Orientation for New Superior Court Judges

School of Government, Chapel Hill, NC

Monday, January 23, 2023

9:00 a.m.	**Welcome and Introductions** Shea Denning, UNC School of Government
9:30 a.m.	**Welcome from the Administrative Office of the Courts** [30 mins] Judge Andrew Heath, Director, NC Administrative Office of the Courts
10:00 a.m.	**Tools of the Trade: The Benchbook and other Online Resources** [20 mins] Shea Denning
10:20 a.m.	***Break***
10:30 a.m.	**Transition to Superior Court** [50 mins] Hon. Robert C. Ervin, Senior Resident Superior Court Judge, District 25A
11:20 a.m.	***Break***
11:30 a.m.	**Transition to Superior Court, continued** [50 mins] Bob Ervin
12:20 p.m.	***Headshots & Lunch at the School of Government***
1:30 p.m.	**Findings of Fact and Conclusions of Law** [50 mins] Hon. Paul C. Ridgeway, Senior Resident Superior Court Judge, District 10
2:20 p.m.	***Break***
2:30 p.m.	**Civil Procedure Basics** [2 hours] Emily Turner, UNC School of Government
4:30 p.m.	***Recess***

Tuesday, January 24

9:00 a.m.	**Judicial Ethics** [50 mins] Hon. Chris Dillon, Court of Appeals Judge, Chair, N.C. Judicial Standards Commission Brittany Pinkham, Commision Counsel, N.C. Judicial Standards Commission
9:50 a.m.	***Break***
10:00 a.m.	**Judicial Ethics, continued** [50 mins] Judge Chris Dillon Brittany Pinkham
10:50 a.m.	***Break***

11:00 a.m. **Interpreter Issues** [1 hr]
Kara Mann, Office of Language Access Services, Administrative Office of the Courts

12:00 p.m. ***Lunch***

12:50 p.m. **Beginning to Form a Judicial Philosophy** [1 hr 30 mins]
Jim Drennan, Adjunct Professor, UNC School of Government

2:20 p.m. ***Break***

2:30 p.m. **Evidence: A Judge's Perspective** [1 hr 30 mins]
Hon. Bryan Collins, Jr., Resident Superior Court Judges, District 10

4:00 p.m. ***Break***

4:10 p.m. **Contempt** [50 mins]
Cheryl Howell, UNC School of Government

5:00 p.m. ***Recess***

Wednesday, January 25

9:00 a.m. **Structured Sentencing** [1 hr 40 mins]
Jamie Markham

10:40 a.m. ***Break***

10:50 a.m. **Probation Violations** [1 hr 10 mins]
Jamie Markham

12:00 p.m. ***Lunch (Boxed Lunches)***

12:45 p.m. **Depart for Tour of Central Prison and Death Row** [3 hours]

5:30 p.m. Arrive back to Chapel Hill

6:30 p.m. **Dinner at NODA Brewing Tapas**

Thursday, January 26

9:00 a.m. **Criminal Court: From Grand Jury to Charging Instruments** [1 hr 15 mins]
Hon. Todd Pomeroy, Senior Resident Superior Court Judge, District 27B

10:15 a.m. ***Break***

10:25 a.m. **Criminal Court: Guilty Pleas** [45 mins]
Shea Denning

11:10 a.m. **Criminal Court: Jury Selection and Jury Management** [50 mins]
Todd Pomeroy

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

1:00 p.m. **Criminal Court: The Right to Counsel** [1 hr 15 mins]
John Rubin, Albert Coates Professor of Public Law and Government, UNC School of Government

2:15 p.m. ***Break***

2:25 p.m. **Criminal Court: From Presentation of Evidence to Verdict** [1 hr 30 mins]
Todd Pomeroy

4:00 p.m. **Recess**

Friday, January 27

8:45 a.m. **Self-Represented Litigants** [50 mins]
Hon. R. Allen Baddour, Senior Resident Superior Court Judge, District 15B

9:35 a.m. **Research Assistant: Pattern Jury Instructions** [50 mins]
Allen Baddour

10:25 a.m. ***Break***

10:35 a.m. **Search Warrants** [1 hr]
Jeff Welty, UNC School of Government

11:35 a.m. ***Boxed Lunches***

12:00 p.m. **Scheduling, Commissions, and the Master Calendar** [1 hr]
Dawn Turnley, Administrative Office of the Courts
Ragan Oakley, Assistant Director, Administrative Office of the Courts

1:00 p.m. **Adjourn**

Sponsored by
North Carolina Administrative Office of the Courts
UNC School of Government

*This program will have **26.00** hours of instruction for continuing judicial education credit under Rule II.C of Continuing Judicial Education.*

ORIENTATION FOR NEW SUPERIOR COURT JUDGES
FACULTY AND SPEAKERS

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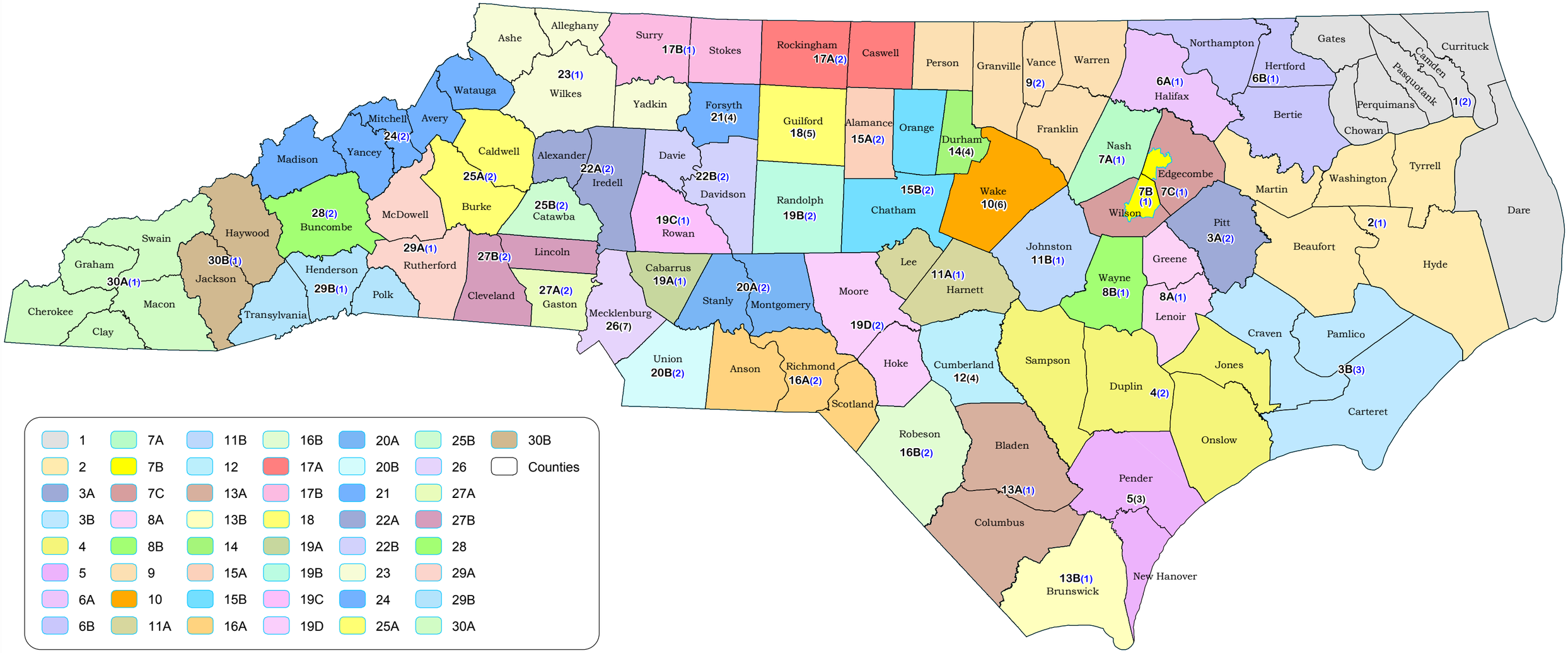
North Carolina Superior Court Districts



