the petition forms have an accompanying instruction sheet. The form number for the instruction sheet is the same as the petition, with the letter "I" added to the end, *e.g.*, AOC-CR-264I. When searching for the petitions by form number on the website, above, both the petition form and the instruction sheet will be listed as search results. Petitioners should be instructed to print *both* forms, so they will have a copy of the instructions for completing the petition and obtaining a hearing. The instruction sheets have been amended to correspond to changes to the petition-and-order forms. The forms with instruction sheets are the AOC-CR-264, -266, -267, -268 and -269.

Each of the petition-and-order forms has been amended to follow a more uniform format and to include all of the information necessary for the filing and routing of the petition and for the court's order after any hearing on the petition:

- required information about the petitioner and the offense(s) to be expunged;
- elements of the petition required for each expunction statute;
- the request to SBI and NCAOC for record checks for statutes that require them;
- certification of records by the SBI and NCAOC;
- pre-printed orders of the court with elements of each order appropriate to the corresponding expunction statute, if granted;
- instructions to the clerk for routing of granted orders to the affected agencies, including address information for the DOC, DMV, and NCAOC; and
- certification by the clerk, certifying both that the order is a true copy and that a copy was provided to all of the required agencies.

The older AOC-CR-237, Request And Reports Convictions/Expunctions Dismissals And Discharge, is no longer accurate and was discontinued in 2009. Parties filing petitions for expunction should be directed to the current forms on the NCAOC's website.

Conclusion

All of the expunction changes described above are effective October 1, 2010. Revised expunction forms will be available on the NCAOC's website on that date. The new "Expunction Guide for Clerks" is posted on the NCAOC's intranet site at https://cis1.nccourts.org/intranet/aoc/clerks/records.jsp. This memo also will be posted on the intranet site at https://cis1.nccourts.org/intranet/aoc/legalservices/legalmemos/criminal.jsp and in TAO under Conferences/Legal_Memos/Criminal.

Questions about the content of this memo may be directed to me at Troy.D.Page@aoc.nccourts.org or (919) 890-1323. Clerks with questions about the expunctions process in general should contact the NCAOC's Records Officer at (919) 890-1341. As always, individual citizens with questions about expunctions and whether or not their record may qualify for expunction should be directed to consult with counsel. Neither the clerk nor the NCAOC can provide them with legal advice on this issue.

cc: Superior Court Judges
District Court Judges
District Attorneys
Public Defenders
Peg Dorer, Conference of DAs
Thomas Maher, IDS
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SENTENCING AND JAIL CREDIT ISSUES

NORTH CAROLINA PRISONER LEGAL SERVICES, INC.
1110 WAKE FOREST ROAD
RALEIGH, NC 27604
(919) 856-2200

JAIL CREDIT STATUTES

§ 15-196.1 Credits allowed

"The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which the defendant is subject."

Comment: A defendant is entitled to jail credit for periods of confinement prior to his conviction (or probation revocation) as long as the defendant was not serving another sentence during the same time period. A defendant stops earning credit when he begins serving his active sentence.

§ 15-196.2 Allowances in cases of multiple sentences

"In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment of more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent."

Comment: If the defendant receives concurrent sentences, each sentence is to be reduced for periods of confinement on charges that brought about the sentence. If a defendant receives consecutive sentences, any period the defendant was confined for more than one of the consecutive sentences is to be counted only once as credit toward the entire string of sentences.

Calculating Jail Credit

Jail credit is computed by excluding the first day and including the last. See *State v. Richardson*, 245 S.E.2d 754 (1978). The day of conviction date is not counted as jail credit because sentences begin on the date of conviction. N.C. Gen. Stat. § 15A-1353.

To determine the amount of jail credit a defendant will receive on his/her sentence or sentences you must answer two questions:

1. Is the defendant entitled to jail credit?
    - Was the defendant confined?
    - In a state or local facility?
    - On the charge he was convicted of?
    - Was the credit applied to a previously imposed sentence?

2. How will the jail credit be applied to his/her sentences?
    - Concurrent sentences
    - Consecutive
    - Concurrent and consecutive

1. IS THE DEFENDANT ENTITLED TO JAIL CREDIT?

- Was the defendant confined?

  YES –

  DART-Cherry – *State v. Lutz*, 177 N.C. App. 140, 628 S.E.2d 34 (2006).

  IMPACT – *State v. Hearst*, 356 N.C. 552, 444 S.E.2d 124 (2002).

  Split sentence/special probation – *State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994).

  NO –

  House arrest – *State v. Jarman*, 140 N.C. App. 198, 535 S.E. 2d 875 (2000).

Ex. 1. Defendant was held for 30 days prior to conviction. Upon conviction, he is given a 30 day split sentence and then 3 years of supervised probation. His probation is revoked. He was not held in jail prior to his probation revocation. How much jail credit is he entitled to upon revocation if

a) The judge used his pre-trial confinement to satisfy the split sentence?

30 days – the jail credit was used to satisfy the split sentence and defendant gets credit for the split sentence.

b) The judge did not give him the credit and he had to serve the 30 days?

60 days – credit for the split sentence and pretrial confinement.

- In a state or local facility?

  YES –

  County jail

  Jail in another State – Defendants are entitled to credit for time spent in an out-of-state jail only if he was held solely on the North Carolina charge of which he is to be sentenced. The

defendant is not entitled to the credit if he was held under a NC charge and out-of state charge unless the out-of-state charge was dismissed. *Childers v. Laws,* 558 F. Supp. 1284 (W.D.N.C. 1983).

- Mental Hospital for pre-trial evaluation

- DART-Cherry

- Juvenile facility – IMPORTANT to take care of this at time of sentencing because records may be destroyed or transferred to Raleigh once defendant turns 18.

NO –

TROSA or Private rehabilitation facilities – Statute §15-196.1 includes only time spent in custody in "State" institutions. See *Childers v. Laws,* 558 F. Supp. 1284 (W.D.N.C. 1983).

Civil commitment to a mental hospital after defendant is found incompetent. – NCPLS litigated this issue. MAR was denied and Court of Appeals did not grant cert. petition. The State argued that defendant was civilly committed and therefore, not being held because of the charge. However, some attorneys have had trial judges grant this credit.

- On the charge he was convicted of?

Ex. 2. Defendant was arrested on January 1 for Attempted First-degree Murder and Assault With a Deadly Weapon Intent to Kill Inflicting Serious Injury. On January 2, defendant makes bond on assault charge, but remains in jail because he has not made bond on attempted murder charge. On June 1, he makes bond on the attempted murder charge. On August 1, he is convicted on assault charge. How much jail credit is he entitled to?

1 day. He was only held on the charge he was convicted of – assault – for one day.

- Was the credit applied on a previously imposed sentence?

*If a defendant serves a misdemeanor sentence in the county jail while awaiting conviction on another charge, upon conviction the days that he served the misdemeanor sentence cannot be credited to his sentence.

Ex. 3 Defendant was arrested on March 1 for Possessing Stolen Goods and Possession of Cocaine. He was convicted of both charges on May 11, 70 days later, and received 10 – 12 months in the DOC under the Possession of Cocaine charge. The judge ordered the defendant to serve 70 days in jail under the Possessing Stolen Goods charge, and the 70 days was counted as time-served. How much jail credit should he receive on the Possession of Cocaine charge?

None. The credit was used on a prior sentence of which he has already served. N.C. Gen. Stat. §15-196.1.

*If a defendant is held on two charges, convicted on two separate dates, and he received jail credit on the first sentence, the Judge may refuse to give him credit on the second even if the charges are running concurrently because the credit was granted on a previously imposed sentence. NCPLS litigated this issue in Guilford County. We lost on the MAR and the Court of Appeals denied our cert. petition.

Ex. 4. On July 1, Defendant was arrested on Possession of Stolen Goods and an old DWI charge. On September 1, defendant was convicted of Possession of Stolen Goods and given 61 days of jail credit. On September 15, he was convicted of DWI and the Judge ordered the sentence to run concurrently to the sentence for Possession of Stolen Goods. How much jail credit is defendant entitled to on the DWI conviction?

Depends on the county. Some counties will give the defendant 61 days jail credit because the defendant was held on the DWI and it's running concurrently with the Possession of Stolen Goods. N.C. Gen. Stat. §15-196.2 Some counties may not want to grant the credit because the time was given on a previously imposed sentence. Where the subsequent concurrent sentence is imposed within a relatively short period of time after the initial sentence, we do ask for the credit to be applied to the subsequent sentence. We base our request on fundamental fairness. *See Williams v. Hayes*, 846 F.2d 6 (4th Cir.1988) (fundamental fairness requires that jail credit which relates to two sentences be applied against sentence from which prisoner would derive some benefit).

Defendant is not entitled to jail credit from September 1 to 15, because at that point he was serving his sentence for Possession of Stolen Goods. N.C. Gen. Stat. §15-196.1

HOW WILL THE CREDIT BE APPLIED TO HIS/HER SENTENCES?

- Concurrent sentences

  If defendant receives concurrent sentences each sentence is credited for the amount of time he was held on that charge. If the defendant was held longer on one charge than another, it is better to consolidate the convictions into one judgment than to run them concurrently.

Ex. 5. Defendant is arrested for a Breaking and Entering charge on July 1. On September 1, she is served with a Larceny charge. On November 1, she is convicted of both. How much jail credit does she receive if

a) she receives two concurrent sentences?

   122 days on Breaking and Entering
   60 days on Larceny

b) the two convictions are consolidated into one judgment?

   122 days.

- Consecutive sentences

  If defendant receives consecutive sentences, the sentences are considered one sentence for the purpose of providing jail credit. All *shared* confinement is counted once toward all consecutive sentences.

Ex. 6. Defendant is held for 55 days on Breaking and Entering and Larceny before being convicted. How much jail credit does the defendant entitled to if she

a) receives two concurrent sentences?

   55 days on Larceny
   55 days on Breaking and Entering

b) receives two consecutive sentences?

   55 days on **either** the Larceny **or** the Breaking and Entering.

Ex. 7. Defendant is arrested for Breaking and Entering on January 1. On February 1, while in jail for Breaking and Entering, he is served with an arrest warrant for Larceny. He is convicted on March 1. How much jail credit is he entitled to if he

a) receives concurrent sentences?

Breaking and Entering: January 1 to February 28 = 58 days
Larceny: February 1 to February 28 = 27 days

b) receives consecutive sentences?

58 days on either the B & E or Larceny

Ex. 8. The defendant was arrested on January 1, 2002 for manslaughter and reckless driving. On December 31, 2002, he received an active prison sentence for manslaughter. The judge ordered the defendant to serve probation for reckless driving immediately after his active prison sentence. The judge orders the 363 days of jail credit to be applied to the probation sentence. Is this a legal sentence?

Yes. The probation sentence is consecutive to the active sentence. Therefore, the jail credit can be applied to either. If the probation sentence is revoked he will get 363 days of credit. However, defense counsel should actively and strongly request for the 363 days to be applied to the active portion of the sentence based on fundamental fairness, *Williams v. Hayes*, 846 F.2d 6 (4th Cir.1988) (fundamental fairness requires that jail credit which relates to two sentences be applied against sentence from which prisoner would derive some benefit).

- <u>Concurrent and consecutive sentences</u>

  "When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent." N.C.G.S. § 15-196.2

Ex. 9 On March 1, 2003 and March 20, 2003, Defendant committed the offenses of Larceny and Possession of Schedule II. He was arrested on March 20, 2003 and released on bond on May 9, 2003. He was arrested again on July 24, 2003 for Breaking and Entering and on the previous Larceny charge. He was released on July 31, 2003. On October 6, 2003, he received a 60 day split-sentence in the County jail and 36-48 months on probation under the Larceny and Breaking and

Entering. His sentence was modified on February 1, 2004. He was ordered to the DART-Cherry program. He remained in the County jail until he was transferred to DART-Cherry. On December 13, 2005, he was arrested for assault and the previous Larceny and B & E charges. He received an active sentence on all three convictions on January 9, 2006.

Offense	Arrested	Released	# of days	
1. Larceny	03/20/03	05/09/03	50	
2. B & E + 1	07/24/03	07/31/03	07	
3. 1 + 2	10/06/03	12/05/03	60	
4. 1 + 2	02/01/04	03/01/04	28	
5. 1 + 2	03/01/04	05/30/04	90	(DART-Cherry)
6. Assault + 1 + 2	12/13/05	01/13/06		
	Convicted	*01/09/06*	*26*	

A. The Larceny and B & E convictions are concurrent. The Assault conviction is consecutive to the Larceny. How much credit should he receive on each sentence?

Larceny	261 days
B & E	211 days
Assault	none

B. The Larceny and B & E convictions are concurrent. The Assault conviction is consolidated with the B & E conviction.

Larceny	261
B & E	211

C. All three convictions are concurrent.

Larceny	261
B & E	211
Assault	026

D. All three are consecutive.

Larceny	261
B & E	none
Assault	none

Working with Combined Records

- Any language written on the back of the judgment after "The Court further recommends:" Combined Records will consider a recommendation and if it is contrary to statute, they will not follow it. For example, if part of the plea agreement is that a Habitual Felon conviction runs concurrently with a previous conviction, this must be expressly written on the front of the judgment. If it is on the back, Combined Records will consider it only a recommendation and run the two sentences consecutively.

Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856 (2001). Before *Hamilton v. Freeman,* when the Department of Correction received a Judgment and Commitment from the Court which ordered a concurrent sentence for a crime that under NC statutes required a consecutive sentence, DOC simply entered the sentence as consecutive, without notifying anyone. Under *Hamilton,* when the DOC receives a judgment ordering a concurrent sentence for a crime that under NC statutes requires a consecutive sentence, they must notify the inmate and the sentencing judge that the sentence is wrong and needs to be corrected. The DOC cannot simply enter the sentence as a consecutive sentence, but must wait for the judge to resentence the inmate and enter a corrected judgment.

- Combined Records will enter *nunc pro tunc* (now for then) judgments if it is written on the front of the judgment. If a defendant is being resentenced, date of judgment can effect the projected release date.

Defendant was convicted as a Habitual Felon and received a 7 year sentence on April 5, 2001. Eight felonies were consolidated under the Habitual Felon conviction. Defendant had served four years of his sentence when he wrote to NCPLS because his Habitual Felon indictment was defective. The Assistant District Attorney agreed to vacate the Habitual Felon indictment and sentence defendant to 4 consecutive 12-to-15-month sentences.

Defendant has four years of jail credit so we thought he would be released immediately because he had worked down to his minimum. When the Habitual Felon conviction was vacated, the date on his new judgment was October 12, 2005, the date he was resentenced, not April 5, 2001, when he was originally convicted. Combined Records calculated his sentence as beginning in 2005. Under structured sentencing, defendants enter at their maximum sentence and work down to their minimum. Instead of using 12 months worth of jail credit to complete the first three sentences, it took 15 months. Only three months of jail credit remained to be applied to his final 12-month sentence, which began on October 12, 2005. The defendant had to serve 12-month minimum minus jail credit. As a result, the client lost at least three months of earned time, if not more. If the judge *"nunc pro tunced"* the

judgments to the original conviction date, the defendant would have worked down to his minimum and would not lose the benefit of his earned time.

- Even if you have a signed order from a judge granting a certain number of days of jail credit, if Combined Records disagrees with the calculation they will not enter it.

State v. Ellis, 361 N.C. 200, 639 S.E.2d 425 (2007) – Defendant filed an MAR asking that an Robbery with a Dangerous Weapon run concurrently with a previously imposed sentence, as agreed to in his plea agreement, but contrary to statute. The judge ordered DOC to change their records. DOC refused arguing that they were not a party and the judge could not enforce judgment that was void.

The NC Court of Appeals ruled that DOC had to comply with the order. The judgment was voidable, not void. The NC Supreme Court agreed to hear the case and reversed the Court of Appeals.

Following the case of *State v. Wall,* 348 N.C. 671, 502 S.E. 2d 585 (1998), the Court decided *Ellis* had two choices on how proceed. He could have either withdrawn his guilty plea and gone to trial, or, he could have attempted to negotiate another plea that would not violate the robbery with a dangerous weapon statute. The Court of Appeals should have remanded the case back to the trial court to where he could have been given the opportunity to do either of these things.

- Follow up with Combined Records. If a defendant is resentenced and getting close to his projected release date, call Combined Records and make sure they have a certified copy of the judgment and know that your client will be a holdover.

FREQUENTLY ASKED QUESTIONS FROM INMATES –

1. I was convicted on September 1, but remained in the county jail until September 15. Can I get jail credit for the time between conviction and being transferred to the DOC?

   No, your sentence begins once you are convicted no matter where you are housed so you were no longer entitled to jail credit after September 1 because that's when you began serving your sentence.

   § 15A-1353(a)
   When a sentence includes a term or terms of imprisonment, the court must issue an order of commitment setting forth the judgment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin.

2. I was sentenced to 8 to 10 months and given two months of jail credit, but when I got to the DOC they had not changed my sentence to 6 to 8 months.

   The DOC does not change your sentence. Your jail credit is subtracted from your minimum and maximum when the DOC calculates your projected release date.

3. I have concurrent sentences, but I did not receive the same amount of jail credit on each sentence.

   To receive the same amount of credit on concurrent sentences you have to be held on both of the charges for the same amount of time.

4. I received a four month split sentence. I spent three months in the county jail prior to being convicted. Why didn't the Judge give me my jail credit?

   The Judge decides whether to use pre-trial confinement to satisfy a split sentence. You are not entitled to this time unless you are revoked.

5. I want my jail credit applied to my minimum instead of my maximum.

   Again, jail credit is applied to the minimum and maximum. Inmates enter into DOC custody under their maximum sentence and have the opportunity to work down towards their minimum sentence.

Ex. 8

The defendant received 6-8 months for Breaking and Entering. He has 30 days of jail credit. Upon entering the DOC, he should have a projected release date that is scheduled at 7 months.

2. If he is able to earn 30 days of gain time, when will he be released?

   At 6 months

3. If he is able to earn 60 days of gain time, when will he be released?

   At 5 months

*This inmate cannot earn more than 60 days of gain time. An inmate cannot earn credit past the minimum sentence.

6. I was held as a fugitive from justice in another state prior to being expedited to a county jail in North Carolina. Why was I not given credit for time spent in the out-of–state jail?

   Defendants are entitled to credit for time spent in an out-of-state jail only if he was held solely on the North Carolina charge of which he is to be sentenced. The defendant is not entitled to the credit if he was held under a NC charge and out-of state charge unless the out-of-state charge was dismissed. If the defendant is entitled to the credit, the credit is calculated from the date on the NC warrant.

7. Can I get DOC earn time for the work I performed in the county jail?

   The Department of Correction (DOC) is not legally obligated to award gain time which was earned while the inmate was not under state supervision. *Childers v. Laws,* 558 F. Supp. 1284 (W.D.N.C. 1983). Further, there is no constitutional right to gain time. According to N.C. Gen. Stat. §15A-1355(c), an inmate *may* earn credit against their sentence; however, there is no requirement for the DOC to provide credit.

   The DOC Policy and Procedures Manual states:

   > In a case of inmates assigned to local confinement facilities pursuant to Court Commitment, the Sheriff or Administrator at the local confinement facility shall establish procedures for granting, approving, and documenting sentence reduction

> credit awards. In the case of inmates confined to local confinement facilities pursuant to a contractual agreement with the Department of Correction, the Sheriff or Administrator shall forward recommendations for sentence reduction credit awards to the Contractual Housing Section of the Division of Prisons for final review and action as appropriate.

There are no legal grounds for requesting gain time credit for work done while in the county jail. It is up to the DOC whether to provide that credit.

SUMMARY OF THE PROGRESSION OF A TYPICAL VEHICLE SEIZURE CASE

UPDATED DECEMBER 2006

(Changes enacted during the 2006 legislative session are indicated in red.)