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4	8B	14	19A	22B	28	
5	9	15A	19B	23	29A	
6A	10	15B	19C	24	29B	
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Number of Judges is shown in parentheses

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J-ST-9 H717 conference Superior

Printed by the NC General Assembly, June 15, 2018.

Tab 1

Tools of the Trade

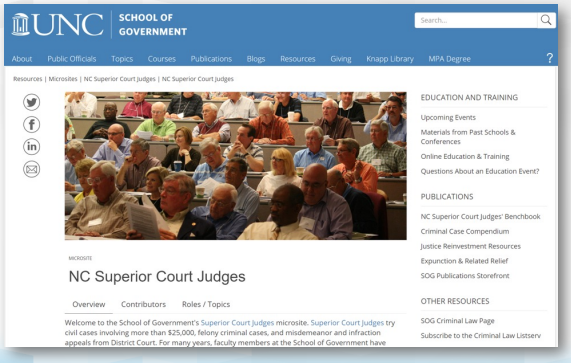
Tools of the Trade

The Judges' Benchbook and Other Online Resources

UNC SCHOOL OF GOVERNMENT

1

judges.unc.edu



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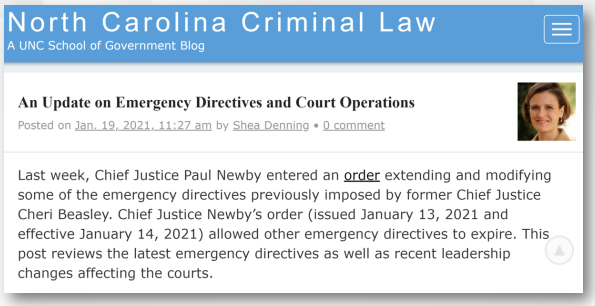
2

Criminal Law Blog



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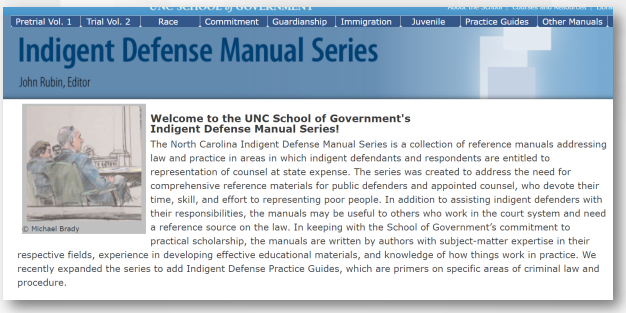
3

Defender Manual



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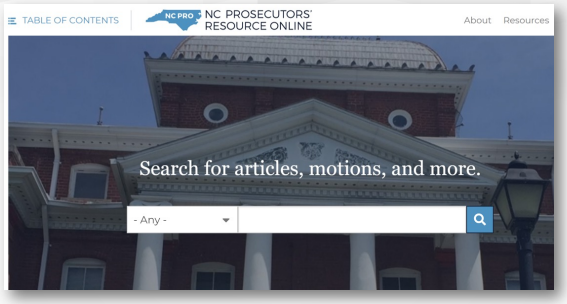
NCPro



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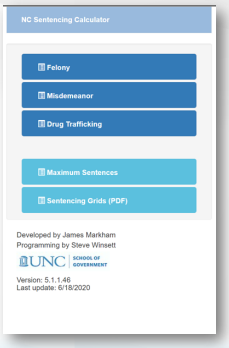
5

Sentencing App



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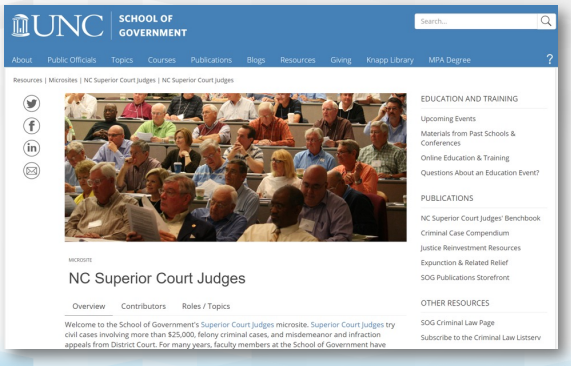
judges.unc.edu



Tab 2 Transition to Superior Court

If too long: Transition to SC

Tab 3

Finding of Facts & Conclusions

Facts & Conclusions

NORTH CAROLINA Judicial COLLEGE

Findings of Fact & Conclusions of Law

Paul Ridgeway
Senior Resident Superior Court Judge
10th Judicial District

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1

Purpose of FOF/COL

- Dispose of issues raised by pleadings
- Collateral estoppel / res judicata
- Evoke care on the part of trial judge
- Allow for meaningful appellate review

2

General Principles

- FOF/COL may be required:
- If evaluating evidence
  - As finder of fact
  - In *de novo* review as appellate court
- FOF/COL not appropriate:
- If matter requires that you accept one party's version "in light most favorable" to that party
- In "whole record" review as appellate court

3

What is Required?

- Find facts
- Ultimate vs. evidentiary facts
- Declare conclusions (separately from findings of fact)
- Enter judgment accordingly
- In writing by separate order?
- Sometimes – e.g. Motion to Suppress

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Ultimate Facts

- "Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. . . . The line of demarcation between ultimate facts and legal conclusions is not easily drawn." (*Farmers Bank v. M.T. Brown Distr., Inc.*, 307 N.C. 342 (1983))

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Scenario 1.

- Defendant (pedestrian) challenges constitutionality of stop and moves to suppress evidences obtained after search.
- At issue at the hearing on defendant's motion to suppress was whether defendant was searched and seized in a manner permissible pursuant to the Fourth Amendment of the United States Constitution.
- After hearing on motion to suppress, trial court says: "Your motion to suppress is denied. I find that the stop was not unreasonable."
- Adequate FOF/COL?

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Scenario 1, cont.

- No.
- In determining whether a seizure for the purposes of 4th Amendment occurred it was "incumbent upon trial court to determine whether a reasonable person in the position of the defendant would not have felt free to leave."
- Material conflict in the evidence presented
- Failure to make FOF and COL is "fatal to validity of denial of motion."
- State v. Baker, COA10-98 (7 Dec. 2010)

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Scenario 2

- Motorist arrested for DWI. While being transported for breathalyzer, he was informed not to put anything in his mouth. Defendant disobeyed, was instructed again to refrain, and disobeyed again.
- Defendant appeals trial court's findings that he willfully refused without just cause or excuse to submit to a chemical analysis.

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Scenario 2, cont.

- Trial court order says, in pertinent part:
  - D taken before Officer who gave oral and written notice to D of all rights as set out in statute
  - That D willfully refused, without just cause or excuse, to submit to chemical analysis upon request
  - Court concludes that D is subject to revocation of license pursuant to NCGS . . .
- Sufficient FOF/COL?

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Scenario 2, cont.

- Yes.
- Trial court need not recite every evidentiary fact presented
- "Must only make specific findings on the ultimate facts established by the evidence that are determinative of the questions raised in the action and essential to support its conclusions"
- "Without just cause or excuse" indicates trial court rejected all opposing inferences.
- *Tolbert v. Hiatt*, 95 N.C. App. 380 (1989)

Scenario 3

- DSS Juvenile Petition alleged dependency and neglect due to lack of care and proper supervision.
- The petition alleged Respondent (mother) left home, did not return, and child was not picked up from school. No one knew mother's whereabouts for several days.

Scenario 3, cont.

- Trial court entered order "incorporating each of the factual allegations set forth in the petition as findings of fact as if set forth herein in their entirety."
- Court adjudicated the child neglected and dependent; granted custody to DSS
- Sufficient FOF?

Scenario 3, cont.

- No.
- The trial court must, through process of logical reasoning based upon evidentiary facts before it find the ultimate facts essential to support the conclusions of law.
- Must be stated with sufficient specificity to allow for meaningful review.
- This it cannot do, particularly without making sufficient additional findings of fact which indicate the trial court considered the evidence presented at the hearing. (*In re SCR*, 217 N.C. App. 166, 169-70 (2011)).

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When are FOF/COL required?

- Criminal Law
- Motions to suppress evidence (NCGS 15A-977(f))
  - Written findings required
  - Sufficient to announce ruling in open court and later file written order
  - Where ruling announced in open court, trial court has jurisdiction to enter written order with FOF/COL even after notice of appeal. *State v. Franklin* (Dec. 18, 2012)
- Proceedings regarding capacity (15A-1002, 1003)
- Mistrials (15A-1064)
- Motions for Appropriate Relief (15A-1420(c))

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Criminal law, cont.

- Order allowing remote testimony of child witness (15A-1225.1)
- Maintenance of order in courtroom & restraint of defendant and witnesses (15A-1031)
- Material witness order (15A-803(d))

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Criminal law, cont.

- *Batson* issues – St. v. Hood, 848 S.E.2d 515 (N.C. Ct. App. 2020).
- Sex offenses –
  - Bail & pretrial release – deviation from standard no contact orders
  - Sentencing – permanent no contact orders
  - Sentencing – deviation from structured sentencing
  - Satellite based monitoring requirements

Civil Law – when are FOF/COL required?

- Bench trials – N.C.R. Civ. P. 52(a)(1)
- "in all actions tried upon facts without a jury . . ., the court shall find the facts specially and state separately the conclusions of law thereon and direct the entry of the appropriate judgment."

Civil Law, cont.

- N.C.R. Civ. P. 41(b) – Involuntary dismissal
- In actions tried without a jury, at close of plaintiff's evidence, judge may dismiss if based on law and facts the plaintiff has shown no right to relief.
- If it does so, court must make FOF/COL as required by Rule 52(a).

Civil Law, cont.

- N.C.R. Civ. P. 52(a)(2) – FOF/COL are required on any decision of any motion or order ex mero moto only when requested by a party or otherwise required by statute or case law
- Absent request, FOF/COL is within court's discretion. If none, appellate court presumes court on proper evidence found facts to support judgment.

Civil Law, cont.

- Timing of request
  - Prior to entry of written order
- Preparation of Order
  - Rely upon orders submitted by parties
- Amendment of Order
  - Rule 52(b) (w/in 10 days of judgment); even after notice of appeal

Specific Civil Law issues

- TRO/Preliminary Injunctions
  - Generally subject to Rule 52(a)(2) (only if requested)
  - But civil contempt cannot be imposed based upon conduct preceding entry of order
- Consent Judgments – FOF/COL not required, even if requested.

Specific Civil Law issues

- Rule 12(b)(6) motions to dismiss, Motions for Judgment on the Pleadings
- FOF/COL not required, even if requested.
- Court deemed to have accepted pleadings in light most favorable to non-movant
- Motions for Summary Judgment
  - FOF/COL not required – same rationale
- Motion for relief from judgment
  - FOF/COL not required – but encouraged.

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Specific Civil Law issues

- FOF/COL are required for (by case law or statute):
- Motions to compel arbitration
- Criminal and civil contempt
  - In criminal contempt, be sure to recite that facts are found "beyond a reasonable doubt".
  - Civil contempt FOF/COL – must be in writing
- Rule 11 sanctions
- Award of Attorneys fees
- Sanctions for non-attendance at mediation
- Motion for JNOV on jury award of punitive damages

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Appeals to Superior Court from Clerk of Court

- Threshold question: What is Superior Court's jurisdiction? *Appellate* or *Original*?
- FOF are not appropriate for where court sits as *appellate* court and is confined to correcting errors of law
  - E.g. appeal of clerk's order denying petition to reopen estate.
- Trial court is confined to record made below.

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Appeals to Superior Court from Clerk of Court, cont.

- Some appeals, by statute, invoke the Superior Court's *original* jurisdiction. FOF/COL are then required.
- Examples:
  - Competency determinations (N.C. Gen. Stat. Ch. 35A)
  - Foreclosure appeals (N.C. Gen. Stat. Ch. 45)
- Require court to consider evidence anew.

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Appeals from Administrative Agencies

- When superior court reviews agency decision under its original jurisdiction, the court conducts a *de novo* hearing, and must make FOF/COL.
- When the superior court reviews agency decisions under its appellate jurisdiction, the court it is considering only errors of law, and is bound by the facts found below if supported by substantial evidence.