NC ADMINISTRATIVE OFFICE OF THE COURTS

SUMMARY OF THE PROGRESSION OF A TYPICAL VEHICLE SEIZURE CASE (DECEMBER 2006)

Table of Contents

SUMMARY OF THE PROGRESSION OF A TYPICAL VEHICLE SEIZURE CASE (DECEMBER 2006)

I. Initial Stop and Seizure/Duties of Officer

- **Motor vehicles subject to seizure**: A motor vehicle is subject to seizure if
  (1) the driver is charged with an offense involving impaired driving and
  (2) at the time of the offense the defendant's license is revoked because of a prior impaired driving offense **(or at the time of the offense the defendant does not have a valid drivers license and is not covered by an automobile liability insurance policy)**. 20-4.01(24a); 20-28.2(a); 20-28.3(a); AOC-CR-323 (Side Two)
- **Seizure and impoundment**: If the charging officer has probable cause to believe that these criteria are present, the officer must seize the motor vehicle and have it impounded. Seizure is required even if the defendant does not own the vehicle. 20-28.3(b); AOC-CR-323
- **Exceptions to seizure requirement**: The officer should not seize the motor vehicle if
  (1) the motor vehicle has been reported stolen or
  (2) the motor vehicle is a rental vehicle and the defendant is not listed on the rental contract as a person authorized to drive the vehicle. 20-28.3(b); AOC-CR-323
- **Presentation to magistrate**: The officer must present to a magistrate an affidavit of impoundment explaining the basis of the seizure. 20-28.3(c); AOC-CR-323

II. Review by Magistrate/Notice to Interested Parties/Title Hold

- **Review by magistrate**: The magistrate will review the officer's affidavit. If the magistrate determines that the criteria for seizure are present, the magistrate must order that the motor vehicle be held. (If for some reason the officer has not yet seized the vehicle, the officer may do so in accordance with the guidelines in 20-28.3(c1).) Otherwise, the magistrate must order the release of the vehicle to the owner upon the owner's payment of any towing and storage costs that have accrued. 20-28.3(c) and (c1); AOC-CR-323
- **Distribution of seizure order**: If the magistrate approves the seizure, the magistrate must forward a copy of the seizure order to the clerk. The clerk must then provide copies to the DA and the school board attorney. 20-28.3(c); AOC-CR-323 (note to clerk)
- **Notice from officer to DMV**: The officer must notify DMV of the seizure within 24 hours. The officer provides this notice through DCI. 20-28.3(b); AOC-CR-323 (note to officer)
- **Notice from DMV to interested parties**: Within 48 hours of receiving notice from the officer, DMV must notify by first-class mail any lienholder of record and any non-defendant owner of the vehicle. This notice from DMV must explain the procedure for seeking the release of the vehicle. If the motor vehicle was damaged during the offense or during the seizure, DMV must also send notice to the company insuring the vehicle. 20-28.3(b1)
- **When clock begins to run for notice from DMV to interested parties**: A notice of seizure received by DMV from the officer after regular business hours "shall be considered to have been received at the start of the next business day." 20-28.3(b1)

- **Special fax notice to lienholders**: In addition to the notice by first-class mail, DMV must also notify the lienholder by fax within 8 hours of the notice from the officer (or within 8 hours of the start of the next business day if DMV received the notice after regular business hours). This additional requirement applies only if the lienholder has previously provided DMV with a fax number for this purpose. 20-28.3(b2)
- **Custody of motor vehicle**: The motor vehicle will be held for a brief period of time at a local storage facility, but will eventually be retrieved by the statewide contractor, Tarheel Specialties, and delivered to its storage facility in Linden, North Carolina. Tarheel Specialties will pay the towing and storage amount owed to the local company. These local charges are added to the amount that must be paid to Tarheel Specialties when the motor vehicle is ultimately forfeited or released. 20-28.3(d); 20-28.9(a)
- **Amount of towing and storage fees**: The seizure statutes do not address the towing and storage fees charged by the local company that initially stores the motor vehicle. The seizure statutes also do not address the towing fee charged by Tarheel Specialties. Once the motor vehicle is in Linden, the Tarheel Specialties storage fee is limited by statute to $10.00 per day. 20-28.3(d); 20-28.9(b)
- **Front-end title hold**: DMV will prohibit the transfer of the title to the seized motor vehicle until the vehicle is permanently released or is sold by the Department of Public Instruction through Tarheel Specialties. 20-28.3(b1); 20-54(7)

III. Pretrial Release or Sale of Seized Motor Vehicle

- **Temporary pretrial bond release to owner**: An owner other than the defendant may temporarily bond out the motor vehicle. The owner files a petition with the clerk. The clerk must release the motor vehicle to the owner if the following conditions are met:
  (1) the motor vehicle has been seized for at least 24 hours,
  (2) the owner posts a bond, payable to the county school fund, that is equal to the fair market value of the motor vehicle as shown in STARS and
  (3) the owner has executed an acknowledgment.
  The owner must return the motor vehicle at the time of the forfeiture hearing "in substantially the same condition as it was at the time of seizure and without any new or additional liens or encumbrances." If the owner fails to return the motor vehicle or otherwise violates a condition of the release, the bond will be forfeited and the motor vehicle will be re-seized. The owner may also be held in civil or criminal contempt. (Note: The owner may not bond out the motor vehicle if he or she has previously executed an acknowledgment for this same defendant or if he or she has previously forfeited a bond for this same vehicle.) 20-28.2(a1)(1) and (a1)(1a); 20-28.3(e); AOC-CR-330; AOC-CR-331; AOC-CR-332 (Side One)
- **Permanent pretrial release to innocent owner**: An owner other than the defendant may seek the permanent pretrial release of the motor vehicle by petitioning the clerk as an "innocent owner." An innocent owner is one who
  (1) did not know and had no reason to know that the defendant's license was revoked **(or did not know and had no reason to know that the defendant did not have a valid drivers license and did not have automobile liability insurance)**,
  (2) knew the defendant's license was revoked **(or knew that the defendant did not have a valid license and did not have liability insurance)**, but the defendant operated the motor vehicle without the owner's express or implied permission (Note: To qualify as an innocent owner under this option, the owner must file a police report for the unauthorized use of the motor vehicle by the defendant and "agree to prosecute" the defendant.),
  (3) had reported the vehicle stolen,
  (4) is in the business of renting vehicles and the defendant was not an authorized driver on the rental contract, or
  (5) is in the business of leasing motor vehicles, held title to the vehicle at the time of seizure as a lessor and had no actual knowledge that the defendant's license was revoked at the time the lease agreement was executed.
  In addition to proving his or her innocent owner status, the petitioner must also
  (1) demonstrate that the motor vehicle is covered by a liability insurance policy or other financial responsibility as required by Article 13 of Chapter 20 and
  (2) execute an acknowledgment.
  The clerk must review and rule on the petition "as soon as may be feasible." The clerk must send a copy of the order to the DA and to the attorney for the county board of education. (Note: The clerk may not release the motor vehicle if the owner has previously executed an acknowledgement for this same defendant driving this same motor vehicle unless the owner can demonstrate by the greater weight of the evidence that he or she "[took] all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately report[ed], upon discovery, any unauthorized use to the appropriate law enforcement agency.") 20-28.2(a1)(1) and (a1)(2); 20-28.3(e1); AOC-CR-330; AOC-CR-332 (Side Two)

- **Permanent pretrial release to defendant-owner**: If the defendant is an owner of the motor vehicle, he or she may petition for release on the grounds that at the time of the offense, his or her license was not revoked because of a prior impaired driving offense. **(Note: The defendant release statute was not amended to account for the "no license/no insurance" seizure theory.)** The defendant files the petition with the clerk's office. The clerk must then schedule a hearing before a judge to be held within 10 business days of the filing of the petition or "as soon thereafter as may be feasible." Notice of the hearing must be provided to the defendant, the DA and the school board attorney (presumably by the clerk). The clerk must forward a copy of the petition to the DA. If the DA consents, the clerk orders the release of the vehicle to the defendant without the need for a hearing (if the defendant can provide proof of insurance). The clerk must also send a copy of the release order to the school board attorney. If the DA does not consent, then the hearing before the judge will take place as scheduled. 20-28.3(e2); AOC-CR-333
- **Permanent pretrial release to lienholder**: A lienholder may petition for the pretrial release of a motor vehicle in which it has a perfected security interest. There are two methods by which the lienholder may obtain pretrial release:
  (1) **method #1 -- hearing before the court**: The lienholder must file a release petition with the clerk and obtain a hearing date. The lienholder must then serve a copy of the petition (which includes a notice of the hearing date, time and location) on the owner, the DA and the school board attorney. The lienholder must provide these other interested parties 10 days prior notice of the hearing. The court must order the release of the motor vehicle to the lienholder if, after the hearing, it determines by the greater weight of the evidence that
  a. the lienholder has a security interest in the motor vehicle that had been perfected at the time of the seizure,
  b. the obligor has defaulted,
  c. because of the default the lienholder is entitled to possession of the motor vehicle,
  d. the lienholder has agreed to sell the motor vehicle and pay into the clerk any net proceeds from the sale,
  e. the lienholder has agreed not to sell (or otherwise transfer) the motor vehicle to the defendant or the owner (or anyone acting on their behalf) and
  f. this same motor vehicle has not previously been released to the lienholder during the course of a prior seizure involving the same defendant or the same owner.
  (2) **method #2 -- waiver by interested parties**: If the other interested parties waive their right to a hearing by signing the back of the lienholder's petition, then the clerk may release the motor vehicle to the lienholder without the need for a hearing before the court. (Note: Although not entirely clear from the statute, it appears that a lienholder who receives the vehicle using this second method must also sell the vehicle and pay any net proceeds into the clerk. Just as with the first method, the lienholder is prohibited from selling or otherwise transferring the motor vehicle to the defendant or the owner.)
  A violation by the lienholder of the conditions of release is punishable by civil or criminal contempt. 20-28.2(a1)(3); 20-28.3(e3); AOC-CR-334
- **Clerk's duty to report pretrial release activity to DMV**: Whenever an owner executes an acknowledgment as part of a pretrial release petition, the clerk must enter the acknowledgment into STARS. Additionally, whenever a vehicle is released prior to trial, the clerk must remove the title hold in STARS. 20-28.8

- **No waiver of towing and storage costs**: Any order authorizing the pretrial release of a seized motor vehicle must require the party to whom the vehicle is released to pay towing and storage costs. "This requirement shall not be waived." 20-28.3(n)
- **Pretrial sale by DPI**: The Department of Public Instruction, through Tarheel Specialties, may sell a seized motor vehicle at a public sale prior to trial if
  (1) 90 days have passed since the date of seizure and the motor vehicle has a fair market value of $1,500 or less, or
  (2) the towing and storage costs exceed 85% of the fair market value, or
  (3) the owner of the motor vehicle consents.
  The sale is conducted in the same manner as a post-trial sale of a vehicle under 20-28.5(a). Following the sale, Tarheel Specialties will pay the proceeds, less the towing and storage costs, into the clerk's office. If the court subsequently enters an order of forfeiture, the proceeds are first used to pay off any outstanding liens. Any remaining balance is paid to the local school fund. If the court subsequently enters a release order, the proceeds are first used to pay off any outstanding liens. Any remaining balance is paid to the owner. (Note: Following a pretrial sale of the motor vehicle, DPI will remove the title hold in STARS and indicate in STARS whether there are any net sale proceeds.) 20-28.2(a1)(1a); 20-28.3(i)

IV. Other Pretrial Issues

- **Insurance proceeds for seized motor vehicles that are damaged**: If the motor vehicle is damaged during the course of the offense or during the course of the seizure, DMV must direct the insurance company to pay the insurance proceeds (minus the deductible) to the clerk. The clerk will later disburse the insurance proceeds pursuant to the direction of the court. Generally, the proceeds will be released or forfeited in the same manner as the seized vehicle. (Note: 20-28.3(h) sets out a special procedure that is used when the motor vehicle is totaled and the insurance company wants to take possession of the totaled vehicle.) 20-28.2(c1); 20-28.3(h); AOC-CR-924
- **Retrieval of personal property left in seized motor vehicle**: "At reasonable times, the entity charged with storing the motor vehicle may permit owners of personal property not affixed to the motor vehicle to retrieve those items from the motor vehicle, provided satisfactory proof of ownership of the motor vehicle or the items of personal property is presented to the storing entity." 20-28.3(j)

V. Trial on Underlying Offense

- **Scheduling of trial on underlying offense**: "District [C]ourt trials of impaired driving offenses involving forfeitures of motor vehicles . . . shall be scheduled on the arresting officer's next court date or within 30 days of the offense, whichever comes first." 20-28.3(m)
- **Continuances**: A District Court trial of an impaired driving offense involving a seized vehicle may not be continued unless
  (1) the party seeking the continuance files a written motion for a continuance and provides notice to the other party and
  (2) the court finds that there is a "compelling reason" for the continuance. 20-28.3(m); AOC-CR-337

VI. Resolution of Underlying Offense and Forfeiture Hearing

- **Forfeiture hearing necessary if conviction plus vehicle or proceeds**: If the defendant is convicted of an offense involving impaired driving, the court should conduct a forfeiture hearing if (1) the motor vehicle is still seized or (2) the clerk is still holding insurance proceeds, lienholder sale proceeds, or pretrial sale proceeds. 20-28.2(d)
- **No need for forfeiture hearing if defendant not convicted of offense involving impaired driving -- motor vehicle released to owner**: If the defendant is not convicted of an offense involving impaired driving, the court must order the release of the motor vehicle to the owner. If the clerk is holding insurance proceeds, these are released to the owner after the owner has paid the outstanding towing and storage fees. If the clerk is holding lienholder sale proceeds, these are released to the owner. If there are pretrial sale proceeds, these proceeds must first be used to pay off outstanding liens on the motor vehicle, with any remainder going to the owner. 20-28.3(i); 20-28.4(a); AOC-CR-336
- **Notice from DA to interested parties**: If a forfeiture hearing is necessary, then the prosecutor must notify the defendant, any owner of the vehicle other than the defendant, the school board attorney and any lienholder that
  (1) the motor vehicle (or proceeds) is (are) subject to forfeiture and
  (2) the defendant, owner, or lienholder may seek to protect his or her interest in the vehicle (or proceeds) by filing a release petition and appearing at the hearing.

  The DA must serve this notice at least 10 days prior to the forfeiture hearing and may use "any means reasonably likely to provide actual notice." If the DA fails to provide this notice, the court must continue the forfeiture hearing until the DA has given adequate notice to the interested parties. (Note: If the court orders such a continuance, it is a continuance only of the forfeiture issue. The continuance should not delay the sentencing of the defendant.) 20-28.2(c) and (d); 20-28.3(k); AOC-CR-324
- **Timing of hearing**: Once the defendant is convicted of the underlying impaired driving offense, "the issue of vehicle forfeiture shall be heard by the judge immediately, or as soon thereafter as feasible." The forfeiture hearing "may be held at the sentencing hearing on the underlying offense involving impaired driving [or] at a separate hearing after conviction of the defendant." If the defendant failed to appear for the trial on the underlying offense, the forfeiture hearing should be held 60 days or more after the defendant failed to appear. 20-28.2(b), (b1) and (d); 20-28.3(m)

  (Note: As rewritten during the 2006 short session, 20-28.2(b) and 20-28.2(b1) appear to indicate that the court, in a non-FTA situation, could make the forfeiture determination at a hearing prior to the defendant's conviction. This is a departure from previous law and conflicts with 20-28.2(d), so it may be a drafting error resulting from the inadvertent omission of the word "sentencing" in 20-28.2(b)(1) and 20-28.2(b1)(1).)
- **Forfeiture determination**: The vehicle (or proceeds) will be forfeited to the school board if the court determines by the greater weight of the evidence that
  (1) the defendant is guilty of an offense involving impaired driving and
  (2) at the time of the offense the defendant's license was revoked for a prior impaired driving offense **(or at the time of the offense the defendant was driving without a valid drivers license and was not covered by an automobile liability insurance policy)**. 20-28.2(b) and (b1); AOC-CR-335

(Note: As rewritten during the 2006 short session, 20-28.2(b) and (b1) appear to indicate that the court could determine the defendant to be not guilty, but still order the forfeiture of the vehicle so long as the underlying charge involved impaired driving. This is a departure from previous law and conflicts with 20-28.4(a)(1), so it may be a drafting error.)

- **Court finds no impaired driving revocation -- motor vehicle released to owner**: If at the forfeiture hearing the court does not find that the defendant's license was revoked at the time of the offense for a prior impaired driving offense, the court must order the release of the motor vehicle to the owner. If the clerk is holding insurance proceeds, these are released to the owner after the owner has paid the outstanding towing and storage fees. If the clerk is holding lienholder sale proceeds, these are released to the owner. If there are pretrial sale proceeds, these proceeds must first be used to pay off outstanding liens on the motor vehicle, with any remaining proceeds going to the owner. 20-28.3(i); 20-28.4(a); AOC-CR-336
  (Note: Presumably a release would also be appropriate if the vehicle was seized under the "no license/no insurance" theory and the court were to determine that the defendant had a valid drivers license or was covered by a liability insurance policy at the time of the offense. 20-28.4 does not specifically address this, however.)
- **Forfeiture to school board**: If the court finds by the greater weight of the evidence that the forfeiture criteria are present, the court must order the forfeiture of the motor vehicle to the school board (unless an innocent owner or lienholder successfully petitions for the release of the vehicle). If the vehicle was not sold prior to trial, then the school board may either keep the vehicle for its own use or sell the vehicle at a public sale. If the clerk is holding insurance proceeds or lienholder sale proceeds, these are released to the school board. If there are pretrial sale proceeds, these proceeds must first be used to pay off outstanding liens on the motor vehicle, with any remaining proceeds going to the school board. 20-28.2(d); 20-28.3(i); AOC-CR-335
- **Clerk's duty to report forfeiture to DMV**: The clerk must report to DMV the entry of a forfeiture order. The clerk will do this via STARS. 20-28.8
- **Retention or sale of forfeited motor vehicle by school board**: As mentioned above, if the motor vehicle was not sold prior to trial, the school board may either
  (1) keep the motor vehicle for its own use or
  (2) sell the vehicle at a public sale.
  If the school board chooses to keep the motor vehicle, it must pay the towing and storage costs and satisfy any outstanding liens of record.
  If the school board opts to sell the vehicle, it must mail a written notice of the sale to the owner, any lienholders and DMV at least 10 days prior to the date of sale. A lienholder may purchase the vehicle at the public sale. (However, the defendant, the owner, or any person acting on behalf of the defendant or the owner may not purchase the vehicle at the sale.)
  The proceeds of the sale are allocated as follows:
  (1) costs of the sale,
  (2) towing and storage costs and
  (3) satisfaction of any liens of record.
  Any remaining amount is paid to the county school fund. (Note: If the towing and storage costs exceed the sale price, it is Tarheel Specialties, not the State, that bears the loss). 20-28.2(d); 20-28.5; 20-28.9(a)

- **Release to innocent owner**: At the forfeiture hearing, the court may release the motor vehicle to an owner other than the defendant who is an "innocent owner." To qualify as an innocent owner, the petitioner must prove by the greater weight of the evidence that he or she
  (1) did not know and had no reason to know that the defendant's license was revoked **(or did not know and had no reason to know that the defendant did not have a valid drivers license and did not have automobile liability insurance)**,
  (2) knew the defendant's license was revoked **(or knew that the defendant did not have a valid license and did not have liability insurance)**, but the defendant operated the motor vehicle without the owner's express or implied permission (Note: To qualify as an innocent owner under this option, the owner must file a police report for the unauthorized use of the motor vehicle by the defendant and "agree to prosecute" the defendant.),
  (3) had reported the vehicle stolen,
  (4) is in the business of renting vehicles and the defendant was not an authorized driver on the rental contract, or
  (5) is in the business of leasing motor vehicles, held title to the vehicle at the time of seizure as a lessor and had no actual knowledge that the defendant's license was revoked at the time the lease agreement was executed.

  In addition to proving his or her innocent owner status, the petitioner must also
  (1) demonstrate that the motor vehicle is covered by a liability insurance policy or other financial responsibility as required by Article 13 of Chapter 20 and
  (2) execute an acknowledgment.

  If the clerk is holding insurance proceeds or lienholder sale proceeds, these are also released to the owner. If there are pretrial sale proceeds, these proceeds must first be used to pay off outstanding liens on the motor vehicle, with any remaining proceeds going to the owner. (Note: The court may not release the motor vehicle to the owner if the owner has previously executed an acknowledgement for this same defendant driving this same motor vehicle unless the owner can demonstrate by the greater weight of the evidence that he or she "[took] all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately report[ed], upon discovery, any unauthorized use to the appropriate law enforcement agency.") 20-28.2(a1)(1), (a1)(2) and (e); 20-28.3(i); AOC-CR-330; AOC-CR-332 (Side Two)
- **Release to lienholder**: At the forfeiture hearing, the motor vehicle may be released to a lienholder if the judge determines, by the greater weight of the evidence, that
  (1) the lienholder has a security interest in the motor vehicle that had been perfected at the time of the seizure,
  (2) the obligor has defaulted,
  (3) because of the default the lienholder is entitled to possession of the motor vehicle,
  (4) the lienholder has agreed to sell the motor vehicle and pay into the clerk any net proceeds from the sale,
  (5) the lienholder has agreed not to sell (or otherwise transfer) the motor vehicle to the defendant or the owner (or anyone acting on their behalf) and
  (6) this same motor vehicle has not previously been released to the lienholder during the course of a prior seizure.

  If the clerk is holding insurance proceeds, these are also released to the lienholder. 20-28.2(a1)(3); 20-28.2(f); AOC-CR-334

- **Clerk's duty to report post-trial release activity to DMV**: Whenever an owner executes an acknowledgment as part of a post-trial release petition, the clerk must enter the acknowledgment into STARS. Additionally, whenever a vehicle is released following trial, the clerk must remove the title hold in STARS. 20-28.8
- **No waiver of towing and storage costs**: Any order authorizing the post-trial release of a seized motor vehicle must require the owner or lienholder to pay towing and storage costs. "This requirement shall not be waived." 20-28.2(h); 20-28.4(a)

VII. Appeals

- **Appeal of nondefendant owner from denial of pretrial bond release petition**: The seizure statutes do not provide for an appeal by an owner who unsuccessfully petitions the clerk for pretrial release using the bond procedure of 20-28.3(e).
- **Appeal of innocent owner from denial of pretrial petition**: Although there is no right of immediate appeal, if the clerk rules against the putative innocent owner at the pretrial hearing, the owner may seek the release of the vehicle again as an innocent owner at the post-trial forfeiture hearing. 20-28.3(e1)
- **Appeal of defendant from denial of pretrial petition**: Although there is no right of immediate appeal, if the court rules against the defendant's pretrial petition, the defendant may seek the release of the vehicle on the same grounds (i.e., that at the time of the offense, the defendant's license was not revoked for a prior impaired driving offense) at the post-trial forfeiture hearing. 20-28.3(e2)
- **Appeal of lienholder from denial of pretrial petition**: If the judge rules against the lienholder at the pretrial hearing, the lienholder may perhaps be able to seek the release of the vehicle again at the post-trial forfeiture hearing under 20-28.2(f). The seizure statutes do not specifically address this issue, however. Accordingly, a lienholder whose petition was denied at the pretrial stage may be barred from requesting release again at the forfeiture hearing under res judicata principles.
- **Post-forfeiture hearing appeal by defendant**: The defendant may appeal the underlying conviction and the forfeiture determination to the Superior Court. If the defendant appeals only the forfeiture determination, it appears that the appeal would be to the Court of Appeals because 20-28.5(e) provides that appeals from final orders of forfeiture are to the Court of Appeals. 20-28.5(e)
- **Post-forfeiture hearing appeal by innocent owner**: A putative innocent owner may appeal a denial of his or her post-trial petition to the Court of Appeals. (Note: When the defendant appeals the District Court conviction on the underlying offense, 20-28.5(e) provides that the Superior Court hears the forfeiture issue de novo. This may mean that if the defendant appeals the underlying conviction, the putative innocent owner must appeal the forfeiture determination to the Superior Court rather than to the Court of Appeals.) 20-28.2(e); 20-28.5(e)
- **Post-forfeiture hearing appeal by lienholder**: The seizure statutes do not expressly address a lienholder's appeal from a denial of its post-trial release petition. Presumably, though, a lienholder who unsuccessfully petitions for release at the forfeiture hearing may appeal under 20-28.5(e), which generally provides for an appeal from a final forfeiture order to the Court of Appeals. (Note: As mentioned above with regard to innocent owners, the lienholder's appeal may be to the Superior Court if the defendant has appealed the District Court conviction.) 20-28.5(e)
- **Appeals by the District Attorney**: The seizure statutes do not expressly provide for any appeals by the DA of pretrial or post-trial release orders. Both 20-28.2(e) and 20-28.5(e) contemplate the appeal of orders of forfeiture, not the appeal of orders of release.
- **Stay of forfeiture order pending appeal of conviction**: If the defendant appeals his or her conviction of the underlying impaired driving offense, any order of forfeiture is stayed pending the appeal. 20-28.5(e); AOC-CR-335 ("Appeal Entries" section)

VIII. Other Seizure/Forfeiture Issues

- **Rights of board of education attorney**: With the consent of the county board of education, the DA "may delegate to the attorney for the county board of education any or all of the duties" of the DA under 20-28.3. Even if these duties are not delegated to the school board attorney, he or she "shall be given notice of all proceedings regarding offenses involving impaired driving related to a motor vehicle subject to forfeiture." (Note: This notice requirement does not apply to innocent owner pretrial release proceedings before the clerk.) Further, he or she has "the right to appear and to be heard on all issues relating to the seizure, possession, release, forfeiture, sale, and other matters related to the seized vehicle." Finally, all agencies with information regarding seizure, release, forfeiture and the like "are authorized and directed to provide county boards of education with access to that information." 20-28.3(k)
- **Payment of towing and storage costs by defendant upon conviction**: If the defendant is convicted of the underlying impaired driving offense, the court must order the defendant "to pay as restitution to the county board of education, the motor vehicle owner, or the lienholder the cost paid or owing for the towing, storage, and sale of the motor vehicle to the extent the costs were not covered by the proceeds from the forfeiture and sale of the motor vehicle." The clerk must docket a civil judgment for these costs in favor of the party to whom the defendant owes the restitution. If the defendant receives active time, the civil judgment becomes effective (and the clerk must docket it) when the defendant's conviction becomes final. If the court places the defendant on probation, "the civil judgment in the amount found by a judge during the probation revocation or termination hearing to be due shall become effective and be docketed by the clerk when the defendant's probation is revoked or terminated." 20-28.3(*l*)
- **Post-conviction registration stop against defendant for all motor vehicles**: If the defendant is convicted of the underlying offense and the court finds that the defendant's license was revoked at the time due to a prior impaired driving offense, DMV must revoke the registration of all motor vehicles registered in the defendant's name. Further, the defendant may not register any motor vehicle in his or her name until DMV has restored his or her license. (Note: As a practical matter, it is the clerk's office that enters this registration stop against the defendant in STARS. However, while the clerk enters the stop, only DMV may lift it.) 20-54.1(a); AOC-CR-310 (note at bottom of Side Two); AOC-CR-335 (second note on Side Two)
- **Post-conviction registration stop against owner for seized motor vehicle**: If the defendant is convicted of the underlying offense and the court finds that the defendant's license was revoked at the time as a result of a prior impaired driving offense, DMV must revoke the registration of the seized motor vehicle even if the defendant was not the owner at the time of seizure. The owner of the vehicle at the time of the seizure may not register this vehicle in his or her name until DMV restores the defendant's license. If, however, the owner has established that he or she is an innocent owner, DMV will not revoke the owner's registration for the motor vehicle. (Note: Again, as a practical matter, it is the clerk's office that enters this registration stop against the owner. As noted above, though, only DMV may lift a registration stop.) 20-54.1(b); AOC-CR-310 (note at bottom of Side Two); AOC-CR-335 (second note on Side Two)

TAB 4

Introduction to Contested Hearings

UNC SCHOOL OF GOVERNMENT

ADMINISTRATION OF JUSTICE BULLETIN NO. 2012/04 | DECEMBER 2012

Estate Proceedings in North Carolina

Ann M. Anderson

Introduction

In addition to their many other duties, North Carolina's clerks of superior court have wide-ranging judicial responsibilities.[1] One of broadest areas of their judicial authority involves estates of the deceased: clerks have long been North Carolina's *ex officio* judges of probate. In that role, they have exclusive jurisdiction to oversee the administration of North Carolina's decedents' estates. In the course of an estate's administration, it is common for conflicts or questions to arise that can—and often must—be answered or resolved by the court. For most such matters, that "court" is the clerk.[2]

The questions that come up during estate administration cover a wide range of topics. For example, the parties may disagree as to who will be named the estate's administrator or whether that administrator may sell estate property. They may contest the amount of a spouse's elective share of the estate, whether a closed estate may be reopened to deal with new issues, and any number of other issues in between. There is no statutory list that attempts to cover every possibility; the scenarios vary according to the situations the decedents leave behind. Recently the General Assembly made significant changes to the statutes governing decedents' estates. These amendments included an effort to capture the range of contested estate issues into a general, defined category and to set rules to govern them. The new legislation designates these matters as "estate proceedings" and goes on to specify the procedures that apply to their

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1. Clerks have authority to hear and make determinations on an array of matters, spanning substantive areas as diverse as partitions of land, appointment of guardians for incompetent adults, and real estate foreclosures, to name a few. The matters that come before a clerk essentially fall into three categories: civil actions, special proceedings, and—broadly stated—estates.