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Agency appeals

- Most agency appeals only invoke the superior court's appellate jurisdiction
- No new evidence – limited to record and findings below
- Superior court order should not make FOF because that would suggest that the court strayed from its appellate jurisdiction.
- But, some agencies have specific statutes directing how appeals to superior court are to be reviewed (DMV, zoning, ESC)
- Look to statute – if statute specifically requires *de novo* review of an agency's findings, it is invoking the original jurisdiction of the superior court, and then order should contain FOF as well as COL.

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- QUESTIONS or COMMENTS?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Paul C. Ridgeway
Senior Resident Superior Court Judge (10th Judicial District – Wake County)
Presented at Orientation for New Superior Court Judges
23 January 2023

I. INTRODUCTION

PURPOSE OF FINDINGS OF FACT ("FOF") AND CONCLUSIONS OF LAW ("COL")

A. Not designed to encourage "ritualistic recitations" (i.e. harass the trial judge) but instead to:

1. Dispose of issues raised by the pleadings;

2. Make definite what was decided for purposes of res judicata and estoppel;

3. Evoke care on the part of the trial judge in ascertaining the facts; and

4. Allow for meaningful appellate review.

State v. Baker, COA 10-98 (7 Dec. 2010); *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001); *Hill v. Lassiter*, 135 N.C. App. 515, 518, 520 S.E.2d 797, 800 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 562, 402 S.E.2d 860, 862 (1991).

See further: Anderson, *Civil Orders: Findings of Fact and Conclusions of Law*, NC SUPERIOR COURT JUDGES' BENCHBOOK (School of Government, UNC 2017)

GENERAL PRINCIPLES

A. If you are evaluating evidence, or the matter involves an appeal that by statute invokes the trial judge's original jurisdiction (i.e. *de novo* review of some clerk of court matters or some administrative agency appeals), be alert to the need for FOF/COL. In some instances, they will be required (as discussed below), in others they will not, except on request of a party.

B. If the matter requires you to accept one party's version of the facts as true (e.g. granting or denying a N.C. R. Civ. P. 12(b)(6) motion), or requires that you accept a lower tribunals findings as conclusive (e.g. reviewing some clerk of court matters and many administrative agency appeals), then FOF/COL normally are not appropriate.

WHAT IS REQUIRED?

Judge must:

A. **Find facts on all issues joined in the pleadings**.

Note that findings of fact are conclusive upon appellate review if supported by competent evidence, even though there may be evidence to the contrary. *Heating & Air Cond. Assoc. v. Myerly,* 29 N.C. App. 85 (1976).

Trial judge is required to find and state ultimate facts only, not evidentiary facts. *State v. Escobar,* 187 N.C. App. 267, 271, 652 S.E.2d 694, 698 (2007). Ultimate fact is the "final resulting effect reached by process of logical reasoning from evidentiary facts." *Farmers Bank v. Michael T. Brown Distr., Inc.,* 307 NC 342 (1983). Evidentiary facts are those "subsidiary facts required to prove the ultimate facts." "Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn." *Id.* Furthermore, the Court is only required to make findings of fact to resolve "all *material* factual conflicts" in the evidence. *State v. Vaughn,* 2013 N.C. App. LEXIS 1089, at 10 (2013) (unpublished) citing *State v. Phillips*, 365 N.C. 103, 116, 711 S.E.2d 122, 134 (2011) (noting that "a more detailed order would be the better practice," *Vaughn* at 11).

For further guidance on requirements for adequate findings of fact, compare and contrast these cases: *Farmers Bank v. Michael T. Brown Distr., Inc.,* 307 NC 342 (1983); *Tolbert v. Hiatt*, 95 N.C. App. 380 (1989); and *State v. Baker*, COA 10-98 (7 Dec. 2010); *In the Matter of S.C.R.*, 718 S.E.2d 709 (2011); *State v. Vaughn,* 2013 N.C. App..LEXIS 1089 (2013)(unpublished).

B. **Declare conclusions of law arising from those facts.**

Conclusions of Law are "the court's statement of law which is determinative of the matter at issue between the parties." *Montgomery v. Montgomery*, 32 N.C. App. 154. It is the "application of fixed rules of law." *State v. Freeman,* 307 N.C. App. 357 (1983). The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law and from which the judgment is to result. *Montgomery, supra.,, citing* 89 C.J.S., Trial, § 615b (1955).

Conclusions of Law must be stated separately from the findings of fact. *Montgomery, supra.* The purpose of requiring that conclusions of law to be stated separately is to enable appellate courts to determine what law the trial court applied. *Hinson v. Jefferson*, 287 N.C. 422 (1975).

C. **Enter judgment accordingly.**

Hilliard v. Hilliard, 146 N.C. App. 709, 710-11, 554 S.E.2d 374, 376 (2001) (quoting *Whitfield v. Todd*, 116 N.C. App. 335, 338, 447 S.E.2d 796, 798 (1994)); *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985) (citing *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971)).

II. WHEN ARE FOF/COL REQUIRED OR APPROPRIATE?

CRIMINAL CASES

A. **Motions to suppress evidence** (N.C. Gen. Stat. § 15A-977(f)). See thorough discussion of this requirement in *State v. Baker*, COA 10-98 (7 Dec. 2010). General rule: Judge is the finder of fact at the hearing on a motion to suppress evidence and should make written findings of fact and conclusions of law. *State v. Grogan*, 40 N.C. App. 371 (1979). Statute is complied with when the judge announces his/her ruling in open court and later files a written order setting forth the findings of fact and conclusions of law. *State v. Fisher*, 158 N.C. App. 133 (2003).

B. **Proceedings regarding capacity** (N.C. Gen. Stat. § 15A-1002 (Determination of mental capacity) and §15A-1003 (Referral of incapable defendant for civil commitment proceedings).

C. **Mistrials** (N.C. Gen. Stat. § 15A-1064). Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.

D. **Motions for Appropriate Relief** (N.C. Gen. Stat. § 15A-1420(c)).
FOF required when the Court holds an evidentiary hearing to resolve disputed issues of fact. COL required when motion is based on an asserted violation of the defendant's rights under the U.S. Constitution or other federal law.

E. **Order allowing remote testimony of child witnesses.** N.C. Gen. Stat. § 15A-1225.1. Order allowing or disallowing shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of remote testimony requires additional findings as enumerated in 15A-1225.1(d)(1)-(5).

F. **Maintenance of Order in the Courtroom – Custody and restraint of defendant and witnesses.** N.C. Gen. Stat. § 15A-1031.

G. **Order Assuring Attendance of Material Witness**. 15A-803(d).

H. **Sex Offenses.** Bail and Pre-trial release – deviation from standard no-contact provisions. N.C. Gen. Stat. § 15A-534. Issuance of permanent no-contact order at sentencing. N.G. Gen. Stat. § 15A-1340.50. Deviation from structured sentencing for adults found guilty of sex offenses or rape of child. N.C. Gen. Stat. § 14-27.2A and .4A. Determination of satellite-based monitoring requirements. N.C. Gen. Stat. § 14-208.40A and B.

I. **Costs in Criminal Matters.** A 2011 amendment to N.C. Gen. Stat. § 7A-304(a) requires that "written finding of just cause" be made whenever a judge waives any court costs required by § 7A-304(a). Court costs otherwise required under § 7A-304(a) include General Court of Justice fees, SBI lab test fees, impaired driving fee, jail fee and several other miscellaneous fees.

J.. ***Batson* Issues.** *State v. Hood*, 848 S.E.2d 515, 522 (N.C. Ct. App. 2020) "The trial court's summary denial of Defendant's *Batson* challenge precludes appellate review. The trial court was tasked with considering the evidence and determining whether the challenged strike of prospective juror Smith 'was motivated in substantial part by discriminatory intent' on the part of the State. Without specific findings of fact, this Court cannot establish on review that the trial court 'appropriately considered all of the evidence necessary to determine whether [Defendant] proved purposeful discrimination with respect to the State's peremptory challenge' . . . Moreover, the trial court's ruling was deficient in that it 'did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges.'" (Remanded to the trial court with instructions "to conduct a *Batson* hearing . . . [and] to make findings of fact and conclusions of law").

K. **Impact of Delayed Ruling**

1. *See State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005) (granting new trial for defendant where trial court heard motion to suppress during spring term, did not get consent of the parties to enter order out of session and out of term, and did not announce ruling in open court until seven months later, during fall term, and did not enter the order until one year later). *See*, Crowell, *Out-of-term, Out-of-Session, Out-of-County*, Adm. of Justice Bulletin No. 2008/05 (Nov. 2008).

2. When a ruling on a motion to suppress is announced in open court, but not yet reduced to writing, and notice of appeal is given prior to the written order being entered, the trial court apparently continues to have jurisdiction to enter the written order consistent with its prior ruling. *See State v. Oates*, 366 N.C. 264 (2012) (discussing legal effect of notice of appeal given three months prior to entry of written order). See further: *State v. Smith*, 320 N.C. 404, 415, 358 S.E.2d 329, 335 (1993) ("[t]he order, however, is simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress . . . . It

was inserted in the transcript in place of the verbal order rendered in open court.")

3. *Cf. Dalenko v. Wake County Dep't of Human Servs.,* 157 N.C. App. 49, 58, 578 S.E.2d 599, 605 (2003) (in civil cases, relevant statutes permit a judge to sign judgment or order out of term and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district and no party objects). *See also* N.C.R. Civ. P. 58. *See,* Crowell, *supra.*

4. Note: Recent amendment to N.C.R. Civ. P. 7 now allows motions filed in Superior Court district consisting of more than one county to be heard in any county in that district. *See* N.C.R. Civ. P. 7(b)(4).

CIVIL CASES

A. **N.C.R. Civ. P. 52** sets out general standard:

1. Under Rule 52(a)(1), FOF/COL are required in <u>all actions tried upon the facts without a jury</u> or with an advisory jury.

2. FOF/COL must be entered in bench trials, even absent a request by the parties. Failure to enter proper order will generally result in remand, unless facts are undisputed and lead to only one inference. *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 822-24 (N.C. Ct. App. 2009); *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 16, 657 S.E.2d 673, 683 (2008); *Cumberland Homes, Inc., v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 520-21, 581 S.E.2d 94, 96 (2003) (declaratory judgment action).

3. <u>Dismissal under N.C.R. Civ. P. 41(b)</u> also requires entry of findings and conclusions where Court hears the case <u>without a jury</u> and dismisses the matter on the merits at the close of the plaintiff's evidence.

   a. Test for dismissal under Rule 41(b) differs from that for directed verdict under Rule 50(a). Trial court does not take evidence in the light most favorable to plaintiff, but simply considers and weighs all competent evidence before it. *See Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999) (stating test and reversing trial court for failing to make findings/conclusions required for appellate review).

   b. Court may dismiss the matter and enter findings even though plaintiff has made out prima facie case that would have precluded a directed verdict for defendant in a jury case. *In re Foreclosure of Deed of Trust*, 63 N.C. App. 744, 746, 306 S.E.2d 475, 476 (1983).

c. But better practice is to decline to enter Rule 41(b) dismissals except in the clearest of cases. *See, e.g., In re J.E.C.M.*, No. COA07-1424, 2008 N.C. App. LEXIS 394, at *11 (N.C. Ct. App. 2008)(unpublished) (quoting *Esteel Co. v. Goodman*, 82 N.C. App. 692, 695, 348 S.E.2d 153, 156 (1986)).

4. In all other cases, FOF/COL are necessary only when requested by a party, pursuant to N.C. R. Civ. P. 52, or where otherwise required by statute or case law.

a. *E.g., Agbemavor v. Keteku*, 177 N.C. App. 546, 629 S.E.2d 337 (2006) (reversing grant of summary judgment where trial court failed to make findings of fact regarding service of process and jurisdiction over defendant after defendant made a motion pursuant to N.C. R. Civ. P. 52(a)(2) requesting that the trial court make such findings).

However, even where requested under Rule 52, the court is not required to make findings of fact on interlocutory orders that are not appealable, such as a denial of a Rule 12(b)(6) motion. *O'Neill v. So. Nat'l Bank*, 40 N.C. App. 227 (1979). *See also* discussion of Summary Judgment orders below.

b. Absent specific request, trial court has discretion whether to make FOF. If court does not do so, appellate courts will presume that the trial court on proper evidence found facts to support its judgment. *Cail v. Cerwin*, 185 N.C. App. 176, 189, 648 S.E.2d 510, 519 (2007); *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987) (discovery sanctions).

B. **Timing of N.C. R. Civ. P. 52 request**

1. *J.M. Dev. Group v. Glover*, 151 N.C. App. 584, 586, 566 S.E.2d 128, 130 (2002) (request deemed timely if made before entry of written order).

C. **Preparation of Order**

1. Court may request proposed FOF/COL from counsel and may adopt those prepared by a party. *Johnson v. Johnson*, 67 N.C. App. 250, 257, 313 S.E. 2d 162, 166 (1984).

2. *But see Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d. Cir. 2004) (reversing trial court for adopting draft opinion submitted by prevailing party, stating, "That practice involves the failure of a trial judge to perform his judicial function" (quoting *Chicopee Mfg. Corp. v. Kendall Co.*, 288

F.2d 719, 725 (4th Cir. 1961))); s*ee also United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004) (vacating intermediate appellate court decision because opinion replicated substantial portions of the government's brief).

D. **Amendment of FOF/COL**

1. Rule 52(b) allows amendment upon motion made not later than 10 days after entry of judgment.
2. So long as motion is otherwise timely, trial court may amend judgment or order even though notice of appeal has been given. *York v. Taylor*, 79 N.C. App. 653, 654-55, 339 S.E.2d 830, 831 (1986).