This judicial authority is held by the 100 elected county clerks of court. The assistant clerks of superior court also are statutorily authorized to conduct hearings and perform related judicial functions, and "any act of an assistant clerk is entitled to the same faith and credit as that of the clerk." Section 7A-102(b) of the North Carolina General Statutes (hereinafter G.S.); *see also* G.S. 28A-2-2 ("An assistant clerk . . . shall have jurisdiction as provided by G.S. 7A-102"). Deputy clerks, on the other hand, are not authorized to act as hearing officers. *Id.* § 7A-102(b). In many counties, elected clerks often must delegate hearing authority to assistant clerks, many of whom become specialized in handling specific types of hearings.

2. This jurisdiction is quite broad and also includes adjudication of matters related to testamentary trusts, estates of minors, and estates of persons who have been adjudicated incompetent. This bulletin, however, focuses specifically on proceedings related to decedents' estates.

adjudication—from filing to litigation to hearing to appeal. This bulletin discusses the new procedural framework for contested estate proceedings.[3]

The legislative amendments that created this new structure were effective January 1, 2012, and they apply to estates of decedents dying on or after that date.[4] It should be noted, then, that matters arising in estates of decedents dying prior to January 1, 2012, are governed by the General Statutes as they existed prior to the effective date of the new legislation.

Clerks' Jurisdiction over Estate Proceedings

Original and Exclusive Jurisdiction

As judges of probate, clerks of superior court have long held original, exclusive jurisdiction over estate administration.[5] Within the wide scope of this jurisdiction, clerks have long been authorized to adjudicate conflicts among the interested parties—including those issues now defined as "estate proceedings." In 2011, the General Assembly amended G.S. Chapter 28A to provide that the clerk's probate jurisdiction "includ[es], but [is] not limited to, estate proceedings,"[6] which are defined as "matter[s] initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding."[7]

"Original" jurisdiction means that a proceeding must be initiated with the clerk in order for the North Carolina courts to have jurisdiction over it—it cannot be brought before a superior or district court judge or before any other division of the court.[8] Except for a few categories discussed below, the clerk's original jurisdiction over estate proceedings is also "exclusive"—that is, the proceedings must remain with the clerk and cannot be transferred to a superior or district

3. This bulletin does not discuss estate administration generally. For information about the complex law of estate administration in North Carolina, clerks, judges, court personnel, and others are encouraged to consult Joan G. Brannon and Ann M. Anderson, 2 North Carolina Clerk of Superior Court Procedures Manual (2d ed., Chapel Hill: UNC School of Government, December 2012), which includes legislative changes from the 2011–2012 session of the General Assembly. Practitioners and others seeking specific guidance on estate administration are also encouraged to consult N.C. Bar Ass'n, North Carolina Estate Administration Manual (Supplemented 7th ed. 2010/2012), and, generally, James B. McLaughlin Jr. and Richard T. Bowser, Wiggins Wills and Administration of Estates in North Carolina (4th ed. 2011).

4. *See* S.L. 2011-344.

5. G.S. 7A-241 provides that, "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law." Although this statute provides that jurisdiction is vested in the "superior court division," G.S. 28A-2-1 specifies that the clerk is given exclusive original jurisdiction over estate administration. *See also In re* Estate of Longest, 74 N.C. App. 386, 390, 328 S.E.2d 804, 807 (1985).

6. G.S. 28A-2-1.

7. *Id*. § 28A-1-1(1b). The General Statutes further provide that "[t]he clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings." *Id*. § 28A-2-4(a). The distinction between estate proceedings and special proceedings is discussed *infra* in the text beginning at page 3.

8. *In re* Estate of Adamee, 291 N.C. 386, 398, 230 S.E.2d 541, 549 (1976).

court judge.[9] In proceedings over which the clerk has exclusive jurisdiction, the clerk "shall determine all issues of fact and law."[10]

Estate Proceedings versus Special Proceedings

As noted above, "special proceedings" are specifically excluded from the definition of "estate proceedings."[11] Special proceedings are a statutory category of matters brought and heard before the clerk that generally are in the clerk's exclusive jurisdiction.[12] A number of issues arising in the course of estate administration are designated by statute as special proceedings rather than estate proceedings. The clerk's exclusive jurisdiction over these special proceedings is not affected by the creation of the statutory category of estate proceedings.[13] Most of these special proceedings are designated as such both for hearing and appeal purposes, but a few are included as special proceedings in a more limited manner. The following are examples:

- Assignment of year's allowance (appealed as special proceeding)[14]
- Assignment of year's allowance of more than $20,000[15]
- Revocation of letters (heard as estate proceeding; appealed as special proceeding)[16]
- Resignation of personal representative (heard as estate proceeding; appealed as special proceeding)[17]
- Proceeding against unknown heirs of decedent before distribution[18]
- Sale of land to create assets[19]
- Proceeding for sale, lease, or mortgage of real estate for payment of debts[20]
- Surviving spouse's right to elect a life estate (heard as special proceeding; appealed as estate proceeding)[21]

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9. G.S. 28A-2-4(a). This statute sets out three categories of proceedings within the exclusive jurisdiction of the clerk, but it also makes clear that the exclusive jurisdiction of the clerk is "not limited to" these matters. The issues that may arise within the clerk's exclusive jurisdiction are many, and thus the three listed categories, while broad, are best seen as common examples rather than as exhaustive categories:

> 1 Probate of wills;
> 2. Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates; and
> 3. Determination of the elective share for a surviving spouse as provided in G.S. 30-3.

G.S. 28A-2-4(a)(1)–(3).

10. *Id*. § 1-301.3(b).

11. *Id*. § 28A-1-1(1b).

12. Special proceedings vary in subject matter from adoptions to legitimations to name changes to land partitions. For an outline of the clerk's judicial authority over special proceedings, including a more comprehensive list of designated matters, see Brannon and Anderson, *supra* note 3, at Chapter 100, "Introduction to Special Proceedings."

13. G.S. 28A-2-5.

14. *Id*. §§ 30-15 through 30-25.

15. *Id*. §§ 30-27 through 30-31.2.

16. *Id*. §§ 28A-9-1 through 28A-9-7.

17. *Id*. §§ 28A-10-1 through 28A-10-8.

18. *Id*. § 28A-22-3.

19. *Id*. § 28A-17-1.

20. *Id*. § 28A-15-1.

21. *Id*. § 29-30.

General procedures for special proceedings are set out in G.S. 1-393 to 1-408.1. The North Carolina Rules of Civil Procedure apply to special proceedings unless the specific governing statutes provide otherwise or the rules conflict with G.S. 1-393 to 1-408.1.[22] Appeal of a clerk's order or judgment in a special proceeding is to the superior court de novo, and the procedure is governed by G.S. 1-301.2.

Transfer of Estate Proceedings

While most estate proceedings remain in the clerk's jurisdiction from filing to final order,[23] a long-standing exception requires transfer of estate matters when clerks have certain conflicts of interest.[24] After the 2011 amendments, G.S. Chapter 28A now also sets out a list of proceedings that may be transferred to superior court even in the absence of such a conflict. The listed proceedings are, therefore, within the clerk's original—but not exclusive—jurisdiction. The list includes proceedings to

- Ascertain heirs or devisees;
- Approve settlement agreements pursuant to G.S. 28A-2-10;[25]
- Determine questions of construction of wills;
- Determine priority among creditors;
- Determine whether a person is in possession of property belonging to an estate;
- Order recovery of property of an estate in the possession of third parties; and
- Determine the existence of any immunity, power, privilege, duty, or right.[26]

In these proceedings,

> [a]ny party or the clerk of superior court may file a notice of transfer of a proceeding pursuant to this subdivision to the Superior Court Division of the General Court of Justice as provided in G.S. 28A-2-6(h).[27]

The statutory requirements for filing and service of transfer must be met in order for transfer to be effective. Time limits apply to both the parties and the clerk. A party seeking transfer must serve a notice of transfer within thirty (30) days after being served a copy of the pleading requesting the relief.[28] If a party fails to timely serve a notice of transfer, the party waives any objection to the clerk's exercise of jurisdiction over the proceeding.[29] If the transfer is pursuant

22. *Id*. § 1-393; *Id*. § 1A-1, Rule 1.

23. Appeal of an estate proceeding is to the superior court; this topic is discussed in greater detail *infra* pages 15 through 18.

24. G.S. 7A-104(a), (a1). In qualifying conflict situations, a party may move either to have the matter heard by a clerk in an adjoining county in the district or by a superior court judge in the appropriate district. *Id*. § 7A-104(a2).

25. See the section titled "Settlement," *infra* page 14.

26. G.S. 28A-2-4(a)(4). Accordingly, "[e]xcept as provided in subdivision (4) of [28A-2-4(a)], the jurisdiction of the clerk of superior court is exclusive." *Id*. § 28A-2-4(a). When an estate is transferred to superior court, the clerk's exclusive jurisdiction over the matters set forth in G.S. 28A-2-4(a)(1)–(3) (non-tranferrable issues) is not stayed unless so ordered by the superior court. *Id*. § 28A-2-6(i). This is true notwithstanding the consolidation and joinder provisions discussed *infra* page 5. *Id*.

27. *Id.* §28A-2-4(a)(4).

28. *Id.* § 28A-2-6(h).

29. *Id.*

to the clerk's motion, the clerk must serve the notice of transfer (1) prior to or at the first hearing duly noticed in the proceeding and (2) prior to the parties' presentation of evidence (including in a hearing at which the clerk orders a continuance).[30]

Once a transfer is filed and served, the clerk shall transfer the proceeding.[31] The rules and procedures of the superior court apply to the matter once it is transferred.[32] Nevertheless, the clerk retains authority to make whatever orders are appropriate to protect the interests of the parties and to avoid unnecessary cost or delay.[33] The clerk also, of course, retains exclusive jurisdiction over the underlying administration of the estate, and he or she therefore continues to have authority to ensure the administration proceeds according to the requirements of law.

In addition, the General Statutes allow for transfer of declaratory judgment claims. If a party to an estate proceeding requests declaratory relief under the general declaratory relief statutes,[34] either party may, but is not required to, move for a transfer of the proceeding to the superior court, as provided in G.S. Chapter 7A, Article 21.[35]

Consolidation and Joinder

In addition to providing for transfer of certain types of estate proceedings, the 2011 legislative changes also allow certain matters to be consolidated or joined with related civil actions filed in the superior court. When an estate proceeding before the clerk and a civil action before the superior court involve a common issue of law or fact, the superior court may order the matters consolidated in the superior court. This consolidation may be done "upon the court's motion or motion of a party to either the estate proceeding or the civil action."[36] Once the judge enters a consolidation order, jurisdiction for all matters pending in the estate proceeding and the civil action "shall be vested in the superior court."[37]

Further, in any civil action before the superior court, the party asserting a claim for relief may join as many claims, legal or equitable, as the party may have against the opposing party, even if such claims are otherwise within the clerk's exclusive jurisdiction.[38] When the court orders either joinder or consolidation of an estate proceeding, the clerk or judge may make appropriate orders to protect the interests of the parties and avoid unnecessary cost or delay.[39]

No Jurisdiction

The clerk's jurisdiction over estate-related conflicts is very broad, but some limitations should be noted. While the 2011 legislation codified these exclusions into one new statute, the categories set out in this statute should not themselves be seen as new exceptions, as they are found in

30. *Id.*

31. *Id.*

32. *Id.* ("The proceeding after the transfer is subject to the provisions of the General Statutes and to the rules that apply to actions initially filed in the court to which the proceeding was transferred.")

33. *Id.* § 28A-2-6(i).

34. *See id.* Chapter 1, Article 26.

35. *Id.* § 28A-2-4(b). In particular, G.S. 7A-258 and 7A-259 govern the procedure for motions and orders to transfer matters to a proper trial division.

36. *Id.* § 28A-2-6(f). It is unclear if the motion of the "court" may include a motion by the clerk.

37. *Id.*

38. *Id.* § 28A-2-6(g).

39. *Id.* § 28A-2-6(i).

existing statutes and in well-settled case law. Generally speaking, these categories are either civil actions by nature or are otherwise matters traditionally adjudicated before the superior court.

The new statute provides that the clerk has no jurisdiction to hear the following matters:

1. Actions by or against creditors or debtors of an estate, except as provided in G.S. 28A, Article 19 (concerning claims against the estate);
2. Actions involving claims for monetary damages, including breach of fiduciary duty, fraud, and negligence;
3. Caveats;[40]
4. Proceedings to determine the proper county of venue; and
5. Recovery of property transferred or conveyed by a decedent with intent to hinder, delay, or defraud creditors pursuant to 28A-15-10(b).[41]

What Matters Are Included in an "Estate Proceeding"?

In any given estate administration, there may be many different types of orders entered by the clerk. Often these matters are a routine part of the administration or are otherwise uncontested, and the clerk is authorized to make summary decisions about them without need of formal petition or hearing. This discussion will focus on estate proceedings in which there is likely to be a hearing because the matter is contested and there is some material issue to be resolved.[42]

As noted above, the statutory definition of "estate proceeding" is "a matter initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding."[43] This definition covers a broad range of issues indeed, and there may be multiple estate proceedings conducted in any given estate administration. This is especially true where estates are large or administration is complicated; the property is unusual, scattered, or hard to value; the representative is unable or unwilling to fulfill his or her duties; the family is in conflict; the will or other instrument is unclear; or the terms are not what the devisees wanted or expected. And the list goes on.

So it is not particularly practical to try and list every matter that can arise as an "estate proceeding." G.S. 28A-2-4(a), however, lists some common categories, stating that

> [e]state proceedings include, *but are not limited to,* the following:
>
> 1. Probate of wills.
> 2. Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates.[44]

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40. Will caveats are actions *in rem* to challenge the validity of a will that has been submitted to probate. Caveats are filed with the clerk but heard before a superior court judge by a jury. The statutes governing will caveats, which were amended during the 2011–2012 legislative session, are found at G.S. Chapter 31, Article 6. An outline of will caveat procedure for judicial officials, prepared by Ann M. Anderson in September 2012, can be downloaded from the School of Government's website at www.sog.unc.edu/node/2190.

41. G.S. 28A-2-4(c).

42. If a matter falls within the definition of "estate proceeding" but is uncontested, it must be commenced by a petition, though the clerk may decide it without a hearing. The clerk may also "hear and decide the petition summarily." *Id.* § 28A-2-6(b).

43. *Id.* § 28A-1-1(1b).

44. Note that, although this new subparagraph (2) to G.S. 28A-2-4(a) provides that proceedings "granting and revoking . . . letters" are "estate proceedings," the statute that governs such proceedings explicitly

3. Determination of the elective share for a surviving spouse as provided in G.S. 30-3.[45]
4. Proceedings to ascertain heirs or devisees, to approve settlement agreements pursuant to G.S. 28A-2-10, to determine questions of construction of wills, to determine priority among creditors, to determine whether a person is in possession of property belonging to an estate, to order the recovery of property of the estate in possession of third parties, and to determine the existence or nonexistence of any immunity, power, privilege, duty or right . . .[46]

The 2011 legislation also provides that certain other types of matters are heard as estate proceedings. Previously the adjudication standard for these matters was not specifically codified or was unclear, or the particular matter was classified as a special proceeding. Among the categories of other matters heard as estate proceedings are

- Petitions for probate of a will in solemn form;[47]
- Determinations of a spouse's life estate in lieu of intestate share;[48]
- Controversies arising under the Intestate Succession Act;[49]
- Decisions of the clerk regarding preservation of assets during pendency of will caveats;[50]
- Proceedings contesting the appointment of (issuance of letters to) a personal representative or collector;[51] and
- Proceedings by a personal representative to enforce his or her rights, as set forth in G.S. 28A-13-3(a).[52]

Another example of an estate proceeding is a personal representative's right to petition for examination of "any persons reasonably believed to be in possession of property of any kind belonging to the estate of the decedent" and to "demand . . . recovery of such property."[53] This type of proceeding can be essential to a personal representative's ability to collect and distribute estate property according to the terms of the decedent's will and the requirements of law. Additional matters that have been treated as falling within the clerk's authority include proceedings to reopen an estate[54] and approval of a fee paid to an attorney hired to represent an estate.[55]

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provides for appeal "as a special proceeding." *Id*. § 28A-9-4.

45. The 2011 legislation amended G.S. 30-3.4(e)(1) to make explicit that elective share determinations are to be adjudicated as estate proceedings. *Id*. § 30-3.4(e)(1).

46. *Id*. § 28A-2-4(a) (emphasis added).

47. *Id*. § 28A-2A-7.

48. *Id*. § 29-30(f).

49. *Id*. § 29-12.1. For example, in *In re* Williams, 208 N.C. App. 148, 701 S.E.2d 399 (2010), the clerk presided over the matter of whether a purported heir had met the statutory requirements for legitimation that would entitle him to inherit from his putative father.

50. G.S. 31-36(c).

51. *Id*. § 28A-6-4.

52. *Id*. § 28A-13-3(d). This statute provides that "[t]he personal representative has the power to institute an estate proceeding pursuant to Article 2 of this Chapter to enforce the rights set forth in this section."

53. G.S. 28A-15-12(b1).

54. *See In re* Estate of Mullins, 182 N.C. App. 667, 669, 643 S.E.2d 599, 601 (2007).

55. *See* Strickland v. Strickland, 206 N.C. App. 766, 699 S.E.2d 142 (2010) (unpublished, reported in table).

Procedure for Estate Proceedings

An estate proceeding typically culminates in an evidentiary hearing during which the clerk hears the parties' testimony, evaluates the competent evidence, makes relevant fact findings and legal conclusions, and renders an order. These hearings, for practical purposes, are formal court proceedings: the clerk is a judge with broad hearing authority,[56] the parties and their counsel are subject to the rules of court, and, as discussed below, the clerk's order is final and appealable.

Before the hearing can occur, the parties must follow specific procedures so that all are afforded due process and the clerk may efficiently and thoroughly dispose of the issues. The procedures, discussed in turn in this section, are set out in new Article 2 of G.S. Chapter 28A.[57]

Applicable Rules of Civil Procedure

Prior to the 2011 legislation, it was unclear whether and to what extent the North Carolina Rules of Civil Procedure[58] applied in estate hearings. G.S. 28A-2-6 now states that the following Rules apply unless the clerk, in any given case, directs otherwise (many of these Rules are also discussed in greater detail in the sections below):

Rule No.	Topic
4	Process
5	Service of subsequent pleadings and other papers
6(a), (d), (e)	Time
18	Joinder of claims
19	Necessary joinder of parties
20	Permissive joinder of parties
21	Procedure upon misjoinder/nonjoinder
24	Intervention
45	Subpoenas
56	Summary judgment
65	Injunctions[59]

When these Rules are applied in estate proceedings, the use of the term "judge" must be interpreted to mean "clerk."[60]

In addition to the Rules that apply by default, the clerk may also direct that any other Rule shall apply to a proceeding. This includes the discovery provisions, as discussed in more detail below. The clerk may make this determination either upon the motion of a party or upon his or her own motion.[61]

56. G.S. 7A-103.
57. *See id*. §§ 28A-2-6 through 28A-2-10.
58. *Id*. § 1A-1, Rules 1 to 83.
59. *Id*. § 28A-2-6(e).
60. *Id.*
61. *Id.*

The Petition

Estate proceedings must begin with the filing of a petition. A motion or other less formal filing is not adequate to notify the court of the relief the petitioner seeks. The petition must be filed in the existing estate administration file.[62] Costs are assessed as set forth in G.S. 7A-307.

The petition contains two essential elements, as outlined in G.S. 28A-2-6. First, it must include a "short and plain statement of the claim that is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions intended to be proved showing that the pleaders are entitled to relief." Second, it must also contain "a demand for judgment for the relief to which the pleader is entitled." While the petition must, therefore, be somewhat specific, these pleading requirements seem not to require the same formality as a typical complaint in a civil case. The statute goes on to state that the averments in the petition "should be simple, concise, and direct" and that "[n]o technical forms of motions or responses are required." As with a complaint in a civil matter, the petition may include alternative statements of claims or defenses.[63]

The parties also may seek injunctive relief in the petition pursuant to the specific requirements of Rule of Civil Procedure 65.[64] Any preliminary injunctive relief may instead be sought in a separate motion. The petition, however, must be filed before the clerk may grant a temporary restraining order,[65] and the petitioner must serve the petition and notice of injunction hearing before the clerk may grant a preliminary injunction.[66]

Finally, the petitioner (or attorney, if applicable) must sign the petition. In doing so, that person certifies that (1) the person has read the pleading; (2) to the best of that person's knowledge, information, and belief formed after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; and (3) it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in litigation costs.[67] This certification requirement parallels a portion of the language of Rule of Civil Procedure 11(a). Rule 11, however, is not among the Rules that apply in estate proceedings.[68] It appears, therefore, that the enforcement and sanction provisions of Rule 11 do not carry over into estate proceedings.[69]

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62. *Id*. § 28A-2-6(a).

63. *Id*. § 28A-2-6(c). In addition, the Rule of Civil Procedure governing joinder of claims applies in estate proceedings. *Id*. § 28A-2-6(e); *see also id*. § 1A-1, Rule 18.

64. *Id*. § 28A-2-6(e).

65. *See* Revelle v. Chamblee, 168 N.C. App. 227, 231, 606 S.E.2d 712, 714 (2005) ("Because there is no pending litigation between petitioner and respondent . . ., there is no action to which the ancillary remedy . . . may attach and the trial court had no jurisdiction to grant the preliminary injunction."); Carolina Freight Carriers Corp. v. Local Union No. 61 of Int'l Bhd. of Teamsters, 11 N.C. App. 159, 161, 180 S.E.2d 461, 463 (1971) (". . . procedure under Rule 65(b) is permissible only after an action is commenced as provided by Rule 3.").

66. *See* G.S. 1A-1, Rule 65(a); Helbein v. S. Metals Co., Inc., 119 N.C. App. 431, 433, 458 S.E.2d 518, 519 (1995).

67. G.S. 28A-2-6(c).

68. *See id*. § 28A-2-6(e).

69. Rule 11(a) provides that an unsigned pleading "shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader . . ." and that appropriate sanctions, including reasonable expenses and attorney fees, may be imposed upon signatories who file pleadings in violation of the rule. *See id*. § 1A-1, Rule 11(a).

Parties

The person bringing the petition is referred to as the petitioner, and adverse parties are known as respondents. All parties to the estate administration who are not named or joined as petitioners to the estate proceeding must be joined as respondents.[70] Due to the sometimes complex nature of estate administration, there may be occasions where persons who are not already participating in the estate administration are necessary to resolution of an estate proceeding. For this reason, G.S. 28A-2-6 allows the clerk to order that additional persons be joined as respondents.[71] Interested persons may also seek to intervene in an estate proceeding pursuant to Rule of Civil Procedure 24.[72]

Summons and Service

When the petition is presented for filing, the clerk must issue an estate proceeding summons to the respondents as well as to additional persons the clerk names as respondents.[73] The Administrative Office of the Courts (AOC) has created a form to satisfy this specific statutory requirement: No. AOC-E-102, ESTATES PROCEEDINGS SUMMONS (1/12), available at the AOC's website.[74]

The petition and summons must be served upon the respondents pursuant to Rule 4 of the Rules of Civil Procedure.[75] Service is the responsibility of the petitioner. The requirements of Rule 4 are exacting; all details should be reviewed carefully. Generally, Rule 4 provides that service upon an individual—a "natural person"—may be made by

(a) delivery to the person or by leaving a copy of the petition and summons at the person's dwelling house or usual place of abode with an individual of "suitable age and discretion then residing therein" (within North Carolina, this personal service is almost always performed by the sheriff);[76]
(b) delivery to an agent authorized to accept service of process;
(c) mailing by registered or certified mail, return receipt requested;
(d) depositing with a designated delivery service (typically UPS or FedEx); or
(e) mailing by United States Postal Service, signature confirmation delivery.[77]

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70. *Id*. § 28A-2-6(a).

71. *Id.* In addition, the Rules of Civil Procedure related to joinder of parties apply in estate proceedings. *Id*. § 28A-2-6(e); *see also id*. § 1A-1, Rules 19, 20, and 21.

72. *Id*. § 28A-2-6(e); *see id*. § 1A-1, Rule 24.

73. *Id*. § 28A-2-6(e).

74. The form can be downloaded at www.nccourts.org/forms/formsearch.asp. Prior to the 2011 legislative amendments, parties to contested estate matters typically served a modified form of the special proceedings summons, form AOC-SP-100. The new statute now expressly requires the use of an estates proceedings summons, so parties to an estate proceeding should not be served using a modification of another form.

75. G.S. 28A-2-6(a).

76. *See id*. § 1A-1, Rule 4(j)(1)a. (proper recipients); *id*. § 1A-1, Rule 4(a) (persons who may properly effect service). For exceptions where the sheriff is unavailable or unable to execute service, see *id*. § 1A-1, Rules 4(h) and (h1).

77. *See id*. § 1A-1, Rule 4(j)(1)b.–e. For methods of service on parties who are not natural persons or who are natural persons under a disability, parties should consult Rule 4(j)(2) through (9). Rule 4(j1) also provides for service by publication where a party cannot after due diligence be served by one of the other allowable methods. Parties or their counsel may also accept service pursuant to Rule 4(j5).

Any filings made in a proceeding after service has been accomplished—most commonly, motions—must be served pursuant to the less stringent requirements of Rule of Civil Procedure 5.[78]

If a respondent is represented by another person as provided in G.S. Chapter 36C, Article 3 (e.g., by a parent representing a minor, a trustee representing a trust), service of process must be made upon the representative.[79] A party or the party's representative may waive notice by filing in the proceeding a written waiver signed by the party or the party's representative or attorney.[80]

Response

The estates proceedings summons notifies the respondent to "appear and answer" the petition within twenty days after service.[81] The purpose of this rule is to set a time after which the parties or clerk may commence the actual hearing: "After the time for responding to the petition . . . has expired, any party or the clerk . . . may give notice to all parties of a hearing."[82] The twenty-day time limit should not be seen as a procedural parallel to Rule of Civil Procedure 12, the default rule in civil actions.[83] Failure of a party to answer a petition in an estate proceeding should not entitle the petitioner to a default judgment by the clerk. The clerk should still decide the matter on its merits and upon the evidence in the record.

Extensions of Time

Before expiration. Where the statutes require or permit an action in the estate proceeding within a certain period of time, and the time has not yet expired, the clerk may, under G.S. 28A-2-6, enter an order enlarging that period of time "for cause shown." The clerk may allow this extension in his or her discretion and with or without motion or notice.[84] The "cause shown" standard is very broad and allows the clerk to extend time for any of a number of reasons less stringent than the "excusable neglect" standard that applies *after* the time period expires. The extension may not, however, exceed ten days unless there is "*good* cause shown."[85] If there is "good cause shown," the clerk may extend the time for a period greater than ten days, but only "to the extent that the court [clerk] in its discretion determines that justice requires."[86]

After expiration. If the time in which a party must perform an act has already expired, the clerk may permit the act where the failure was the result of excusable neglect.[87] Excusable neglect "depends upon what, under all the surrounding circumstances, may be reasonably

78. G.S. 28A-2-6(e); *see id*. § 1A-1, Rule 5.

79. *Id*. § 28A-2-7. In any estate proceeding, "the parties shall be represented as provided in Article 3 of Chapter 36C of the General Statutes." *Id*. § 28A-2-7(a). Further, nothing in Rule of Civil Procedure 17 shall require appointment of a guardian ad litem for a represented party except as provided by Chapter 36C, Article 3. *Id*. § 28A-2-6(e).

80. *Id*. § 28A-2-8.

81. *Id*. § 28A-2-6(a).

82. *Id.*

83. Note that Rules 8 through 12, which govern pleadings and answers in civil actions, do not apply in estate proceedings. *Id*. § 28A-2-6(e).

84. G.S. 28A-2-6(d).

85. *Id.* (emphasis added).

86. *Id.*

87. *Id.*

expected of a party in paying proper attention to his case."[88] Although excusable neglect is a question of law, in general, an order allowing an extension of time for excusable neglect will not be disturbed on appeal absent an abuse of the clerk's discretion.[89]

Stipulations. In lieu of an order by the clerk, the parties may enter into binding stipulations, without clerk approval, enlarging applicable time requirements by up to thirty days.[90] This is a common practice that preserves court resources. The parties should file such stipulations with the clerk or otherwise inform the clerk regarding stipulation details.

Discovery and Subpoenas

In more contentious or complex proceedings, some types of discovery may be necessary to fully develop the evidence the court will hear. The parties may be aided by discovery of various types of documents, written admissions, answers to specific interrogatories, or sworn deposition testimony of important witnesses. In such situations, the parties are allowed to ask the clerk's permission to conduct discovery pursuant to Rules of Civil Procedure 26 through 37.[91] The clerk has broad discretion to allow or disallow discovery and to permit some types of discovery and disallow others. Also, as provided in Rule 26, the clerk may set limits on the scope and amount of discovery to be conducted and may issue protective orders, as needed, to prevent excesses and shield vulnerable parties.[92]

The parties also are permitted to use subpoenas to gather documents in the custody of non-parties and to bring non-parties before the court to obtain their testimony.[93] Rule of Civil Procedure 45 governs the issuance of subpoenas, and the parties should observe its requirements carefully.

Hearing

After the time for the parties to respond has passed, any party or the clerk may give notice to all the parties of a hearing.[94] For those proceedings in which the parties are allowed to conduct discovery, the hearing will occur after the parties have a reasonable amount of time to respond to discovery requests.

In addition, the 2011 legislation allows the use of summary judgment motions in estate proceedings.[95] If summary judgment motions are filed, the clerk may elect to hear those motions on a date prior to the date scheduled for the hearing of the estate proceeding.

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88. Monaghan v. Schilling, 197 N.C. App. 578, 584, 677 S.E.2d 562, 566 (2009) (quoting McIntosh v. McIntosh, 184 N.C. App. 697, 705, 646 S.E.2d 820, 825 (2007)).

89. Johnson v. Hooks, 21 N.C. App. 585, 588–89, 205 S.E.2d 796, 799 (1974). For example, in *Williams v. Jennette*, 77 N.C. App. 283, 290, 335 S.E.2d 191, 196 (1985), the clerk did not err in granting an extension of time where the movants alleged conflicting schedules, previous commitments, and the inadvertent tardiness of their attorney, who believed that all the defendants had been served on the same day.

90. G.S. 28A-2-6(d).

91. *Id*. § 28A-2-6(e).

92. *Id*. § 1A-1, Rule 26(c).

93. *Id*. § 28A-2-6(e).

94. *Id*. § 28A-2-6(a).

95. *Id*. § 28A-2-6(e); *see id*. § 1A-1, Rule 56.

An estate proceeding is a formal hearing before a judicial officer of the court. The clerk has broad authority to control the proceedings, including the power to issue subpoenas[96] and, subject to the provisions of G.S. Chapter 5A, to punish criminal contempt and hold persons in civil contempt.[97] If the parties are represented by counsel, counsel should expect to conduct themselves with decorum similar to that required in the trial court division by General Rule of Practice 12.[98]

Although contested proceedings before the clerk generally are less formal than proceedings before the trial courts, the North Carolina Rules of Evidence nevertheless apply to them.[99] The extent to which the rules will be enforced will depend upon the questions to be resolved, the nature of the evidence, the sophistication of the parties, whether the parties are represented by counsel, the clerk's preferences, and other factors. Because there are no juries in estate proceedings, the clerk may allow informality in the presentation of evidence. It is important also to note that the essential Rule of Evidence requiring parties to object in order to preserve an issue for appeal does not apply in estate proceedings.[100] In estate proceedings, "[i]t is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion."[101]

The evidence upon which the clerk relies, however, in making his or her ruling must be competent. Upon making a determination in an estate proceeding, the clerk "shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment."[102] As discussed in more detail below, the clerk's written findings of fact and conclusions of law allow the superior court, in the event of an appeal, to conduct a proper review of the record and to assess whether the clerk's decision is based on competent evidence. The hearing generally will be recorded electronically to preserve the record for the superior court's review.[103]

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96. *Id*. § 7A-103(1). Rule of Civil Procedure 45, governing the use of subpoenas, applies in estate proceedings unless the clerk directs otherwise. *Id*. § 28A-2-6(e).

97. *Id*. § 7A-103(7). G.S. Chapter 5A governs contempt proceedings by North Carolina's judicial officers. Chapter 5A, Article 1, governs criminal contempt and Chapter 5A, Article 2, governs civil contempt.

98. *See* N.C. Gen. R. of Prac. for the Superior & Dist. Courts, R. 12.

99. "Except as otherwise provided . . . by statute, these rules apply to all actions and proceedings in the courts of this State." G.S. 8C-1, Rule 1101(a).

100. *Id*. § 8C-1, Rule 103. This exception is discussed in more detail *infra* page 18.

101. *Id*. § 1-301.3(d).

102. *Id*. § 1-301.3(b). A "finding of fact" has been interpreted to mean a determination reached after "logical reasoning from the evidentiary facts." Sheffer v. Rardin, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010) (citing Quick v. Quick, 305 N.C. 446, 452, 290 S.E.2d 653, 657–58 (1982)). Findings of fact are not recitations of the evidence or summaries of the record. The clerk must reach factual conclusions from the evidence in the record, resolving the material disputes in the form of judicial "findings." A "conclusion of law" is the application of the findings of fact to the controlling law. *Id.* In making written findings, the clerk is not required to include every "evidentiary fact" in the case. The order need only include those "ultimate" or "controlling" findings of fact necessary to make the relevant conclusions of law. *Quick*, 305 N.C. at 452, 290 S.E.2d at 658; Woodward v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951); Estate of Mullins, 182 N.C. App. 667, 671–72, 643 S.E.2d 599, 602 (2007).

103. G.S. 1-301.3(f).

Settlement

It has long been the practice of many clerks to approve settlement agreements that resolve the various disputes arising during estate administration. The 2011 legislation codified and clarified this authority by providing that a clerk is authorized, in his or her discretion, to consider and approve settlement agreements where

> (1) the controversy arose with respect to a matter over which the clerk has jurisdiction; and
> (2) the controversy arose in good faith.[104]

So, clerks are not authorized to approve settlement of an estate proceeding once jurisdiction over that proceeding has been transferred to the superior court, and clerks may not approve any settlement "resolving a caveat of a last will and testament."[105]

More generally, clerks may not approve agreements "modifying the terms of a last will and testament."[106] The probate of wills is an *in rem* type of proceeding, and the clerk has a role in protecting the intent of the testator, even where the living have difficulty accepting the testator's choices. The heirs, devisees, and other survivors should not be permitted to override the court's role in the administration process (and thus overrule a testator's intent) simply by agreeing among themselves to do so. A couple of examples illustrate this exclusion:

- Jane died a widow and excluded two of her five daughters from her will. The estate administration becomes very contentious, and the two excluded daughters threaten to file a caveat to claim that Jane's will was the product of the undue influence of the other three daughters. Soon the five daughters agree to a settlement that would divide the assets equally among them. They submit the settlement to the clerk so the estate may be administered accordingly. The clerk may not approve this agreement because it fundamentally alters the terms of Jane's will.
- Joseph died leaving his three sons as heirs, each taking one-quarter of his estate, with the remaining one-quarter going to a church. Joseph's oldest son is executor. The estate includes many difficult-to-value antiques and collectables. The two younger sons are unhappy with the executor's proposed division of assets among the devisees. They have objected to the distribution and petitioned the clerk to remove their brother as executor. Soon all the sons and the church present the clerk a settlement meticulously listing the items to be distributed to each devisee and agreeing that the list equally divides the assets into quarters. The clerk *is* authorized to approve this settlement as a resolution of the parties' disputes and to allow administration to proceed accordingly. Rather than altering the will's provisions, the settlement simply resolves the valuation of estate assets so that the executor is able to satisfy the will's provisions.

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104. *Id*. § 28A-2-10.

105. *Id.* As discussed *supra* note 40, will caveats are formal *in rem* challenges to the validity of a will that has been submitted to probate. The procedure for will caveats is governed by G.S. Chapter 31, Article 6. The parties to a will caveat may enter into a settlement agreement resolving the caveat any time before a judgment is entered. The settlement agreement must first be approved by a superior court judge before it may be entered as a judgment in the matter. A clerk has no authority to approve such a settlement agreement. G.S. 31-37.1.

106. *Id*. § 28A-2-10.

Appeal

The trial division—the superior courts and, to a much more limited extent, the district courts—have appellate jurisdiction over most appealable orders entered by clerks.[107] G.S. 1-301.1 through 1-301.3 give the basic framework for appeal of a clerk's order or judgment according to the type of proceeding being appealed.[108] Appeal of an estate proceeding is to the superior court, and the procedure for such an appeal is governed by G.S. 1-301.3.[109]

Standard of Review

In appeals of estate proceedings, the superior court does not conduct a new trial of the matter—in other words, review is not de novo. Instead, the court reviews the matter under the more deferential "on the record" standard:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings are supported by the evidence.
> (2) Whether the conclusions of law are supported by the findings of facts.
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.[110]

The superior court judge has no authority to modify or substitute the clerk's findings of fact.[111] In the recent case of *In re Severt*, the clerk had jurisdiction over administration of an estate valued at over $100 million. In the course of the estate's administration, the clerk heard a complex set of issues related, among other things, to the deceased's domicile, and he entered an order with twelve findings of fact and ten conclusions of law. Upon appeal, the superior court judge reversed the clerk's order and entered an order making his own findings of fact, some of which

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107. G.S. 7A-251 provides that

(a) In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.
(b) In all matters properly cognizable in the district court division which are heard originally before the clerk of superior court, appeals lie to the judge of district court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.

108. These statutes were enacted in 1999 at the recommendation of the General Statutes Commission to give clear procedural guidance to clerks, judges, practitioners, and litigants while largely maintaining the essential substance of existing law. Prior to enactment of these provisions as part of S.L. 1999-216, the law was a collection of sometimes inconsistent post–Civil War statutes and decades-old cases. For a more detailed discussion of the history of these laws, see David W. Owens (ed.), North Carolina Legislation 1999 Ch. 6, (Chapel Hill, UNC Institute of Government, 1999).

In addition, many of the statutes governing particular types of hearings before the clerk contain further (and more specific) appeal requirements. Those looking for guidance concerning appeals from the clerk should look closely at both Chapter 1 of the General Statutes and the relevant substantive chapters governing the types of proceedings at issue.

109. G.S. 28A-2-9(c).

110. *Id.* § 1-301.3(d).

111. *In re* Severt, 194 N.C. App. 508, 513–14, 669 S.E.2d 886, 889–891 (2008).

"re-characterized the findings made by the clerk."[112] The Court of Appeals vacated the superior court order, stating

> There is no language in the superior court's order that tells this Court whether or not the clerk's findings of fact were supported by the evidence. Even if the superior court had made such a determination, our statutes make no provision for the trial court to make such a modification to the clerk's findings of fact. Here, the superior court seems to have ignored completely those findings of fact made by the clerk . . . and substituted its own in their place. In doing so, the trial court exceeded its statutorily proscribed standard of review.[113]

Because the superior court's review is limited to an examination of the clerk's written findings and conclusions (and their support in the record), the clerk must provide the requisite written order for the judge to review. The record is insufficient if the clerk has merely recited his or her decision orally at the conclusion of the hearing or entered an order containing only the clerk's final decree or disposition.[114] In the absence of a sufficient order, the superior court typically remands the proceeding to the clerk for proper findings and conclusions.

Notice of Appeal

Upon making a determination in an estate matter, the clerk "shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment."[115] Parties "aggrieved by an order or judgment of the clerk" who wish to appeal must file a written notice of the appeal with the clerk. The notice must be filed within ten (10) days of the entry of the order or judgment after service of the order on that party.[116] "Entry" of an order or judgment occurs when it is reduced to writing, signed by the clerk, and filed in the clerk's office.[117] The written notice of appeal "shall contain a short and plain statement of the basis for the appeal."[118]

Unless statutes or case law provide otherwise, a superior court judge or the clerk may issue a stay of the order or judgment upon the appellant's posting an appropriate bond set by the judge or clerk issuing the stay. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority.[119]

Stating Reasons for the Appeal

Prior to the 2011 revisions to G.S. 1-301.3, appellants were required to file a written notice of appeal which "shall specify the basis for the appeal." In *Estate of Whitaker*,[120] the court of appeals interpreted this language to require the aggrieved party to point to specific findings and conclusions of the clerk. In *Whitaker*, the clerk held a hearing on a motion by a co-executor

112. *Id.* at 512, 669 S.E.2d at 889.
113. *Id.* at 513, 669 S.E.2d at 889.
114. G.S. 1-301.3(b), (d).
115. *Id.* § 1-301.3(b); *see also supra* note 102.
116. *Id.* § 1-301.3(c). The 2011 amendments added the language "after service of the order on that party" to the statute.
117. *Id.* § 1A-1, Rule 58.
118. *Id.* § 1-301.3(c).
119. *Id.*
120. 179 N.C. App. 375, 633 S.E.2d 849 (2006).

of an estate, the administration of which had been very contentious up to that point. The co-executor sought reimbursement for expenses and attorney fees she had allegedly incurred during the complicated administration. The clerk granted in part and denied in part the motion in an order consisting of sixty-six findings of fact and several conclusions of law. The co-executor appealed to the superior court, stating that "the findings of fact are not supported by evidence, the conclusions of law are not supported by findings of fact, and the order is inconsistent with the conclusions of law, prior court orders and applicable law."[121] The superior court noted that this assignment of error was merely a general objection and thus inadequate to properly state an appeal. The judge nevertheless reviewed the findings and conclusions and entered an order affirming them. The court of appeals agreed with the superior court judge that the statement of error was inadequate:

> In the present case, petitioner's appeal to the superior court did not refer specifically to any of the clerk's 66 findings of fact. . . . Th[e] statement constitutes only a broadside attack on the findings of fact and thus the trial court did not err by concluding that petitioner had only made a "general objection."[122]

The court of appeals stated that an appeal from a clerk's order must make a specific challenge or it will be "ineffective."[123]

Session Law 2011-344 amended the language "shall *specify* the basis for the appeal" to read, "shall *contain a short and plain statement of* the basis for the appeal."[124] This amendment appears effectively to overrule *Whitaker* to the extent *Whitaker* requires *specific* objection to particular findings and conclusions. The new statutory language reduces the burden of addressing each potential error separately. It does, however, require *some* explanation of the basis for the appeal, even if that explanation need only be "short and plain." Thus, to the extent it requires more than a mere general objection to (or "broadside attack on") all findings and conclusions, *Whitaker* likely continues to be good law.