III. SPECIFIC LEGAL ISSUES

CIVIL MOTIONS & TRIAL MATTERS

A. **TRO/Preliminary Injunction** (N.C.R. Civ. P. 52(a)(2) & N.C.R. Civ. P. 65)

1. Although order must state the reason(s) for granting relief, FOF/COL generally not required unless requested by a party or otherwise required by statute for the remedy being considered. *Pruitt v. Williams*, 25 N.C. App. 376, 378, 213 S.E.2d 369, 371 (1975).

2. Same analysis applies to motions seeking other provisional remedies (i.e., arrest and bail, attachment, claim and delivery, and receivership proceedings).

3. Effect of delay in entering Order on TRO/PI

   a. *See Hassell v. Hassell*, No. COA01-553, 2002 N.C. App. LEXIS 1911, at *5-6 (N.C. Ct. App. 2002)(unpublished) (trial court erred in holding defendant in civil contempt for failing to pay alimony where contempt finding was based on conduct preceding entry of order); *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780, (trial court erred in holding defendant in civil contempt for violating a preliminary injunction order where the contempt finding was based on conduct that occurred prior to filing of the order), *rev. denied*, 349 N.C. 361, 525 S.E.2d 453 (1998).

   b. *But see Hart Cotton Mills, Inc. v. Abrams,* 231 N.C. 431, 438, 57 S.E.2d 803, 807 (1950) (formal service of an preliminary injunction order is not required to hold party accountable for violating the same; all that is necessary is actual notice of the order's existence and contents).

B. **Consent Judgments**

FOF/COL not required even if requested by parties, as these are not judgments in the purest sense, but rather a summary of the parties' agreement. *Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E.2d 869, 875 (1999); *In re Estate of Peebles*, 118 N.C. App. 296, 300, 454 S.E.2d 854, 857 (1995).

C. **Rule 12(b)(6) Motions to Dismiss**

FOF/COL not required (even if requested)--trial court is deemed to have accepted as true the well-pleaded allegations of the non-moving party. *G & S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 490, 380 S.E.2d 792, 796 (1989).

D. **Motions for Judgment on the Pleadings** (N.C.R. Civ. P. 12(c))

Same rule applies. *United Va. Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 323, 339 S.E.2d 90, 95 (1986) (quoting *J.F. Wilkerson Contracting Co. v. Rowland*, 29 N.C. App. 722, 725, 225 S.E.2d 840, 842 (1976)).

E. **Motions for Summary Judgment** (N.C.R. Civ. P. 56(c))

1. Same rule applies, as summary judgment presupposes that there are no triable issues of material fact. *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 680, 401 S.E.2d 92, 95 (1991) (quoting *Garrison v. Blakeney*, 37 N.C. App. 73, 76, 246 S.E.2d 144, 146 (1978)).

2. While FOF in summary judgment orders generally are "disfavored," *see, e.g., Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 722, 338 S.E.2d 601, 604 (1986) (citing *Carroll v. Rountree*, 34 N.C. App. 167, 237 S.E.2d 566 (1977)), where there is no real issue of disputed fact, a factual summary is not error and may be helpful on appeal. *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 189, 594 S.E.2d 809, 813 (2004) (quoting *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 64-65 (2001)); *Capps v. City of Raleigh*, 35 N.C. App. 290, 292-93, 241 S.E.2d 527, 529 (1978).

F. **Motions for Relief from Judgment** (N.C.R. Civ. P. 60(b))

1. FOF/COL not required unless requested by a party, although it is better practice. *Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642 (2000) (quoting *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993)).

2. But if judge does not make formal FOF/COL, appellate court will determine whether evidence supports judge's conclusions. *Monaghan v. Schilling*, 677 S.E.2d 562, 564-65 (N.C. Ct. App. 2009).

G. **Motions to Compel Arbitration**

Trial court must make FOF/COL as to whether parties had valid arbitration agreement and whether dispute falls within agreement's substantive scope. *U.S. Trust Co., N.A. v. Stanford Group Co.*, 681 S.E.2d 512, 514 (N.C. Ct. App. 2009).

H. **Criminal & Civil Contempt** (N.C. Gen. Stat. §§ 5A-11, 14, 23(e))

1. Statute requires separate FOF/COL sufficient to justify order of contempt. *State v. Ford,* 164 N.C. App. 566, 596 S.E.2d 846 (2004); *Glesner v. Dembrosky*, 73 N.C. App. 594, 597, 327 S.E.2d 60, 62 (1985).

2. For criminal contempt, be sure that you find relevant facts supporting your order beyond a reasonable doubt or you will see the case again. *See State v. Brill*, No. COA07-1143, 2008 N.C. App. LEXIS 989, at *17 (N.C. Ct. App. 2008); *Ford,* 164 N.C. App. at 569-70, 596 S.E.2d at 849.

3. Exception: FOF/COL not required where there are no factual determinations for the court to make. *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999) (affirming contempt order where trial court failed to indicate the standard of proof applied in holding the witness in contempt for refusing the trial court's order to answer an attorney's question because "there was simply no factual determination for the trial court to make").

4. For civil contempt, order must be reduced to writing, entered as a judgment and adequate notice given before contempt is proper. *Carter v. Hill,* 186 N.C. App. 464, 466, 650 S.E.2d 843, 845 (2007).

I. **Rule 11 Sanctions**

1. FOF/COL required for appellate review. *Lowry v. Lowry*, 99 N.C. App. 246, 255, 393 S.E.2d 141, 146 (1990).

2. Failure to enter FOF/COL generally results in reversible error unless there is no evidence in the record, considered in the light most favorable to the movant, which could support an award of sanctions. *Lincoln v. Beuche*, 166 N.C. App. 150, 601 S.E.2d 237 (2004).

J. **Award of Attorney Fees**

Order must contain FOF and COL regarding entitlement to attorney fees, *Washington v. Horton*, 132 N.C. App. 347, 351 (1999) and the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381 (1993) (award of fees under Chapter 75); *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E.2d 168, 170 (1975) (award of fees under N.C. Gen. Stat. § 6-21.1 requires court to make some findings of fact supporting award).

K. **Sanctions for Non-attendance at Mediated Settlement Conference**

Order must contain findings explaining the Court's conclusion that the non-attendance was without good cause. *Perry v. GRP Financial Services Corp.,* 196 N.C. App. 41 (2009).

L. **Motion for JNOV on Jury Award of Punitive Damages**

NCGS 1D-15(a) does not require findings of fact, but the trial court "shall state in a 'written opinion' its reasons for upholding or disturbing the finding or award." The trial judge, in doing so, is not determining the truth or falsity of the evidence or weighing the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. *Scarborough v. Dillard's, Inc.*, 363 N.C. 715 (2009); *Hudgins v. Wagoner*, 694 S.E.2d 436 (N.C. App. 2010).