Record of the Clerk's Hearing

To determine "whether the findings are supported by the evidence," the superior court judge must have reasonable access to the evidentiary record before the clerk. G.S. 1-301.3 therefore provides that,

> In the discretion of the clerk or upon request by a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device. . . . If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk.[125]

Electronic recordation is far and away a better option than a summary of the evidence. As a practical matter, when a clerk hears a contested estate matter that is reasonably likely to be appealed, a clerk is well served to record the proceeding. Recording will eliminate the difficulty inherent in relying on notes and memory to re-create a record, particularly when significant time has passed since the hearing was conducted. When the parties use the services of a court

121. *Id.* at 382, 633 S.E.2d at 854.
122. *Id.*
123. *Id.*
124. G.S. 1-301.3(c) (emphasis added).
125. *Id.* § 1-301.3(f).

reporter, a "transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge."[126]

Special Evidentiary Exception

As discussed on page 13 above, contested proceedings before the clerk tend to be less formal than proceedings before the trial courts, but the North Carolina Rules of Evidence nevertheless generally apply to them.[127] When G.S. 1-301.3 was enacted, however, a significant exception was carved out for estate matters. Rule 103, the general Rule of Evidence regarding objections, states that parties may not raise an issue on appeal if they do not properly object to it in the underlying proceeding: "Error may not be predicated upon a ruling which admits or excludes evidence unless a . . . timely objection or motion to strike appears of record."[128] In estate proceedings, under G.S. 1-301.3, however, "[i]t is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion."[129] If the judge finds prejudicial error in the clerk's admission or exclusion of evidence,

> [T]he judge, in the judge's discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional evidence on the factual issue in question.[130]

The statute further provides that the judge "may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence."[131]

Conclusion

The broad hearing authority of North Carolina's clerks of superior court is an abiding part of their role as ex officio judges of probate. The 2011 legislation discussed in this bulletin did not alter that fundamental part of our court system's structure. What it did attempt to do is better define the categories over which clerks have jurisdiction, set parameters for transfer of that jurisdiction, and provide rules—designed to be flexibly administered—for commencement, litigation, and hearing of estate proceedings. The result is more procedural certainty for clerks, parties, and superior court judges when navigating these matters through the judicial process.

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126. *Id.*

127. "Except as otherwise provided . . . by statute, these rules apply to all actions and proceedings in the courts of this State." *Id.* § 8C-1, Rule 1101(a).

128. *Id.* § 8C-1, Rule 103(a)(1).

129. *Id.* § 1-301.3(d).

130. *Id.* For example, in *Strickland v. Strickland*, 206 N.C. App. 766, 699 S.E.2d 142 (2010) (unpublished, reported in table), the Court of Appeals held it was proper for the judge to receive additional evidence on a factual point (upon finding the clerk's findings of fact insufficient) and then to enter the court's own finding of fact based upon that newly received evidence.

131. G.S. 1-301.3(d).

TAB 5

Ex Parte Communications

THE STORY

EX PARTE COMMUNICATIONS

What We Will Cover

- Definition of an ex parte communication
- The different roles of the Clerk
- How to avoid ex parte communications
- What to do if there has been an ex parte communication

EX PARTE COMMUNICATIONS

- What is an ex parte communication?
  - A communication made at the request of or for the benefit of one party without the other party being given notice or the conversation or an opportunity to be heard

Different Hats (Roles)

The Different Hats You Wear

RECORDKEEPER

- The Clerk must maintain records, files, dockets, and indexes as prescribed by the Director of the Administrative Office of the Courts (AOC). G.S. 7A-109.
  - Clerk is required to keep records of civil, criminal, and juvenile actions; special proceedings; estate actions; judgments and miscellaneous filings.

RECORDKEEPER

- Clerk maintains the judgment docket
- Clerk's office is the central repository for all court documents

BOOKKEEPER

- Clerk is responsible for the
  - Receipt of Money
  - Deposit of Money

FIDUCIARY

- Investment of Money
- Disbursement of Money

G.S. 7A-111, G.S. 7A-112, & G.S. 7A-112.1.

ELECTED OFFICIAL

- The Clerk is an elected official in the county in which the Clerk resides
- The Clerk is elected by the voters of the county

JUDICIAL OFFICIAL

- The Clerk is the ex officio judge of probate and has jurisdiction over
  - Probate and administration of decedent's estates.
    G.S. 7A-240, G.S. 7A-241.

JUDICIAL OFFICIAL

- Incompetency proceedings and appointment of guardians for minors and incompetent adults.
  Chapter 35A of the NC General Statutes.
- Administration of trusts.
  Art. 2, Chapter 36C of the NC General Statutes.

JUDICIAL OFFICIAL

• Special Proceedings, including foreclosures.

Chapters 1 and 45 of the NC General Statutes.

JUDICIAL OFFICIAL

• Clerk hears arguments of the parties or their attorneys

• Clerk considers evidence

• Clerk makes a judicial determination about the cases before him or her

EX PARTE COMMUNICATIONS

• What is an ex parte communication?

• A communication made at the request or for the benefit of one party without the other party being given notice of the conversation or an opportunity to be heard

EX PARTE COMMUNICATIONS

• The Clerk should be mindful of the basic principle that neither parties nor their attorneys may communicate with the judge ex parte.

Code of Ethics for Clerks, II, A. 3. c, NC Clerk of Superior Court, Procedures Manual, School of Government, 2003 Ed.

EX PARTE COMMUNICATIONS

• The image of the Clerk is important, particularly when acting as a judicial officer

• The Clerk may "…disqualify herself or himself …in circumstances justifying disqualification…by a judge."

G.S. 7A-104(a1).

EX PARTE COMMUNICATIONS

• A judge should perform the duties of the judge's office impartially and diligently.

• A judge should accord to every person…, or the person's lawyer, full right to be heard according to law, and,

EX PARTE COMMUNICATIONS

except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding.

Code of Judicial Conduct, Canon 3.

EX PARTE COMMUNICATIONS

- When and where can an ex parte conversation occur?
  - Courthouse
  - Grocery store
  - School Events
  - Places of Worship

EX PARTE COMMUNICATIONS

- What can you do to stop ex parte communication?
  - Explain to the person that you should not be discussing the matter, since it may come before you for a hearing

EX PARTE COMMUNICATIONS

• What should you do if there has been an ex parte communication?

  • Inform all the parties and attorneys that an ex parte communication about the matter currently before you has occurred.

EX PARTE COMMUNICATIONS

- Ask the parties if they want you to continue with the hearing
- If the parties want you to continue:

EX PARTE COMMUNICATIONS

put it in writing (can be in the order) that the parties were aware of the ex parte communication and waived any disqualification.

G.S. 7A-104(a2).

EX PARTE COMMUNICATIONS

• If the parties do not want you to continue:

any party may apply to a superior court judge for an order to remove the matter to a clerk in an adjoining county ; or

EX PARTE COMMUNICATIONS

any party may apply to a superior court judge for the judge to make all necessary orders and judgments in the matter.

G.S. 7A-104(b)

THE REST OF THE STORY

TAB 6

Dispensing Legal Advice

DISPENSING LEGAL ADVICE (?)
THE [NOT SO CLEAR] DISTINCTION BETWEEN
LEGAL INFORMATION AND LEGAL ADVICE

The line between legal information and legal advice can often be blurry. For frequently asked questions your staff receives (e.g., court dates, court rooms, costs for various filings) you may want to develop standard responses for your staff. (See, Clerks Manual chapter on Code of Ethics for Clerks).

In all other instances follow this advice:

"If there is a chance that what you say may be wrong, don't say it."

I will illustrate how it works with a few examples.

Small Claims filings. The forms say you must file the action where at least one defendant resides. The clerk can answer or explain that. However, if the person asks "Is 123 XYZ Street in Caswell County?" the clerk should not answer because the clerk will not know if that particular address is in Caswell or an adjoining county.

Defining Plaintiff, Petitioner, etc. Simple terms such as this can be explained as follows:

"If you file this action you will be the Plaintiff (or Petitioner in SP)...."

However if the person asks should I file or is it too late to file, the clerk would not know the answer, so she/he should say "I don't know, and if you are not sure I suggest you contact a lawyer."

Calculating time. I recommend the clerk NOT calculate time for a person, because there are various factors that could change the calculation. For example, Columbus Day and Presidents' Day are not State holidays, but they are federal holidays. So, when a filing deadline is due on a weekend or state holiday the clerk should simply say:

"You have X days to file the Y. If the X day falls on a day the courthouse is not open, such as a weekend, you have until 5:00 on the next business day when the courthouse is open."

No more explanation is needed, and this avoids having to explain the difference between State and Federal holidays.

For rental payments simply tell them they have 20 days to pay, and that if they do not pay the plaintiff may seek to have them evicted. Do not help the party calculate time because there may be a fact that could change the outcome such as the landlord accepting rent.

Estates and Guardianships This is an area where it is very easy to cross the line from legal information to legal advice. Since all estates and guardianship proceedings in your county are

handled by your office, your staff is considered experts in this area. Even attorneys contact your staff for "advice."

EXAMPLES

"Mother died last week after being in the hospital for three months. Her Will left everything to Daddy. I don't need to open an estate do I? I don't want to spend the money, if I don't need to."

"My brother had nothing, other than a car, mobile home that is not worth much, and a dog. He was killed at work, and all we have is his last paycheck that will cover the cost of the funeral. Do I have to open an estate?"

Clerks, including assistant and deputy clerks, are prohibited from practicing law. This includes Clerks that are licensed attorneys. G.S. 84-2.

Options that you can offer to assist without giving advice:

Estate Procedures
http://www.nccourts.org/Forms/Documents/735.pdf

Responsibilities of Guardians in North Carolina
http://www.nccourts.org/Forms/Documents/1184.pdf

Legal Assistance Sources

Legal Aid (income based for some services)
http://www.legalaidnc.org/

Legal Aid offices by county
http://www.legalaidnc.org/public/learn/locations/

Lawyer Referral Service of the NC Bar Association
1.800.662-7407
https://www.ncbar.org/public-pro-bono/lawyer-referral-service/nc-find-a-lawyer

Legal information vs. legal advice Developments during the last five years

by John M. Greacen

In 1995 my article "No Legal Advice From Court Personnel What Does That Mean?"[1] was the first published attempt to examine critically the standard court instruction to staff not to give legal advice. It explored legal and practical definitions of the term "legal advice" and suggested guidelines a court could give staff members on what answers they can and cannot provide. This article reviews that article's discussion and recommendations, as well as developments during the past five years.

"No Legal Advice" argued that the phrase "legal advice" had no inherent meaning to the courts or to court staff who were required to interpret it. The use of a vague term has negative consequences for the courts and the public; it causes staff to limit unnecessarily the flow of information to the public about court operations and it creates opportunities for discrimination among different categories of court users. The article addressed the concerns that cause courts to prohibit their staffs from providing information about court processes to the public—concerns about their "practicing law," about their giving incorrect information, and about their binding the judge by such incorrect information. It articulated five general principles that court staff should keep in mind in answering questions:

> The increase in self-represented litigants nationwide heightens the need for assistance from courts and their staff.

1. Court staff have an obligation to explain court processes and procedures to litigants, the media, and other interested citizens.

2. Court staff have an obligation to inform litigants, and potential litigants, how to bring their problems before the court for resolution.

3. Court staff cannot advise litigants whether to bring their problems before the court, or what remedies to seek.

4. Court staff must always remember the absolute duty of impartiality. They must never give advice or information for the purpose of giving one party an advantage over another. They must never give advice or information to one party that they would not give to an opponent.

5. Court staff should be mindful of the basic principle that neither parties nor their attorneys may communicate with the judge *ex parte*. Court staff should not let themselves be used to circumvent that principle by conveying information to a judge on behalf of a litigant, or fail to respect it in acting on matters delegated to them for decision.

Finally, the article suggested 11 guidelines for staff to use in responding to questions. The first six are positive statements. All staff are expected to perform the following tasks:

1. Provide information contained in docket reports, case files, indexes and other reports.

2. Answer questions concerning court rules, procedures, and ordinary practices. Such questions often contain the words "Can I?" or "How do I?"

3. Provide examples of forms or pleadings for the guidance of litigants.

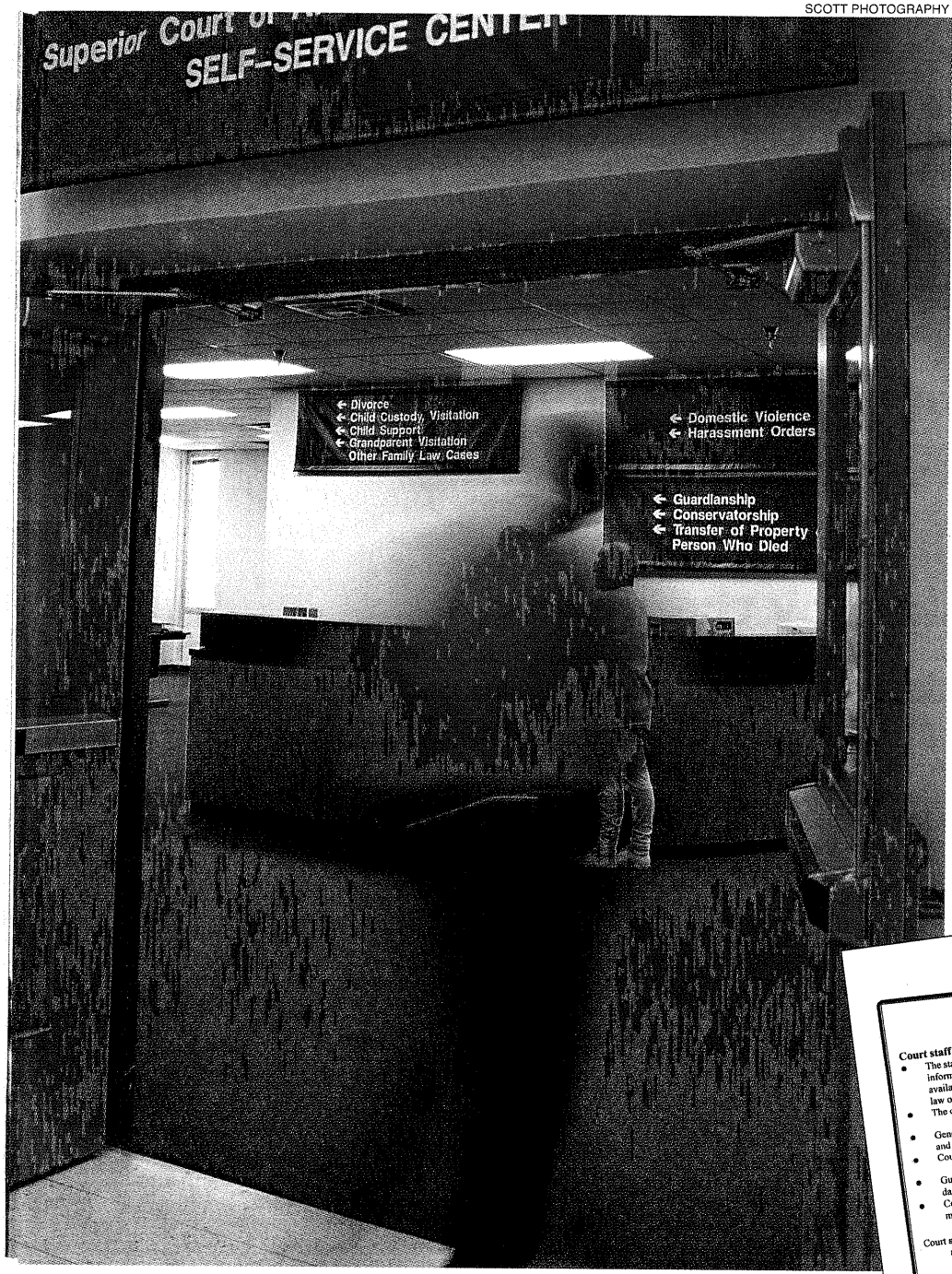
4. Answer questions about the completion of forms.

5. Explain the meaning of terms and documents used in the court process.

***JOHN M. GREACEN** is Director of the Administrative Office of the Courts for the state of New Mexico.*

1. 34 *The Judges Journal* 10 (Winter 1995). A slightly different version appeared contemporaneously in *Clerks, Office Staff Cannot Give Legal Advice: What Does That Mean?* 10 COURT MANAGER 35–40 (Winter 1995).

SCOTT PHOTOGRAPHY



take a particular course of action. Do not answer questions that contain the words "Should I?" Suggest that questioners refer such issues to a lawyer.

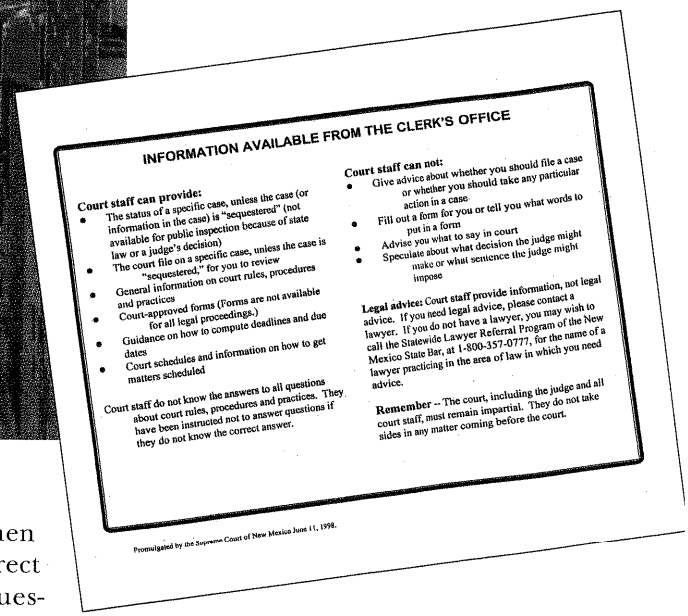
3. Take sides in a case or proceeding pending before the court.

4. Provide information to one party that you would be unwilling or unable to provide to all other parties.

5. Disclose the outcome of a matter submitted to a judge for decision until the outcome is part of the public record, or until the judge directs disclosure of the matter.

Responses to the article

Many judges and court managers used the article and its recommendations in creating policies and training for court staff. And a court manager from Canada reported that it is the standard reference point for the courts of Canada as well. I have con-



INFORMATION AVAILABLE FROM THE CLERK'S OFFICE

Court staff can provide:

- The status of a specific case, unless the case (or information in the case) is "sequestered" (not available for public inspection because of state law or a judge's decision)
- The court file on a specific case, unless the case is "sequestered," for you to review
- General information on court rules, procedures and practices
- Court-approved forms (Forms are not available for all legal proceedings.)
- Guidance on how to compute deadlines and due dates
- Court schedules and information on how to get matters scheduled

Court staff do not know the answers to all questions about court rules, procedures and practices. They have been instructed not to answer questions if they do not know the correct answer.

Court staff can not:

- Give advice about whether you should file a case or whether you should take any particular action in a case
- Fill out a form for you or tell you what words to put in a form
- Advise you what to say in court
- Speculate about what decision the judge might make or what sentence the judge might impose

Legal advice: Court staff provide information, not legal advice. If you need legal advice, please contact a lawyer. If you do not have a lawyer, you may wish to call the Statewide Lawyer Referral Program of the New Mexico State Bar, at 1-800-357-0777, for the name of a lawyer practicing in the area of law in which you need advice.

Remember -- The court, including the judge and all court staff, must remain impartial. They do not take sides in any matter coming before the court.

Promulgated by the Supreme Court of New Mexico June 11, 1998.

6. Answer questions concerning deadlines or due dates.

The last five are negative statements. In providing information, staff will not:

1. Give information when you are unsure of the correct answer. Transfer such questions to supervisors.

2. Advise litigants whether to

ducted training sessions for court administrators and court staff based on the principles set forth in the article in both federal and state courts throughout the country. The guidelines have been included in the curriculum of the "Litigant Without Lawyers" seminars presented by the Maricopa County Superior Court and in educational sessions at conferences of the National Association for Court Management and its Mid Atlantic Association for Court Management.

The Michigan Court Support Training Consortium, under a grant from the Michigan Judicial Institute, developed an interactive training program using compact disk interactive technology, called the Legal Advice CD-i program, based on the principles set forth in the article. That training program has been widely used by courts in other states and received the Justice Achievement Award from the National Association for Court Management in 1998.

Court staff *know the correct answers* to the questions they are asked by the public.

Several states have adopted their own guidelines derived from those suggested in the article.

- In 1997, the Michigan Judicial Institute prepared and distributed a booklet entitled, *Legal Advice v. Access to the Courts: Do YOU Know the Difference?* The booklet provides general guidelines, together with specific applications of those guidelines through the use of questions and answers. The booklet was endorsed by the Michigan Supreme Court as a model for providing information to the public and access to the Michigan court system.
- In June 1998, the New Mexico Supreme Court adopted a standard notice entitled "Information Available from the Clerk's Office." It requires all courts to post that notice "in lieu of any other notices pertaining to the topic of information or advice that court staff may or may not provide." The notice sets forth the information that court staff can and cannot provide and includes information on how to find a lawyer; New Jersey has created a similar notice.
- In November, 1998, the Ventura County Superior Court adopted guidelines for its employees staffing its Self Help Legal Access Center.
- The Supreme Court of Florida, with one dissent, has adopted a rule of court, Florida Family Law Rule 12.750, entitled "Family Self Help Programs," that sets forth the services that court "self help" staff can and cannot provide.
- A Customer Service Advisory Committee for the Judicial Branch, created by order of the Iowa Supreme Court, has developed *Guidelines for Clerks Who Assist Pro Se Litigants in Iowa's Courts.* The Iowa Supreme Court recently approved the guidelines. The Advisory Committee also developed a guidebook for clerks containing 25 pages of model responses to frequently asked questions.
- A Task Force on Unrepresented Litigants of the Boston Bar Association conducted a comprehensive study of the needs of self-represented litigants in all levels of courts in Massachusetts. Its August 1998 *Report on Pro Se Litigation* is one of the most thorough treatments of the topic, including extensive recommendations to the courts and the bar for improving their programs. Exhibit F of that report is a set of "Sample Staff Guidelines" for Massachusetts courts.
- Finally, in 2000, the Utah Judicial Council adopted guidelines for all court staff in that state.

Critiques

Jona Goldschmidt and his colleagues have criticized the suggested guidelines on two grounds. First, they believe that the article does not go far enough in its analysis of the court's obligation to provide information to the public. The United States Constitution, through the privileges and immunities clause, the First Amendment, or the due process or equal protection clauses of the Fourteenth Amendment, may create a fundamental right of access to the courts for persons representing themselves.[2]

The closest that any U. S. Supreme Court opinion has come in articulating such a broad right of access is Justice Brennan's concurring opinion in *Boddie v. Connecticut* (1971), finding that Connecticut's mandatory filing fee for divorce cases violated an indigent person's right to due process. Justice Brennan objected to language in the majority opinion limiting the reach of the decision to divorce proceedings—"the exclusive precondition to the adjustment of a fundamental human relationship." Justice Brennan wrote:

> I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only forum effectively empowered to settle their

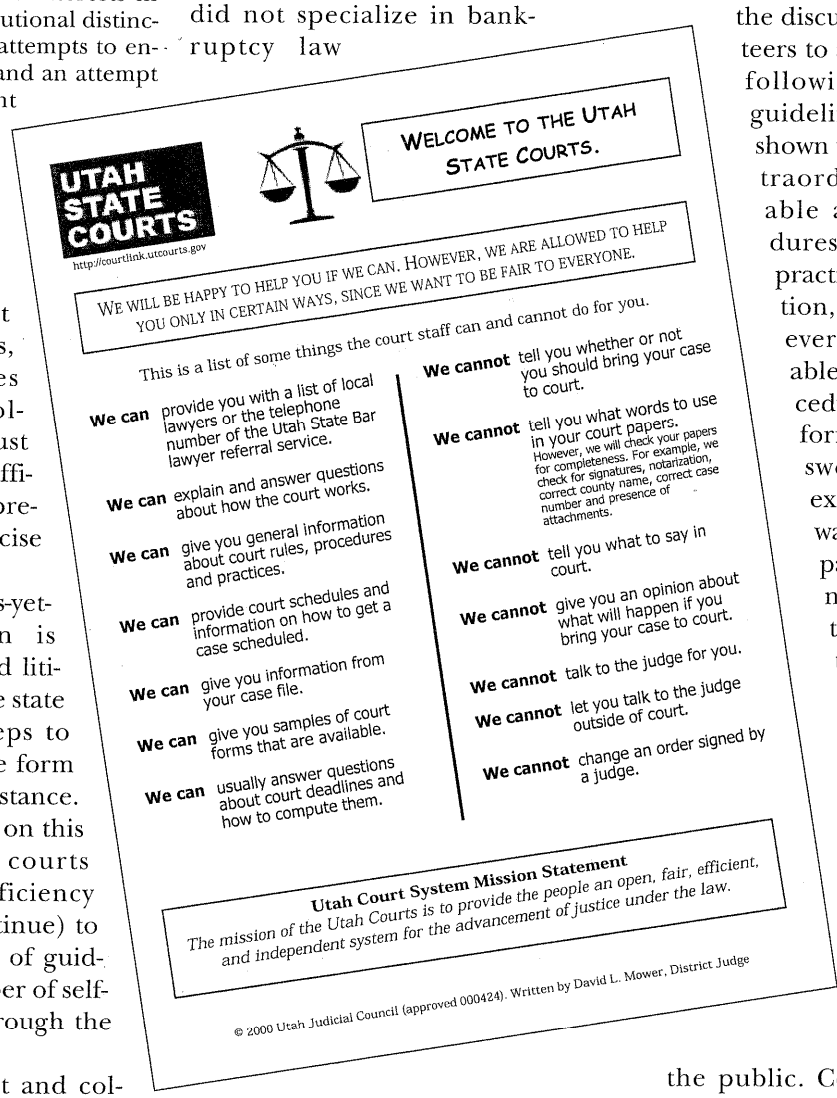
2. See the discussion on pages 19 to 24 in Goldschmidt, Mahoney, Solomon and Green, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (American Judicature Society, 1998). *Editor's note:* To order, see page 205.

disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' . . . I see no constitutional distinction between appellants' attempts to enforce this statutory right and an attempt to vindicate any other right arising under federal or state law. . . . The right to be heard in some way at some time extends to all proceedings entertained by courts.

If there is such a right of access to the courts, then, argues Goldschmidt and colleagues, the courts must provide information sufficient to enable self-represented persons to exercise that right.

The significant and as-yet-unanswered question is whether self-represented litigants' rights obligate the state to take affirmative steps to provide them with some form of "adequate" legal assistance. Until a definitive ruling on this question is made, courts should—if only for efficiency reasons—begin (or continue) to develop creative means of guiding the increasing number of self-represented litigants through the legal process.[3]

Second, Goldschmidt and colleagues argue that the guidelines are too general in nature. They believe that court staff need explicit direction on the answers to be given to specific questions, not just general direction differentiating legal information from legal advice. All courts owe their staff the support of an operating manual, describing basic court operations and instructing them how to handle routine matters. These materials, in turn, serve as a reference for staff in answering questions from the public. The most extensive manual of this sort that I have seen is the *Clerk's Practice and Procedure Guide* developed by the United States Bankruptcy Court for the District of New Mexico. The judges of the court instructed the clerk to develop the manual in order to give lawyers who did not specialize in bankruptcy law the basic information they would need to practice before the court. With the help of a committee of the local bankruptcy bar, the court prepared a manual detailing the court's procedures with respect to all parts of the bankruptcy process. The manual is available to the public. It also serves as a resource for court staff in answering questions posed by the public.



UTAH STATE COURTS
http://courtlink.utcourts.gov

WELCOME TO THE UTAH STATE COURTS.

WE WILL BE HAPPY TO HELP YOU IF WE CAN. HOWEVER, WE ARE ALLOWED TO HELP YOU ONLY IN CERTAIN WAYS, SINCE WE WANT TO BE FAIR TO EVERYONE.

This is a list of some things the court staff can and cannot do for you.

We can provide you with a list of local lawyers or the telephone number of the Utah State Bar lawyer referral service.

We can explain and answer questions about how the court works.

We can give you general information about court rules, procedures and practices.

We can provide court schedules and information on how to get a case scheduled.

We can give you information from your case file.

We can give you samples of court forms that are available.

We can usually answer questions about court deadlines and how to compute them.

We cannot tell you whether or not you should bring your case to court.

We cannot tell you what words to use in your court papers. However, we will check your papers for completeness. For example, we check for signatures, notarization, correct county name, correct case number and presence of attachments.

We cannot tell you what to say in court.

We cannot give you an opinion about what will happen if you bring your case to court.

We cannot talk to the judge for you.

We cannot let you talk to the judge outside of court.

We cannot change an order signed by a judge.

Utah Court System Mission Statement

The mission of the Utah Courts is to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law.

A knowledgeable staff

My experience in providing training on this topic all over the country has convinced me that lack of staff knowledge of procedures is not a significant impediment to the ability of court staff to provide information to the public. In training sessions I ask participants to write down the questions they have the most difficulty answering and use them as the basis for the discussion. I ask for volunteers to answer the questions, following my suggested guidelines. Experience has shown that court staff are extraordinarily knowledgeable about court procedures, requirements, and practices. With one exception, some participant in every seminar has been able to provide the procedural or substantive information needed to answer a question. The exception was in Delaware, where all participants agreed there was no answer to a particular question—their case management information system did not provide the requested information.

My experience suggests, therefore, that court staff throughout this country *know the correct answers* to the questions they are asked by the public. Consequently, courts should not delay authorizing their staff to provide procedural information until they develop detailed guidebooks or reference materials.

As additional courts develop rules and guidelines, they are becoming more detailed. See, for instance, the elaboration provided by the Florida rule of court and the draft Iowa guidelines. In addition, the drafters of the Iowa guidelines have included a substantial number of standard answers to frequently asked questions. Some such standard answers, based on the most common questions that recur in training sessions on this subject, appear on page 202.

A just outcome

Russell Engler, Professor of Law and Director of Clinical Programs at the

3. *Id.* at 24.

Suggested answers to recurring questions

Here are some of the most common questions presented by participants in seminars on this topic, and suggested answers:

Do I need a lawyer?

You are not required to have a lawyer to file papers or to participate in a case in court. You have the right to represent yourself. Whether to hire a lawyer must be your personal decision. You may want to consider how important the outcome of this case is to you in making that decision. A lawyer may not cost as much as you think. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case. [Lawyers participating in the Albuquerque Bar Association lawyer referral service offer one half hour of consultation for $25 plus tax.]

Should I hire a lawyer?

Same as above.

Can you give me the name of a good lawyer?

The court cannot recommend a particular lawyer. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case.

Should I plead guilty?

You need to decide that for yourself.

What sentence will I get if I plead guilty [or do not plead guilty]?

The judge will decide what sentence to impose based on the facts and the law that apply to your case. I cannot predict what the judge will do.

What will happen in court?

Suggested answer to a plaintiff in a small claims case: The judge will call on you to present your evidence first. Then [he][she] will call on the other side to present its evidence. The judge will ask questions if [he][she] needs clarification. When the judge has heard all the evidence, [he][she] will announce [his][her] decision.

What should I say in court?

You must tell the truth.

How do I get the money that the judge said I am entitled to?

You are responsible for taking the steps necessary to enforce a judgment (or an award of child support). Here is a pamphlet that describes the procedural options available to you. When you decide what option to pursue, I can provide you with the appropriate forms. [It may be appropriate to refer a litigant to an agency for help, e.g, with child support enforcement.]

What should I put in this section of the form?

You should write down what happened in your own words.

What should I put down here where it says "remedy sought"?

You should write in your own words what you want the court to do.

Would you look over this form and tell me if I did it right?

You have provided all of the required information. I cannot tell you whether the information you have provided is correct or complete; only you know whether it is correct and complete.

I am not able to read or write. Would you fill out the form for me?

In that case, I am able to fill out the form for you, but you have to tell me what information to put down. I will write down whatever you say and read it back to you to make sure what I have written is correct.

What do I do next?

Describe the next step in the court process.

I want to see the judge. Where is his office?

The judge talks with both parties to a case at the same time. You would not want the judge to be talking to the [police officer][landlord] about this case if you were not present. Your case is scheduled for hearing on ____ at ____. That is when you should speak with the judge.

The judge heard my case today but did not make a decision. When will he decide?

There is no way for me to know when the judge will issue a decision in your case. In general, judges try to reach a decision within [60] days of taking a case under advisement. But there is no guarantee that the judge will decide your case within that time.

New England School of Law, has written a thought-provoking article arguing that judges, mediators, and court staff *should* provide legal advice to self-represented litigants.[4] Engler argues that most persons representing themselves in court do so because they cannot afford to retain counsel. Without competent advice concerning available options and their advantages and disadvantages, litigants cannot obtain a just outcome. He argues that principles underlying the concept of the court's impartiality must be reconsidered. Instead of giving no advice to either side, Engler believes that the court

4. Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 FORDHAM L. REV. 1987 (1999).

must give whatever help is needed to *both* sides, giving more help to one side than to the other where needed. He argues that true impartiality exists when both parties are fully informed of their rights, their procedural options, and the benefits and detriments arising from exercising them.

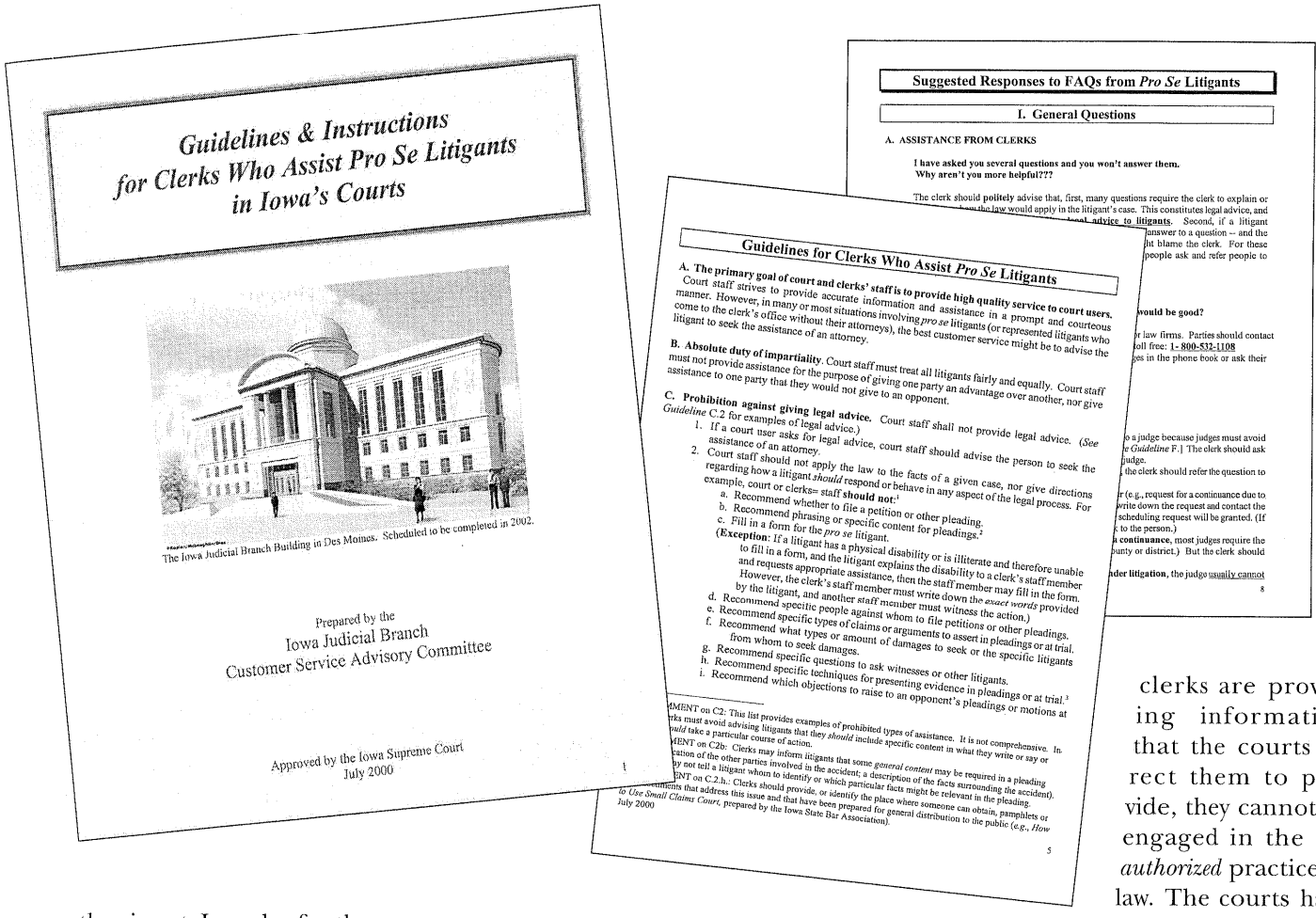
The most obvious instance in which the court has an obligation to provide different levels of help to one side than to the other is when one side is represented by counsel and the other is not. In order for the courts to do justice, Engler argues, the courts must be prepared to provide whatever assistance is needed to both sides in order for them to understand their rights and remedies and make a reasoned, informed judgment of their best interests. Current restrictions on court staff, mediators, and judges inhibit their ability to ensure justice. He poses the problem of the mediator who is prohibited from informing one party that his proposed settlement terms are foregoing a remedy to which he is clearly entitled by law. His article goes on to argue that the type of advice needed, and who should provide it, depends on the context—the nature of the legal proceeding and the type of dispute.

Professor Engler's analysis is thought-provoking. He forcefully points out the injustices that can result from imbalances in the power and knowledge of self-represented parties. However, his view that a dispute cannot be resolved justly without fully informing both parties of every substantive and procedure right and option available is not one to which I am willing to subscribe. It is neither necessary nor realistic to expect the courts to serve not only as dispute resolvers but also as counselors and advocates for both sides.

Unauthorized practice of law

Much of the concern about court staff providing information arises from apprehension they will be practicing law without a license. In my view, laws or court rules prohibiting the unauthorized practice of law do not apply to court staff performing tasks at the direction of the court. Preoccupation with the topic of unauthorized practice of law focuses attention on the wrong issues and provides either too much or too little guidance to the courts on what information their staff should and should not provide.

First, as a matter of law, when court clerks are providing information that the courts direct them to provide, they cannot be engaged in the *unauthorized* practice of law. The courts have authorized them to do what they are doing. When the authorization comes from the state court of last resort, which is the body responsible for deciding what constitutes the practice of law, there can be no doubt that court staff are insulated from any statute or rule prohibiting the unauthorized practice of law. The Supreme Court of Florida recognized this principle in its family court rule on self-help programs. Section (e) of Rule 12.750 reads:



(e) Unauthorized Practice of Law. The services listed in subdivision (c), when performed by nonlawyer personnel in a self-help program, shall not be the unauthorized practice of law.

A committee of the Washington State Bar Association has reached the same conclusion. The Committee to Define the Practice of Law worked for almost a year and a half to develop a comprehensive definition of the practice of law for the State Bar Association to recommend to the state supreme court for adoption. Section (b)(2) of its Definition of the Practice of Law excludes "serving as a court house facilitator pursuant to court rule". . . "whether or not [it] constitute[s] the practice of law."

The attorney general of Vermont has applied this reasoning to court staff activities authorized by the trial court, not the court of last resort. In Vermont, the unauthorized practice of law is prohibited by rule of the state supreme court. An attorney wrote to the Vermont attorney general asking that it commence a criminal contempt proceeding to enforce that rule, complaining about an advertised job description that included the following duties of a court case manager: "assist litigants to complete court documents and to understand the judicial process" and ensure "that all persons involved in child support actions understand the court process, their rights under the law and all documents that they are asked to file or agree to." The complaint also questioned the court's production and distribution of various booklets that define legal terms and discuss the divorce process. While expressing his opinion that the activities set forth in the job description did not constitute the practice of law, Chief Assistant Attorney General William Griffin noted that "[e]ven if they did, since the activities are authorized by the Court and performed on its behalf, the Attorney General would be hard pressed to argue that they are unauthorized."[5]

Analyzing this issue in terms of the unauthorized practice of law focuses attention on what lawyers do, not on what courts must, and must not, do. First, courts must provide self-represented litigants with the information they need to bring their cases before the court. Whether or not there is a constitutional right to access to the courts, there are overwhelming policy reasons for the courts to provide effective access. That is what courts are for—to serve as the forum for resolving disputes. For the courts to enjoy the public trust and confidence of the people, they must make their services practically, as well as theoretically, available to the public. So, the focus of the courts must be on providing the information that citizens need in order to avail themselves of the courts' dispute-resolving services.

The limitations on the court staff in answering questions from the public arise not from what lawyers do, but from the principle of impartiality central to public trust and confidence in the courts. Court staff should not advise a person accused of crime whether to plead guilty—not because lawyers give such advice, but because that advice causes the court staff, and hence the court itself, to be taking sides in the outcome of the case.

An example where courts are misled by looking to unauthorized practice of law principles, rather than to the needs of the courts, is with respect to court forms. Some courts consider the choice of the appropriate form for a litigant to use to be a function that lawyers perform for their clients and therefore restrict the role that staff can play in pointing out the correct form to a litigant requesting assistance. See, for instance, the discussion of this issue by Goldschmidt and colleagues.[6]

As a practical matter, court staff are fully competent to direct litigants to the correct form. This service constitutes an essential part of the information a litigant needs in order to be able to present his or her case to the court. And, because the court provides equal services to all litigants—e.g., to petitioners as well as respondents—the court does not depart from its impartial role in providing forms and directing litigants to their proper use.[7]

By focusing on the issue of the unauthorized practice of law, courts may not go far enough in limiting the role that staff can play. For instance, does the fact that a particular court staff member is a lawyer free the court from concerns arising from the court's need to remain impartial? Or, in Arizona, where there is no unauthorized practice of law statute, can the courts decide that there are no limitations on the role that their staff should play in assisting litigants?

Finally, the ethical opinions analyzing the functions that clerks can and cannot perform from the standpoint of the unauthorized practice of law draw the same line in the same place as does my analysis based on the principle of maintaining the court's impartiality. The Massachusetts Advisory Committee on Ethical Opinions for Clerks of the Court reviewed five scenarios that regularly occur, approving clerk conduct in three and disapproving it in the remaining two. In summarizing its opinion, it stated:

> [P]roviding assistance with filling out forms and offering procedural advice clearly do not run afoul of the prohibition on the practice of law. Drafting documents, taking over a case and becoming an advocate on behalf of a litigant would clearly violate the prohibition.

***

The increase in numbers of self-represented litigants throughout the nation heightens the need to provide them with information. Court staff are the first people litigants come into contact with, and there are many ways they can assist. Recognizing this, courts are developing guidelines and providing the staff training necessary to ensure access to justice for all.

5. Letter from William Griffin, Assistant Attorney General, to Jan Rickless Paul, Esq., dated August 8, 1994.

6. MEETING THE CHALLENGE, *supra n.* 2, at 43.

7. It is clear that the New Mexico Supreme Court, the state in which an ethics opinion questioned the propriety of a judge's providing litigants with forms he drafted, finds it acceptable for court staff to provide approved court forms to litigants. *See* the New Mexico legal information form.

TAB 7

Decedents' Estates: Essential Terminology

TAB 8

Introduction to the Guardianship Process

TAB 9

Introduction to Foreclosures

TAB 10

Ethics, Fairness and Bias

Drennan
School of Government
March, 2012

Selected General Statutes Relevant to the Ethical Duties of Clerks of Court

§ 7A-104. Disqualification; waiver; removal; when judge acts.

(a) The clerk shall not exercise any judicial powers in relation to any estate, proceeding, or civil action:

(1) If he has, or claims to have, an interest by distribution, by will, or as creditor or otherwise;

(2) If he is so related to any person having or claiming such an interest that he would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him;

(3) If clerk or the clerk's spouse is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;

(4) If clerk or the clerk's spouse is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of the superior court. The clerk may renounce the executorship and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate.

(a1) The clerk may disqualify himself in a proceeding in circumstances justifying disqualification or recusement by a judge.

(a2) The parties may waive the disqualification specified in this section, and upon the filing of such written waiver, the clerk shall act as in other cases.

(b) When any of the disqualifications specified in this section exist, and there is no waiver thereof, or when there is no renunciation under subdivision (a)(4) of this section, any party in interest may apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county, for an order to remove the proceedings to the clerk of superior court of an adjoining county in the district or set of districts; or he may apply to the judge to make either in vacation or during a session of court all necessary orders and judgments in any proceeding in which the clerk is disqualified, and the judge in such cases is hereby authorized to make any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceedings.

(c) In any case in which the clerk of the superior court is executor, administrator, collector, or guardian of an estate at the time of his election or appointment to office, in order to enable him to settle such estate, a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county may make such orders as may be necessary in the settlement of the estate; and he may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to him for his approval, and when the accounts are so approved, the judge shall order the proper records to be made by the clerk.

§ 7A-105. Suspension, removal, and reinstatement of clerk.

A clerk of superior court may be suspended or removed from office for willful misconduct or mental or physical incapacity, and reinstated, under the same procedures as are applicable to a superior court district attorney, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides, and the hearing shall be conducted by the senior regular resident superior court judge serving the county of the clerk's residence. If suspension is ordered, the judge shall appoint some qualified person to act as clerk during the period of the suspension.

Canon 3
A judge should perform the duties of the judge's office impartially and diligently.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Chapter 138A.
State Government Ethics Act.
Article 1.
General Provisions.

§ 138A-1. Title.

This Chapter shall be known and may be cited as the "State Government Ethics Act". (2006-201, s. 1.)

§ 138A-2. Purpose.

The purpose of this Chapter is to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence. To this end, it is the intent of the General Assembly in this Chapter to ensure that standards of ethical conduct and standards regarding conflicts of interest are clearly established for elected and appointed State agency officials, that the State continually educates these officials on matters of ethical conduct and conflicts of interest, that potential and actual conflicts of interests are identified and resolved, and that violations of standards of ethical conduct and conflicts of interest are investigated and properly addressed. (2006-201, s. 1.)

§ 138A-3. Definitions.

The following definitions apply in this Chapter:

(1) Blind trust. – A trust established by or for the benefit of a covered person or a member of the covered person's immediate family for divestiture of all control and knowledge of assets. A trust qualifies as a blind trust under this subdivision if the covered person or a member of the covered person's immediate family has no knowledge of the holdings and sources of income of the trust, the trustee of the trust is independent of and not associated with or employed by the covered person or a member of the covered person's immediate family and is not a member of the covered person's extended family, and the trustee has sole discretion as to the management of the trust assets.

(1c) Board. – Any State board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, as determined and designated by the Commission, except for those public bodies that have only advisory authority.