M. **Batson Issues (***see II(J) – Batson Issues, above under Criminal Law issues)*

APPEALS

A. **Appeals from the Clerk**

1. Where judge sits as an appellate court, FOF/COL not appropriate. Example: Petitions to reopen estate under N.C. Gen. Stat. Ch. 28. *See, e.g., In Re Estate of English*, 83 N.C. App. 359, 367, 350 S.E.2d 379, 384 (1986) (on appeal of Clerk's order denying petition to reopen estate, the superior court hearing should have been on the record only and not *de novo*, and the judge was confined to correcting errors of law).

2. But FOF/COL are required where statute requires trial court to hear the matter *de novo* (original jurisdiction). Examples:

   a. Competency determinations (N.C. Gen. Stat. Chapter 35A)

   b. Foreclosure appeals (N.C. Gen. Stat. Chapter 45).

B. **Agency Appeals**

(For further information on the topic of review of agency appeals by the trial court, see *Administrative Appeals* in the Superior Court Judges' Survival Guide.)

1. Rules of Civil Procedure (including Rule 52) generally do not apply to agency appeals under the APA (N.C. Gen. Stat. § 150B-1, *et. seq.*) or other statutory appeal mechanisms.

2. Whether an agency appeal requires FOF/COL depends upon two considerations:

    i. Whether the reviewing court finds that the finding of facts of the agency were not supported by substantial evidence (see 4, *infra*); or

    ii. Whether a specific statute requires a *de novo* hearing (original jurisdiction) of the agency's decision (see 5, *infra*).

3. The requirement of FOF/COL depends upon the statutory bases of the appeal. Many appeals are governed by the Administrative Procedures Act ("APA"). N.C. Gen. Stat. § 150B-51(a1) and (b) of the APA set out the permitted grounds that may be asserted on appeal.

    a. If the grounds for appeal brought under the APA are that the decision was **not supported by substantial evidence** (N.C. Gen. Stat. § 150B-51(b)(5)) or that it was **arbitrary, capricious or an abuse of discretion** (N.C. Gen. Stat. § 150B-51(b)(6)), the standard of review is the "whole record review." The whole record review requires the examination of all competent evidence to determine if the agency's decision is supported by substantial evidence." *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm*., 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Walker v. N.C. Dep't of Human Resources,* 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990). *See also, N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530 (2005). In such instances, except where the Court finds that the agency's findings were not supported by substantial evidence (see 4, *infra.),* **FOF are not appropriate, and the COL should simply be whether the decision was supported by substantial evidence and/or whether the decision was arbitrary, capricious or an abuse of discretion**. *Markham v. Swails*, 29 N.C. App. 205, 223 S.E.2d 920 (1976).

b. If the grounds for appeal under APA are that the decision was in **violation of constitutional provisions** (N.C. Gen. Stat. § 150B-51(b)(1)), in **excess of statutory authority or jurisdiction** (N.C. Gen. Stat. § 150B-51(b)(2)), made upon **unlawful procedure** (N.C. Gen. Stat. § 150B-51(b)(3)) or affected by **other error of law** (N.C. Gen. Stat. § 150B-51(b)(4)), the standard of review is *de novo.* However, even though the standard of review is *de novo*, the reviewing court is exercising only its appellate jurisdiction and not its original jurisdiction and therefore is not conducing a "*de novo* hearing" but is required to adopt the agency's findings of fact that are supported by substantial evidence and not make alternate findings. Thus, unless the Court finds that the agency's findings were not supported by substantial evidence (see 4, *infra.),* **FOF are not appropriate, but COL are.** *N.C. Forestry Ass'n v. N.C. Dep't of Env't and Natural Res.*, 162 N.C. App. 467, 475, 591 S.E.2d 549, 555 (2004); *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

4. If, under either the whole record review or *de novo* review described *supra* in (3)(a) and (b) the reviewing court finds that the **agency's FOF are not supported by substantial evidence**, then the reviewing **court should enter FOF on those findings that are at variance with the agency's**. *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530 (2005) citing *Scroggs v. N.C. Justice Standards Com.*, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991). However, this is not to be used as a "tool for judicial intrusion; the court is not permitted to replace the agency's judgment with its own even though a different conclusion might be rational." *N.C. Dep't of Crime Control, supra,* citing *Floyd v. N.C. Dep't of Commerce*, 99 N.C. App. 125, 129, 392 S.E.2d 660, 662 (1990).

5. In some instances, **statutes other than the APA govern the appeal** of agency decisions. Sometimes, those statutes require the trial court to "hear the matter *de novo,*" which invokes the trial court's original jurisdiction to hear the matter anew, and in such cases**, FOF and COL of the reviewing court are required.** See, e.g. N.C. Gen. Stat. § 20-25 (appeal of DMV suspension of driver's license). *See Joyner v. Garrett*, 279 N.C. 226, 232, 182 S.E.2d 553, 558 (1971).

However, where a statute other than the APA provides for judicial review of an administrative action, but does not specify that the trial court is to "hear the matter *de novo*" or words to that effect, the review is presumed to be limited to the trial court's appellate jurisdiction and FOF would not be appropriate. See e.g.:

a. Employment Security Commission Appeals (governed by N.C. Gen. Stat. § 96-15): FOF by Commission deemed conclusive if there is any competent evidence to support them; court's review is confined to questions of law.

b. Zoning Board Appeals *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 54-55, 344 S.E.2d 272, 274 (1986) (quoting *In re Campsites Unltd.*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975)) (trial court may only determine whether FOF are supported by competent evidence).

Tab 4

Civil Procedure Basics

Civil Procedure

Civil Procedure Essentials for New Superior Court Judges

Emily P. Turner
Orientation for New Superior Court Judges

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UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

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N.C. Rules of Civil Procedure
G.S. § 1A-1

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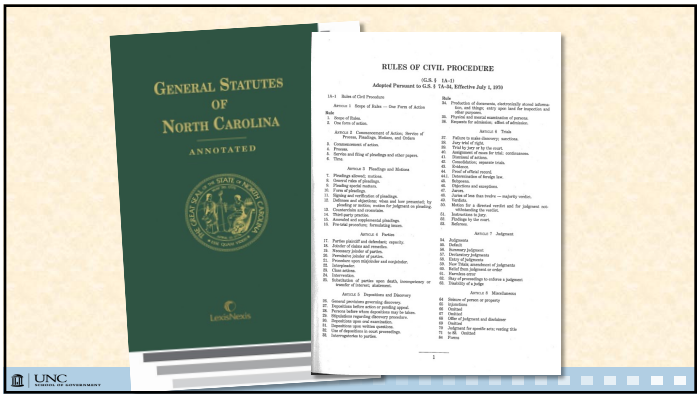
(and G.S. Chapter 1)

UNC SCHOOL OF GOVERNMENT

3



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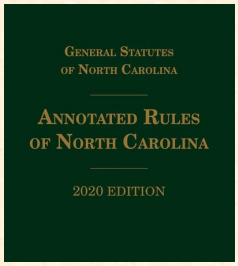
Other Sources



- General Rules of Practice and Procedure for the Superior and District Court
- Local Rules adopted by Chief Judge

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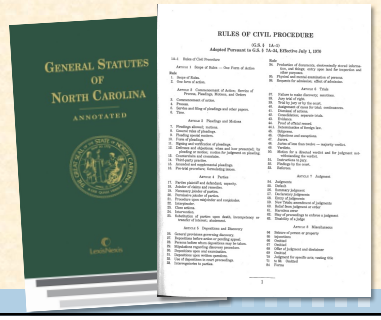
WHY?