(2) Business. – Any of the following organized for profit:

a. Association.
b. Business trust.
c. Corporation.
d. Enterprise.
e. Joint venture.
f. Organization.
g. Partnership.
h. Proprietorship.
i. Vested trust.
j. Every other business interest, including ownership or use of land for income.

(3) Business with which associated. – A business in which the covered person or filing person or any member of that covered person's or filing person's immediate family does any of the following:

a. Is an employee.
b. Holds a position as a director, officer, partner, proprietor, or member or manager of a limited liability company, irrespective of the amount of compensation received or the amount of the interest owned.
c. Owns a legal, equitable, or beneficial interest of ten thousand dollars ($10,000) or more in the business or five percent (5%) of the business, whichever is less, other than as a trustee on a deed of trust.
d. Is a lobbyist registered under Chapter 120C of the General Statutes.

For purposes of this subdivision, the term "business" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:

1. The covered person, filing person, or a member of the covered person's or filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
2. The fund is publicly traded, or the fund's assets are widely diversified.

(4) Commission. – The State Ethics Commission.

(5) Committee. – The Legislative Ethics Committee as created in Part 3 of Article 14 of Chapter 120 of the General Statutes.

(6) Compensation. – Any money, thing of value, or economic benefit conferred on or received by any covered person or filing person in return for services rendered or to be rendered by that covered person or filing person or another. This term does not include campaign contributions properly received and, reported as required by Article 22A of Chapter 163 of the General Statutes.

(7) Confidential information. – Information defined as confidential by the law.

(8) Constitutional officers of the State. – Officers whose offices are established by Article III of the North Carolina Constitution.

(9) Contract. – Any agreement, including sales and conveyances of real and personal property, and agreements for the performance of services.

(10) Covered person. – A legislator, public servant, or judicial officer, as identified by the Commission under G.S. 138A-11.

(11) Repealed by Session Laws 2008-213, s. 84(c), effective August 15, 2008.

(12) Employing entity. – For public servants, any of the following bodies of State government of which the public servant is an employee or a member, or over which the public servant exercises supervision: agencies, authorities, boards, commissions, committees, councils, departments, offices, institutions and their subdivisions, and constitutional offices of the State. For legislators, it is the house of which the legislator is a member. For legislative employees, it is the authority that hired the individual. For judicial employees, it is the Chief Justice.

(13) Extended family. – Spouse, lineal descendant, lineal ascendant, sibling, spouse's lineal descendant, spouse's lineal ascendant, spouse's sibling, and the spouse of any of these individuals.

(14) Filing person. – An individual required to file a statement of economic interest under G.S. 138A-22.

(14a), (14b) Reserved for future codification purposes.

(14c) Financial benefit. – A direct pecuniary gain or loss to the legislator, the public servant, or a person with which the legislator or public servant is associated, or a direct pecuniary loss to a business competitor of the legislator, the public servant, or a person with which the legislator or public servant is associated.

(15) Gift. – Anything of monetary value given or received without valuable consideration by or from a lobbyist, lobbyist principal, liaison personnel, or a person described under G.S. 138A-32(d)(1), (2), or (3). The following shall not be considered gifts under this subdivision:

a. Anything for which fair market value, or face value if shown, is paid by the covered person or legislative employee.
b. Commercially available loans made on terms not more favorable than generally available to the general public in the normal course of business if not made for lobbying.
c. Contractual arrangements or commercial relationships or arrangements made in the normal course of business if not made for lobbying.
d. Academic or athletic scholarships based on the same criteria as applied to the public.

e. Anything of value properly reported as required under Article 22A of Chapter 163 of the General Statutes.

f. Expressions of condolence related to a death of an individual, sent within a reasonable time of the death, if the expression is one of the following:

1. A sympathy card, letter, or note.
2. Flowers.
3. Food or beverages for immediate consumption.
4. Donations to a religious organization, charity, the State or a political subdivision of the State, not to exceed a total of two hundred dollars ($200.00) per death per donor.

(15a) through (15c) Reserved for future codification purposes.

(15d) Governmental unit. – A political subdivision of the State, and any other entity or organization created by a political subdivision of the State.

(16) Honorarium. – Payment for services for which fees are not legally or traditionally required.

(17) Immediate family. – An unemancipated child of the covered person residing in the household and the covered person's spouse, if not legally separated. A member of a covered person's extended family shall also be considered a member of the immediate family if actually residing in the covered person's household.

(18) Judicial employee. – The director and assistant director of the Administrative Office of the Courts and any other individual, designated by the Chief Justice, employed in the Judicial Department whose annual compensation from the State is sixty thousand dollars ($60,000) or more.

(19) Judicial officer. – Justice or judge of the General Court of Justice, district attorney, clerk of court, or any individual elected or appointed to any of these positions prior to taking office.

(20) Legislative action. – As the term is defined in G.S. 120C-100.

(21) Legislative employee. – As the term is defined in G.S. 120C-100.

(22) Legislator. – A member or presiding officer of the General Assembly, or an individual elected or appointed a member or presiding officer of the General Assembly before taking office.

(23) Lobbying. – As the term is defined in G.S. 120C-100.

(24) Nonprofit corporation or organization with which associated. – Any not for profit corporation, organization, or association, incorporated or otherwise, that is organized or operating in the State primarily for religious, charitable, scientific, literary, public health and safety, or educational purposes and of which the covered person, filing person, or any member of the covered person's or filing person's immediate family is a director, officer, governing board member, employee, lobbyist registered under Chapter 120C of the General Statutes, or independent contractor. Nonprofit corporation or organization with which associated shall not include any board, entity, or other organization created by this State or by any political subdivision of this State.

(25) Official action. – Any decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.

(26) Participate. – To take part in, influence, or attempt to influence, including acting through an agent or proxy.

(26c) Permanent designee. – An individual designated by a public servant to serve and vote in the absence of the public servant on a regular basis on a board on which the public servant serves.

(27) Person. – Any individual, firm, partnership, committee, association, corporation, business, or any other organization or group of persons acting together. The term "person" does not include the State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State.

(27a), (27b) Reserved for future codification purposes.

(27c) Person with which the legislator is associated. – Any of the following:
- a. A member of the legislator's extended family.
- b. A client of the legislator.
- c. A business with which the legislator or a member of the legislator's immediate family is associated.
- d. A nonprofit corporation or association with which the legislator or a member of the legislator's immediate family is associated.
- e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the legislator or a member of the legislator's immediate family.

(27d) Person with which the public servant is associated. – Any of the following:
- a. A member of the public servant's extended family.
- b. A client of the public servant.
- c. A business with which the public servant or a member of the public servant's immediate family is associated.
- d. A nonprofit corporation or association with which the public servant or a member of the public servant's immediate family is associated.
- e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the public servant or a member of the public servant's immediate family.

(28) Political party. – Either of the two largest political parties in the State based on statewide voter registration at the applicable time.

(29) Repealed by Session Laws 2008-213, s. 49, effective August 15, 2008.

(30) Public servants. – All of the following:
- a. Constitutional officers of the State and individuals elected or appointed as constitutional officers of the State prior to taking office.
- b. Employees of the Office of the Governor.
- c. Heads of all principal State departments, as set forth in G.S. 143B-6, who are appointed by the Governor.
- d. The chief deputy and chief administrative assistant of each individual designated under sub-subdivision a. or c. of this subdivision.
- e. Confidential assistants and secretaries as defined in G.S. 126-5(c)(2), to individuals designated under sub-subdivision a., c., or d. of this subdivision.
- f. Employees in exempt positions designated in accordance with G.S. 126-5(d)(1), (2), or (2a) and confidential secretaries to these individuals.
- g. Any other employees or appointees in the principal State departments as may be designated by the Governor to the extent that the designation does not conflict with the State Personnel Act.
- h. Judicial employees.
- i. All voting members of boards, including ex officio members, permanent designees of any voting member, and members serving by executive, legislative, or judicial branch appointment.
- j. For The University of North Carolina, the voting members of the Board of Governors of The University of North Carolina, the president, the vice-presidents, and the chancellors, the vice-chancellors, and voting members of the boards of trustees of the constituent institutions.
- k. For the Community College System, the voting members of the State Board of Community Colleges, the President and the chief financial officer of the Community College System, the president, chief financial officer, and chief administrative officer of each community college, and voting members of the boards of trustees of each community college.
- l. Members of the Commission, the executive director, and the assistant executive director of the Commission.
- m. Individuals under contract with the State working in or against a position included under this subdivision.

n. The director of the Office of State Personnel.
o. The State Controller.
p. The chief information officer, deputy chief information officers, chief financial officers, and general counsel of the Office of Information Technology Services.
q. The director of the State Museum of Art.
r. The executive director of the Agency for Public Telecommunications.
s. The Commissioner of Motor Vehicles.
t. The Commissioner of Banks and the chief deputy commissioners of the Banking Commission.
u. The executive director of the North Carolina Housing Finance Agency.
v. The executive director, chief financial officer, and chief operating officer of the North Carolina Turnpike Authority.

(30a) through (30j) Reserved for future codification purposes.

(30k) State agency. – An agency in the executive branch of the government of this State, including the Governor's Office, a board, a department, a division, and any other unit of government in the executive branch.

(31) Vested trust. – A trust, annuity, or other funds held by a trustee or other third party for the benefit of the covered person or a member of the covered person's immediate family, except a blind trust. A vested trust shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if:

a. The covered person or a member of the covered person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund; and
b. The fund is publicly traded, or the fund's assets are widely diversified. (2006-201, s. 1; 2007-347, ss. 7, 8; 2007-348, ss. 19-26; 2008-187, s. 44; 2008-213, ss. 40-54, 84(c); 2010-169, ss. 10, 17(n), (o); 2010-170, s. 14.)

§ 138A-10. Powers and duties.

(a) In addition to other powers and duties specified in this Chapter, the Commission shall:

(1) Provide reasonable assistance to covered persons in complying with this Chapter.

(2) Develop readily understandable forms, policies, and procedures to accomplish the purposes of the Chapter.

(3) Identify and publish the following:

a. A list of nonadvisory boards.
b. The names of individuals subject to this Chapter as covered persons and legislative employees under G.S. 138A-11.

(4) Receive and review all statements of economic interests filed with the Commission by prospective and actual covered persons and evaluate whether (i) the statements conform to the law and the rules of the Commission, and (ii) the financial interests and other information reported reveals actual or potential conflicts of interest. Pursuant to G.S. 138A-24(e), this subdivision does not apply to statements of economic interest of legislators and judicial officers.

(5) Conduct inquiries of alleged violations against judicial officers, legislators, and legislative employees in accordance with G.S. 138A-12.

(7) Render advisory opinions in accordance with G.S. 138A-13 and G.S. 120C-102.

(10) Adopt procedures and guidelines to implement this Chapter.

(12) Publish annually statistics on complaints filed with or considered by the Commission, including the number of complaints filed, the number of complaints referred under G.S. 138A-12(b), the number of complaints dismissed under G.S. 138A-12(c)(4), the number of complaints dismissed under G.S. 138A-12(f), the number of complaints referred for criminal prosecution under G.S. 138A-12, the number of complaints dismissed under G.S. 138A-12(h), the number of complaints referred for appropriate

action under G.S. 138A-12(h) or G.S. 138A-12(k)(3), and the number and age of complaints pending action by the Commission.

(13) Perform other duties as may be necessary to accomplish the purposes of this Chapter.

§ 138A-11. Identify and publish names of covered persons and legislative employees.

The Commission shall identify and publish at least quarterly a listing of the names and positions of all individuals subject to this Chapter as covered persons or legislative employees. The Commission shall also identify and publish at least annually a listing of all boards to which this Chapter applies. This listing may be published electronically on a public Internet Web site maintained by the Commission. (2006-201, s. 1; 2008-213, s. 56.)

§ 138A-12. Inquiries by the Commission.

(a) Jurisdiction. – The Commission may receive complaints alleging unethical conduct by covered persons and legislative employees and shall conduct inquiries of complaints alleging unethical conduct by covered persons and legislative employees, as set forth in this section.

(a1) Notice of Allegation. – Upon receipt by the Commission of a written allegation of unethical conduct by a covered person or legislative employee, or the initiation by the Commission of an inquiry into unethical conduct under subsection (b) of this section, the Commission shall immediately notify the covered person or legislative employee subject to the allegation or inquiry in writing.

(c) Complaint. –

(1) A sworn complaint filed under this Chapter shall state the name, address, and telephone number of the individual filing the complaint, the name and job title or appointive position of the covered person or legislative employee against whom the complaint is filed, and a concise statement of the nature of the complaint and specific facts indicating that a violation of this Chapter or Chapter 120 of the General Statutes or G.S. 126-14 or the criminal law in the performance of that individual's official duties has occurred, the date the alleged violation occurred, and either (i) that the contents of the complaint are within the knowledge of the individual verifying the complaint, or (ii) the basis upon which the individual verifying the complaint believes the allegations to be true.

(2) Except as provided in subsection (d) of this section, a complaint filed under this Chapter must be filed within two years of the date the complainant knew or should have known of the conduct upon which the complaint is based.

(3) The Commission may decline to accept, refer, or conduct an inquiry into any complaint that does not meet all of the requirements set forth in subdivision (1) of this subsection, or the Commission may, in its sole discretion, request additional information to be provided by the complainant within a specified period of time of no less than five business days.

(4) In addition to subdivision (3) of this subsection, the Commission may decline to accept, refer, or conduct an inquiry into a complaint if it determines that any of the following apply:

a. The complaint is frivolous or brought in bad faith.

b. The covered person or legislative employee and conduct complained of have already been the subject of a prior complaint.

c. The conduct complained of is primarily a matter more appropriately and adequately addressed and handled by other federal, State, or local agencies or authorities, including law enforcement authorities. If other agencies or authorities are conducting an investigation of the same actions or conduct involved in a complaint filed under this section, the Commission may stay its complaint inquiry pending final resolution of the other investigation.

(5) The Commission shall send a copy of the complaint to the covered person or legislative employee who is the subject of the complaint and the employing entity, within 10 business days of the filing.

(d) Conduct of Inquiry of Complaints by the Commission. – The Commission shall conduct an inquiry into all complaints properly before the Commission in a timely manner. The Commission shall initiate an inquiry into a complaint within 10 business days of the filing of the complaint. The Commission is authorized to initiate inquiries upon request of any member of the Commission if there is reason to believe that a covered person or legislative employee has or may have violated this Chapter. Commission-initiated complaint inquiries under this section shall be initiated within two years of the date the Commission knew of the conduct upon which the complaint is based, except when the conduct is material to the continuing conduct of the duties in office. In determining whether there is reason to believe that a violation has or may have occurred, a member of the Commission may take general notice of available information even if not formally provided to the Commission in the form of a complaint. The Commission may utilize the services of a hired investigator when conducting inquiries.

(e) Covered Person and Legislative Employees Cooperation With Inquiry. – Covered persons and legislative employees shall promptly and fully cooperate with the Commission in any Commission-related inquiry. Failure to cooperate fully with the Commission in any inquiry shall be grounds for sanctions as set forth in G.S. 138A-45.

(f) Dismissal of Complaint After Preliminary Inquiry. – The Commission shall conclude the preliminary inquiry within 20 business days. The Commission shall dismiss the complaint, if at the end of its preliminary inquiry the Commission determines that any of the following apply:

(1) The individual who is the subject of the complaint is not a covered person or legislative employee subject to the Commission's jurisdiction and authority under this Chapter.

(2) The complaint does not allege facts sufficient to constitute a violation within the jurisdiction of the Commission under subsection (b) of this section.

(3) The complaint is determined to be frivolous or brought in bad faith.

(g) Commission Inquiries. – If at the end of its preliminary inquiry, the Commission determines to proceed with further inquiry into the conduct of a covered person or legislative employee, the Commission shall provide written notice to the individual who filed the complaint and the covered person or legislative employee as to the fact of the inquiry and the charges against the covered person or legislative employee. The covered person or legislative employee shall be given an opportunity to file a written response with the Commission.

(h) Action on Inquiries. – The Commission shall conduct inquiries into complaints to the extent necessary to either dismiss the complaint for lack of probable cause of a violation under this section, or:

(1) For public servants, decide to proceed with a hearing under subsection (i) of this section.

(2) For legislators, except the Lieutenant Governor, refer the complaint to the Committee.

(3) For judicial officers, refer the complaint to the Judicial Standards Commission for complaints against justices and judges, to the senior resident superior court judge of the district or county for complaints against district attorneys, or to the chief district court judge for the district or county for complaints against clerks of court.

(4) For legislative employees, refer the complaint to the employing entity.

(l) Notice of Dismissal. – Upon the dismissal of a complaint under this section, the Commission shall provide written notice of the dismissal to the individual who filed the complaint and the covered person or legislative employee against whom the complaint was filed. The Commission shall forward copies of complaints and notices of dismissal of complaints against legislators to the Committee, against legislative employees to the employing entity for legislative employees, and against judicial officers to the Judicial Standards Commission for complaints against justices and judges, and the senior resident superior court judge of the district or county for complaints against district attorneys, or the chief district court judge of the district or county for complaints against clerks of court. The Commission shall also forward a copy of the notice of dismissal to the employing entity of the covered person against whom a complaint was filed if the employing entity received a copy of the complaint under subdivision (5) of subsection (c) of this section. Except as provided in subsection (n) of this section, the complaint and notice of dismissal are confidential and not public records.

(m) Reports and Records. – The Commission shall render the results of its inquiry in writing. When a matter is referred under subdivision (h)(2) and (3), or subsection (k) of this section, the

Commission's report shall consist of the complaint, response, and detailed results of its inquiry in support of the Commission's finding of a violation under this Chapter.

(n) Confidentiality. – Complaints and responses filed with the Commission and reports and other investigative documents and records of the Commission connected to an inquiry under this section, including information provided pursuant to G.S. 147-64.6B or G.S. 147-64.6(c)(19), shall be confidential and not matters of public record, except as otherwise provided in this section or when the covered person or legislative employee under inquiry requests in writing that the complaint, response, and findings be made public. Once a hearing under this section commences, the complaint, response, and all other documents offered at the hearing in conjunction with the complaint, not otherwise privileged or confidential under law, shall be public records. If no hearing is held at such time as the Commission reports to the employing entity a recommendation of sanctions, the complaint and response shall be made public.

(p) Authority of Employing Entity. – Any action or failure to act by the Commission under this Chapter, except G.S. 138A-13, shall not limit any authority of any of the applicable employing entities to discipline the covered person or legislative employee.

(t) Concurrent Jurisdiction. – Nothing in this section shall limit the jurisdiction of the Committee or the Judicial Standards Commission with regards to legislative or judicial misconduct, and jurisdiction under this section shall be concurrent with the jurisdiction of the Committee and the Judicial Standards Commission.

§ 138A-13. Request for advice.

(a) At the request of any public servant or legislative employee, any individual who is responsible for the supervision or appointment of a public servant or legislative employee, legal counsel for any public servant or legislative employee, any ethics liaison under G.S. 138A-14, or any member of the Commission, the Commission shall render advice on specific questions involving the meaning and application of this Chapter and the public servant's or legislative employee's compliance therewith. Requests for advice and advice rendered in response to those requests shall relate prospectively to real or reasonably anticipated fact settings or circumstances.

f) This section shall apply to judicial officers only for advice related to Article 3 of this Chapter.

§ 138A-21. Purpose.

The purpose of disclosure of the financial and personal interests by covered persons is to assist covered persons and those who appoint, elect, hire, supervise, or advise them identify and avoid conflicts of interest and potential conflicts of interest between the covered person's private interests and the covered person's public duties. It is critical to this process that current and prospective covered persons examine, evaluate, and disclose those personal and financial interests that could be or cause a conflict of interest or potential conflict of interest between the covered person's private interests and the covered person's public duties. Covered persons must take an active, thorough, and conscientious role in the disclosure and review process, including having a complete knowledge of how the covered person's public position or duties might impact the covered person's private interests. Covered persons have an affirmative duty to provide any and all information that a reasonable person would conclude is necessary to carry out the purposes of this Chapter and to fully disclose any conflict of interest or potential conflict of interest between the covered person's public and private interests, but the disclosure, review, and evaluation process is not intended to result in the disclosure of unnecessary or irrelevant personal information. (2006-201, s. 1; 2008-213, s. 63.)

§ 138A-22. Statement of economic interest; filing required.

(a) Every covered person subject to this Chapter who is elected, appointed, or employed, including one appointed to fill a vacancy in elective office, except for public servants (i) included under G.S. 138A-3(30)b., e., f., or g. whose annual compensation from the State is less than sixty thousand dollars ($60,000), or (ii) who are ex officio student members under Chapters 115D and 116 of the General Statutes, shall file a statement of economic interest with the Commission prior to the covered person's initial appointment, election, or employment and no later than April 15 of every year thereafter, except as otherwise filed under subsections (c1) and (d) of this section. A prospective covered person required to file a statement under this Chapter shall not be appointed, employed, or receive a certificate of election, prior to submission by the Commission of the Commission's evaluation of the statement in accordance

with this Article. The requirement for an annual filing under this subsection also shall apply to covered persons whose terms have expired but who continue to serve until the covered person's replacement is appointed. Once a statement of economic interest is properly completed and filed under this Article, the statement of economic interest does not need to be supplemented or refiled prior to the next due date set forth in this subsection.

(b) Notwithstanding subsection (a) of this section, individuals hired by, and appointees of, constitutional officers of the State may file a statement of economic interest within 30 days after their appointments or employment when the appointment or employment is made during the first 60 days of the constitutional officer's initial term in that constitutional office.

(c) Notwithstanding subsection (a) of this section, public servants, under G.S. 138A-3(30)j. and k., who have submitted a statement of economic interest under subsection (a) of this section, may be hired, appointed, or elected provisionally prior to submission by the Commission of the Commission's evaluation of the statement in accordance with this Article, subject to dismissal or removal based on the Commission's evaluation.

(c1) A public servant reappointed to a board between January 1 and April 15 shall file a current statement of economic interest prior to the reappointment.

(c2) A public servant appointed to a board determined and designated as nonadvisory under G.S. 138A-10(a)(3) shall file the initial statement of economic interest within 60 days of notification of the designation by the Commission and as provided in this section thereafter.

(d) A candidate for an office subject to this Article shall file the statement of economic interest at the same place and in the same manner as the notice of candidacy for that office is required to be filed under G.S. 163-106 or G.S. 163-323 within 10 days of the filing deadline for the office the candidate seeks. An individual who is nominated under G.S. 163-114 after the primary and before the general election, and an individual who qualifies under G.S. 163-122 as an unaffiliated candidate in a general election, shall file a statement of economic interest with the county board of elections of each county in the senatorial or representative district. An individual nominated under G.S. 163-114 shall file the statement within three days following the individual's nomination, or not later than the day preceding the general election, whichever occurs first. An individual seeking to qualify as an unaffiliated candidate under G.S. 163-122 shall file the statement of economic interest with the petition filed under that section. An individual seeking to have write-in votes counted for that individual in a general election shall file a statement of economic interest at the same time the candidate files a declaration of intent under G.S. 163-123. A candidate of a new party chosen by convention shall file a statement of economic interest at the same time that the president of the convention certifies the names of its candidates to the State Board of Elections under G.S. 163-98.

(d1) In addition to subsections (a) and (d) of this section, a covered person holding elected office or a former covered person who held elected office subject to this Article shall file a statement of economic interest in all of the following instances, as specified:

(1) Filed on or before April 15 of the year following the year a covered person or former covered person does not file a notice of candidacy or petition for election, or does not receive a certificate of election, to the position making that individual a covered person, with all information provided in the statement of economic interest current as of the last day of December of the preceding year.

(2) Filed on or before April 15 of the year following the year the covered person or former covered person resigns from the position making that individual a covered person, with all information provided in the statement of economic interest current as of the last day in the position.

(e) The State Board of Elections shall provide for notification of the statement of economic interest requirements of this Article to be given to any candidate filing for nomination or election to those offices subject to this Article at the time of the filing of candidacy.

(f) Within 10 days of the filing deadline for office of a covered person, the executive director of the State Board of Elections shall send to the State Ethics Commission a list of the names and addresses of each candidate who have filed as a candidate for office as a covered person. A county board of election shall forward any statements of economic interest filed with the board under this section to the State Board of Elections. The executive director of the State Board of Elections shall forward a certified copy of the statements of economic interest to the Commission for evaluation upon its filing with the State Board of Elections under this section.

(g) The Commission shall issue forms to be used for the statement of economic interest and shall revise the forms from time to time as necessary to carry out the purposes of this Chapter. Except as otherwise set forth in this section and in G.S. 138A-15(h), upon notification by the employing entity, the Commission shall furnish to all other covered persons the appropriate forms needed to comply with this Article. (2006-201, s. 1; 2007-29, s. 2; 2007-348, ss. 32, 33; 2008-213, s. 64; 2009-549, s. 13; 2010-169, ss. 12, 22(b).)

§ 138A-23. Statements of economic interest as public records.

(a) The statements of economic interest filed by prospective public servants under this Article for appointed or employed positions and written evaluations by the Commission of these statements are not public records until the prospective public servant is appointed or employed by the State. All other statements of economic interest and all other written evaluations by the Commission of those statements are public records.

(b) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals elected by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the election and made available to all members of the General Assembly. The statements of economic interest filed by public servants elected to positions by the General Assembly, and written evaluations by the Commission of those statements, are not public records until the prospective public servant is sworn into office.

(c) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals confirmed for appointment as a public servant by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the appointment. The statements of economic interest filed by prospective public servants for confirmation for appointment by the General Assembly, and written evaluations by the Commission of those statements, are public records at the time of the announcement of the appointment. (2006-201, s. 1; 2007-347, s. 10; 2008-213, ss. 65, 66.)

§ 138A-24. Contents of statement.

(a) Any statement of economic interest filed under this Article shall be on a form prescribed by the Commission. Answers must be provided to all questions. The form shall include the following information about the filing person and the filing person's immediate family:

(1) Except as otherwise provided in this subdivision, the name, current mailing address, occupation, employer, and business of the filing person. Any individual holding or seeking elected office for which residence is a qualification for office shall include a home address. A judicial officer may use a current mailing address instead of the home address on the form required in this subsection. The filing person may also use the initials instead of the name of any unemancipated child of the filing person who also resides in the household of the filing person. If the filing person provides the initials of an unemancipated child, the filing person shall concurrently provide the name of the unemancipated child to the Commission. The name of an unemancipated child provided by the filing person to the Commission shall not be a public record under Chapter 132 of the General Statutes and is privileged and confidential.

(2) A list of each asset and liability included in this subdivision of whatever nature (including legal, equitable, or beneficial interest) with a value of at least ten thousand dollars ($10,000) owned by the filing person and the filing person's immediate family, except assets or liabilities held in a blind trust. This list shall include the following:

a. All real estate located in the State owned wholly or in part by the filing person or the filing person's immediate family, including descriptions adequate to determine the location by city and county of each parcel.

b. Real estate that is currently leased or rented to or from the State.

c. Personal property sold to or bought from the State within the preceding two years.

d. Personal property currently leased or rented to or from the State.

e. The name of each publicly owned company. For purposes of this sub-subdivision, the term "publicly owned company" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:
    1. The filing person or a member of the filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
    2. The fund is publicly traded, or the fund's assets are widely diversified.

f. The name of each nonpublicly owned company or business entity, including interests in sole proprietorships, partnerships, limited partnerships, joint ventures, limited liability companies, limited liability partnerships, and closely held corporations.

g. For each company or business entity listed under sub-subdivision f. of this subdivision, if known, a list of any other companies or business entities in which the company or business entity owns securities or equity interests exceeding a value of ten thousand dollars ($10,000).

h. Repealed by Session Laws 2010-169, s. 13(a), effective January 1, 2011, and applicable to statements of economic interest filed on or after that date.

i. Recodified as subdivision (a)(16) by Session Laws 2010-169, s. 13(c), effective January 1, 2011, and applicable to statements of economic interest filed on or after that date.

j. For a vested trust created, established, or controlled by the filing person of which the filing person or the members of the filing person's immediate family are the beneficiaries, excluding a blind trust, the name and address of the trustee, a description of the trust, and the filing person's relationship to the trust.

k. A list of all liabilities, excluding indebtedness on the filing person's primary personal residence, by type of creditor and debtor.

l. Repealed by Session Laws 2007-348, s. 34. See Editor's note for effective date.

m. A list of all stock options in a company or business not otherwise disclosed on this statement.

(3) The name of each source (not specific amounts) of income of more than five thousand dollars ($5,000) received during the previous year by business or industry type, if that source is not listed under subdivision (2) of this subsection. Income shall include salary, wages, professional fees, honoraria, interest, dividends, rental income, and business income from any source other than capital gains, federal government retirement, military retirement, or social security income.

(4) If the filing person is a practicing attorney, an indication of whether the filing person, or the law firm with which the filing person is affiliated, earned legal fees during the past year in excess of ten thousand dollars ($10,000) from any of the following categories of legal representation:

a. Administrative law.
b. Admiralty law.
c. Corporate law.
d. Criminal law.
e. Decedents' estates law.
f. Environmental law.
g. Insurance law.
h. Labor law.
i. Local government law.
j. Negligence or other tort litigation law.
k. Real property law.
l. Securities law.
m. Taxation law.

n. Utilities regulation law.

(5) Except for a filing person in compliance under subdivision (4) of this subsection, if the filing person is a licensed professional or provides consulting services, either individually or as a member of a professional association, a list of categories of business and the nature of services rendered, for which payment for services were charged or paid during the past year in excess of ten thousand dollars ($10,000).

(6) An indication of whether the filing person, the filing person's employer, a member of the filing person's immediate family, or the immediate family member's employer is licensed or regulated by, or has a business relationship with, the board or employing entity with which the filing person is or will be associated. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.

(7) A list of societies, organizations, or advocacy groups, pertaining to subject matter areas over which the public servant's agency or board may have jurisdiction, in which the public servant or a member of the public servant's immediate family is a director, officer, or governing board member. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.

(8) A list of all things with a total value of over two hundred dollars ($200.00) per calendar quarter given and received without valuable consideration and under circumstances that a reasonable person would conclude that the thing was given for lobbying, if such things were given by a person not required to report under Chapter 120C of the General Statutes, excluding things given by a member of the filing person's extended family. The list shall include only those things received during the 12 months preceding the reporting period under subsection (d) of this section, and shall include the source of those things. The list required by this subdivision shall not apply to things of monetary value received by the filing person prior to the time the filing person filed or was nominated as a candidate for office, as described in G.S. 138A-22, or was appointed or employed as a covered person.

(9) A list of any felony convictions of the filing person, excluding any felony convictions for which a pardon of innocence or order of expungement has been granted.

(10) Any other information that the filing person believes may assist the Commission in advising the filing person with regards to compliance with this Chapter.

(11) A list of any nonprofit corporation or organization with which associated during the preceding calendar year, including a list of which of those nonprofit corporations or organizations with which associated do business with the State or receive State funds and a brief description of the nature of the business, if known or with which due diligence could reasonably be known.

(12) A statement of whether the filing person or the filing person's immediate family is or has been a lobbyist or lobbyist principal registered under Chapter 120C of the General Statutes within the preceding 12 months.

(13) A list of all contributions as defined in G.S. 163-278.6(6) with a cumulative total of more than one thousand dollars ($1,000) made by the filing person only, during the preceding calendar year, to the candidate or candidate campaign committee of the covered person as defined in G.S. 138A-3(30)a. appointing the filing person to the covered board.

(14) A statement indicating "Yes" or "No" as to whether the filing person engaged in each of the following activities during the preceding calendar year, with respect to or on the behalf of the candidate or candidate campaign committee of the covered person as defined in G.S. 138A-3(30)a. appointing the filing person: (i) collected contributions from multiple contributors, took possession of such multiple contributions, and transferred or delivered those collected multiple contributions, (ii) hosted a fund-raiser in the filing person's residence or place of business, or (iii) volunteered for campaign-related activity. This subdivision only applies to filing persons in the following categories:

a. A public servant, or a prospective appointee to, as defined in G.S. 138A-3(30)c.

b. A judicial officer that serves on, or a prospective appointee to, the Supreme Court, the Court of Appeals, the superior court, or the district court.

c. A covered person serving on, or a prospective appointee to, one of the following panels or boards:

1. Alcoholic Beverage Control Commission.
2. Coastal Resources Commission.
3. State Board of Education.
4. State Board of Elections.
5. Division of Employment Security.
6. Environmental Management Commission.
7. Industrial Commission.
8. State Personnel Commission.
9. Rules Review Commission.
10. Board of Transportation.
11. Board of Governors of the University of North Carolina.
12. Utilities Commission.
13. Wildlife Resources Commission.

(15) The name of each business with which associated that the filing person or a member of the filing person's immediate family is an employee, director, officer, partner, proprietor, or member or manager.

(16) For any company or business entity listed under subdivision (15) of this subsection and sub-subdivisions f. and g. of subdivision (2) of this subsection, if known, a statement whether that company or business entity has any material business dealings or business contracts with the State, or is regulated by the State, including a brief description of the business activity.

(b) The Supreme Court, the Committee, constitutional officers of the State, heads of principal departments, the Board of Governors of The University of North Carolina, the State Board of Community Colleges, other boards, and the appointing authority or employing entity may require a filing person to file supplemental information in conjunction with the filing of that filing person's statement of economic interest. These supplemental filings requirements shall be filed with the Commission and included on the forms to be filed with the Commission. The Commission shall evaluate the supplemental forms as part of the statement of economic interest. The failure to file supplemental forms shall be subject to the provisions of G.S. 138A-25.

(c) Each statement of economic interest shall contain a certification by the filing person that the filing person has read the statement and that, to the best of the filing person's knowledge and belief, the statement is true, correct, and complete. The filing person's certification also shall provide that the filing person has not transferred, and will not transfer, any asset, interest, or other property with the intent to conceal it from disclosure while retaining an equitable interest therein.

(c1) Reserved for future codification purposes.

(c2) Recodified as G.S. 138A-22(c2) by Session Laws 2010-169, s. 22(b), effective August 2, 2010.

(d) All information provided in the statement of economic interest shall be current as of the last day of December of the year preceding the date the statement of economic interest was due.

(e) The Commission shall prepare a written evaluation of each statement of economic interest relative to conflicts of interest and potential conflicts of interest. This subsection does not apply to statements of economic interest of legislators and judicial officers. The Commission shall submit the evaluation to all of the following:

(1) The filing person who submitted the statement.

(2) The head of the agency in which the filing person serves.

(3) The Governor for gubernatorial appointees and employees in agencies under the Governor's authority.

(4) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.

(5) The appointing or hiring authority for those public servants not under the Governor's authority.

(6) The State Board of Elections for those filing persons who are elected.

(7) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.

(f) The Commission shall prepare a written evaluation of each statement of economic interest for nominees of the Board of Governors of The University of North Carolina elected pursuant to G.S. 116-6, and nominees of the State Board of Community Colleges elected pursuant to G.S. 115D-2.1 within seven days of the submission of the completed statement of economic interest to the Commission. (2006-201, s. 1; 2007-29, s. 1; 2007-348, s. 34; 2008-187, s. 32; 2008-213, ss. 67-72(a), 73, 74, 74.5, 91; 2009-549, s. 14; 2009-570, s. 45; 2010-169, ss. 13(a)-(d), 17(q), 22(b); 2011-401, s. 3.18.)

§ 138A-25. Failure to file.

(a) Within 30 days after the date due under G.S. 138A-22, the Commission shall notify filing persons who have failed to file or filing persons whose statement has been deemed incomplete. For a filing person currently serving as a covered person, the Commission shall notify the filing person and the ethics liaison that if the statement of economic interest is not filed or completed within 30 days of receipt of the notice of failure to file or complete, the filing person shall be subject to a fine as provided for in this section.

(b) Any filing person who fails to file or complete a statement of economic interest within 30 days of the receipt of the notice, required under subsection (a) of this section, shall be subject to a fine of two hundred fifty dollars ($250.00), to be imposed by the Commission.

(c) Failure by any filing person to file or complete a statement of economic interest within 60 days of the receipt of the notice, required under subsection (a) of this section, shall be deemed to be a violation of this Chapter and shall be grounds for disciplinary action under G.S. 138A-45. (2006-201, s. 1; 2008-213, s. 75; 2009-549, s. 15.)

§ 138A-26. Concealing or failing to disclose material information.

A filing person who knowingly conceals or knowingly fails to disclose information that is required to be disclosed on a statement of economic interest under this Article shall be guilty of a Class 1 misdemeanor and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

§ 138A-27. Penalty for false information.

A filing person who provides false information on a statement of economic interest as required under this Article knowing that the information is false is guilty of a Class H felony and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

Article 4.

Ethical Standards for Covered Persons.

§ 138A-31. Use of public position for private gain.

(a) Except as permitted under G.S. 138A-38, a covered person or legislative employee shall not knowingly use the covered person's or legislative employee's public position in an official action or legislative action that will result in financial benefit to the covered person or legislative employee, a member of the covered person's or legislative employee's extended family, or business with which the covered person or legislative employee is associated. This subsection shall not apply to financial or other benefits derived by a covered person or legislative employee that the covered person or legislative employee would enjoy to an extent no greater than that which other citizens of the State would or could enjoy, or that are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the covered person's or legislative employee's ability to protect the public interest and perform the covered person's or legislative employee's official duties would not be compromised.

(b) A covered person shall not mention or authorize another person to mention the covered person's public position in nongovernmental advertising that advances the private interest of the covered person or others. The prohibition in this subsection shall not apply to any of the following:

(1) Political advertising.
(2) News stories and articles.
(3) The inclusion of a covered person's public position in a directory or a biographical listing.
(4) The inclusion of a covered person's public position in an agenda or other document related to a meeting, conference, or similar event when the disclosure could

reasonably be considered material by an individual attending the meeting, conference, or similar event.

(5) The inclusion of a covered person's public position in a charitable solicitation for a nonprofit business entity qualifying under 26 U.S.C. § 501(c)(3).

(6) The disclosure of a covered person's position to an existing or prospective customer, supplier, or client when the disclosure could reasonably be considered material by the customer, supplier, or client.

(c) Notwithstanding G.S. 163-278.16A, no covered person shall use or permit the use of State funds for any advertisement or public service announcement in a newspaper, on radio, television, magazines, or billboards, that contains that covered person's name, picture, or voice, except in case of State or national emergency and only if the announcement is reasonably necessary to the covered person's official function. This subsection shall not apply to fund-raising on behalf of and aired on public radio or public television.

§ 138A-32. Gifts.

(a) A covered person or a legislative employee shall not knowingly, directly or indirectly, ask, accept, demand, exact, solicit, seek, assign, receive, or agree to receive anything of value for the covered person or legislative employee, or for another person, in return for being influenced in the discharge of the covered person's or legislative employee's official responsibilities, other than that which is received by the covered person or the legislative employee from the State for acting in the covered person's or legislative employee's official capacity.

(b) A covered person may not solicit for a charitable purpose any thing of monetary value from any subordinate State employee. This subsection shall not apply to generic written solicitations to all members of a class of subordinates. Nothing in this subsection shall prohibit a covered person from serving as the honorary head of the State Employees Combined Campaign.

(d) No public servant shall knowingly accept a gift from a person whom the public servant knows or has reason to know any of the following:

(1) Is doing or is seeking to do business of any kind with the public servant's employing entity.

(2) Is engaged in activities that are regulated or controlled by the public servant's employing entity.

(3) Has financial interests that may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties.

(d1) No public servant shall accept a gift knowing all of the following:

(1) The gift was obtained indirectly from a person described under subdivision (d)(1), (2), or (3) of this section.

(2) The person described under subdivision (d)(1), (2), or (3) of this section intended for an ultimate recipient of the gift to be a public servant.

(e) Subsections (c), (d), and (d1) of this section shall not apply to any of the following:

(1) Food and beverages for immediate consumption in connection with any of the following:

a. An open meeting of a public body, provided that the open meeting is properly noticed under Article 33C of Chapter 143 of the General Statutes.

b. A gathering of a person or governmental unit with at least 10 or more individuals in attendance open to the general public, provided that a sign or other communication containing a message that is reasonably designed to convey to the general public that the gathering is open to the general public is displayed at the gathering.

c. A gathering of a person or governmental unit to which the entire board of which a public servant is a member, at least 10 public servants, all the members of the House of Representatives, all the members of the Senate, all the members of a county or municipal legislative delegation, all the members of a recognized legislative caucus with regular meetings other than meetings with one or more lobbyists, all the members of a committee, a standing subcommittee, a joint committee or joint commission of the House of

Representatives, the Senate, or the General Assembly, or all legislative employees are invited, and one of the following applies:

1. At least 10 individuals associated with the person or governmental unit actually attend, other than the covered person or legislative employee, or the immediate family of the covered person or legislative employee.
2. All shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit located in North Carolina are notified and invited to attend.

For purposes of this sub-subdivision only, the term "invited" shall mean written notice from at least one host or sponsor of the gathering containing the date, time, and location of the gathering given at least 24 hours in advance of the gathering to the specific qualifying group listed in this sub-subdivision. If it is known at the time of the written notice that at least one sponsor is a lobbyist or lobbyist principal, the written notice shall also state whether or not the gathering is permitted under this section.

(2) Informational materials relevant to the duties of the covered person or legislative employee.

(3) Reasonable actual expenditures of the legislator, public servant, or legislative employee for food, beverages, registration, travel, lodging, other incidental items of nominal value, and entertainment, in connection with (i) a legislator's, public servant's, or legislative employee's attendance at an educational meeting for purposes primarily related to the public duties and responsibilities of the legislator, public servant, or legislative employee; (ii) a legislator's, public servant's, or legislative employee's participation as a speaker or member of a panel at a meeting; (iii) a legislator's or legislative employee's attendance and participation in meetings of a nonpartisan state, regional, national, or international legislative organization of which the General Assembly is a member or that the legislator or legislative employee is a member or participant of by virtue of that legislator's or legislative employee's public position, or as a member of a board, agency, or committee of such organization; or (iv) a public servant's attendance and participation in meetings as a member of a board, agency, or committee of a nonpartisan state, regional, national, or international organization of which the public servant's agency is a member or the public servant is a member by virtue of that public servant's public position, provided the following conditions are met:

a. The reasonable actual expenditures shall be made by a lobbyist principal, and not a lobbyist.
b. Any meeting must be attended by at least 10 or more participants, have a formal agenda, and notice of the meeting has been given at least 10 days in advance.
c. Any food, beverages, transportation, or entertainment must be provided to all attendees or defined groups of 10 or more attendees as part of the meeting or in conjunction with the meeting.
d. Any entertainment must be incidental to the principal agenda of the meeting.
e. If the legislator, public servant, or legislative employee is participating as a speaker or member of a panel, then that legislator, public servant, or legislative employee must be a bona fide speaker or participant.

(4) A plaque or similar nonmonetary memento recognizing individual services in a field or specialty or to a charitable cause.

(5) Gifts accepted on behalf of the State for use by the State or for the benefit of the State.

(6) Anything generally made available or distributed to the general public or all other State employees by lobbyists or lobbyist principals, or persons described in subdivisions (d)(1), (2), or (3) of this section.

(7) Gifts from the covered person's or legislative employee's extended family, or a member of the same household of the covered person or legislative employee.

(10) Gifts given or received as part of a business, civic, religious, fraternal, personal, or commercial relationship provided all of the following conditions are met:

a. The relationship is not related to the public servant's, legislator's, or legislative employee's public service or position.

b. The gift is made under circumstances that a reasonable person would conclude that the gift was not given to lobby.

(g) A prohibited gift shall be, and a permissible gift may be, promptly declined, returned, paid for at fair market value, or donated to charity or the State.

(h) A covered person or legislative employee shall not accept an honorarium from a source other than the employing entity for conducting any activity where any of the following apply:

(1) The employing entity reimburses the covered person or legislative employee for travel, subsistence, and registration expenses.

(2) The employing entity's work time or resources are used.

(3) The activity would be considered official duty or would bear a reasonably close relationship to the covered person's or legislative employee's official duties.

An outside source may reimburse the employing entity for actual expenses incurred by a covered person or legislative employee in conducting an activity within the duties of the covered person or legislative employee, or may pay a fee to the employing entity, in lieu of an honorarium, for the services of the covered person or legislative employee. An honorarium permissible under this subsection shall not be considered a gift for purposes of subsection (c) of this section.

(i) Acceptance or solicitation of a gift in compliance with this section without corrupt intent shall not constitute a violation of the statutes related to bribery under G.S. 14-217, 14-218, or 120-86

§ 138A-33. Other compensation.

A public servant or legislative employee shall not solicit or receive personal financial gain, other than that received by the public servant or legislative employee from the State, or with the approval of the employing entity, for acting in the public servant's or legislative employee's official capacity, or for advice or assistance given in the course of carrying out the public servant's or legislative employee's duties.

§ 138A-34. Use of information for private gain.

A public servant or legislative employee shall not use or disclose nonpublic information gained in the course of, or by reason of, the public servant's or legislative employee's official responsibilities in a way that would affect a personal financial interest of the public servant or legislative employee, a member of the public servant's or legislative employee's extended family, or a person or governmental unit with whom or business with which the public servant or legislative employee is associated. A public servant or legislative employee shall not improperly use or improperly disclose any confidential information.

§ 138A-40. Employment and supervision of members of covered person's or legislative employee's extended family.

A covered person or legislative employee shall not cause the employment, appointment, promotion, transfer, or advancement of an extended family member of the covered person or legislative employee to a State office, or a position to which the covered person or legislative employee supervises or manages, except for positions at the General Assembly as permitted under G.S. 120-32(2). A public servant or legislative employee shall not supervise, manage, or participate in an action relating to the discipline of a member of the public servant's or legislative employee's extended family, except as specifically authorized by the public servant's or legislative employee's employing entity.

Article 5.
Violation Consequences.

§ 138A-45. Violation consequences.

(a) Violation of this Chapter by any covered person or legislative employee is grounds for disciplinary action. Except as specifically provided in this Chapter and for perjury under G.S. 138A-12 and G.S. 138A-24, no criminal penalty shall attach for any violation of this Chapter.

(f) Nothing in this Chapter affects the power of the State to prosecute any person for any violation of the criminal law.