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"[I]t is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

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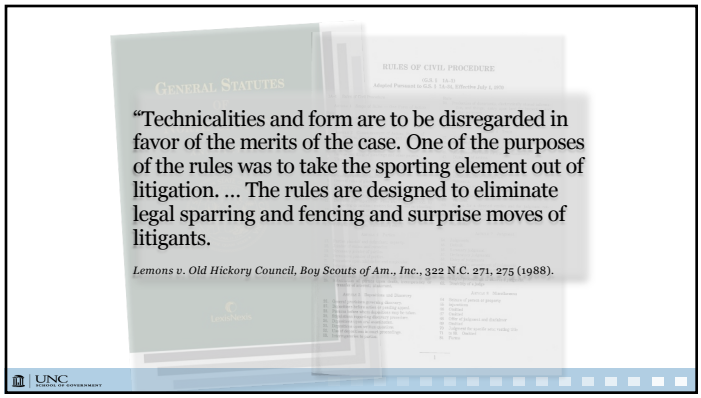
"Technicalities and form are to be disregarded in favor of the merits of the case. One of the purposes of the rules was to take the sporting element out of litigation. … The rules are designed to eliminate legal sparring and fencing and surprise moves of litigants.
Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).
UNC

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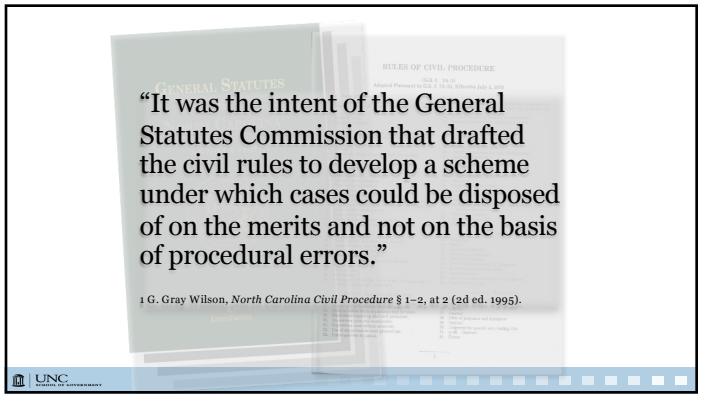
"It was the intent of the General Statutes Commission that drafted the civil rules to develop a scheme under which cases could be disposed of on the merits and not on the basis of procedural errors."
1 G. Gray Wilson, North Carolina Civil Procedure § 1–2, at 2 (2d ed. 1995).
UNC

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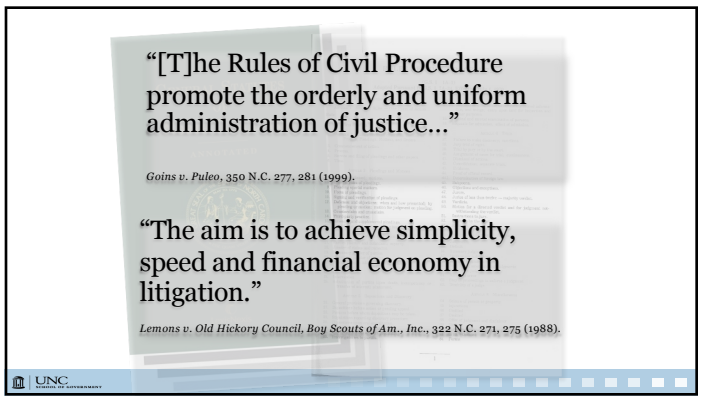
"[T]he Rules of Civil Procedure promote the orderly and uniform administration of justice…"
Goins v. Puleo, 350 N.C. 277, 281 (1999).
"The aim is to achieve simplicity, speed and financial economy in litigation."
Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).
UNC

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"It is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

"The aim is to achieve simplicity, speed and financial economy in litigation."

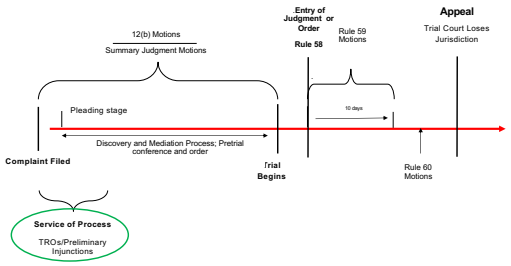
Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).

11

- Initiation and Pleadings – 3, 7, 8, 12
- Injunctive Relief – 65
- Service – 4
- "Early" Resolutions – 12, 56
  - Voluntary Dismissals (Rule 41(a))
- Discovery – 26-37
- Directed Verdict & JNOV – 50, 59
- Post-Judgment Relief – 60(b)

12

A Civil Case



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Initiation & Pleadings

14

GS 1A, Rule 3

"A civil action is commenced by filing a complaint with the court."

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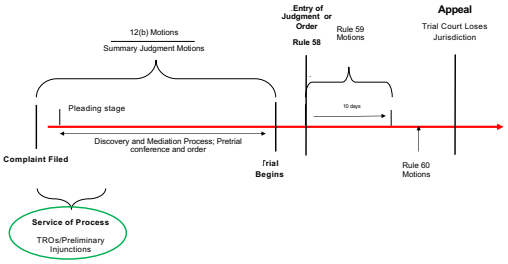
A Civil Case



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GS 1A, Rule 7. Pleadings allowed; motions.

(a) Pleadings. - There shall be a **complaint and an answer; a reply to a counterclaim denominated as such;** an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(b) **Motions** and other papers. -

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, **shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.** The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

GS 1A, Rule 8. General rules of pleadings.

(a) Claims for relief. - A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain

(1) **A short and plain statement of the claim** sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved **showing that the pleader is entitled to relief**, and

(2) **A demand for judgment for the relief** to which he deems himself entitled.

DID YOU KNOW?

Self test

- Defendant files her Answer 40 days after being served with process
- Plaintiff argues the Answer must be disregarded because it was filed too late
- Is Plaintiff correct?
  1. Yes
  2. No

GS 1A, Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

(a) (1) When Presented. - A defendant shall serve his answer within **30 days after service of the summons and complaint** upon him. ……

Defendant can file an Answer at any time until entry of default by clerk.
Peebles v. Moore, 302 NC 351 (1981)

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GS 1A, Rule 8. General rules of pleadings.

(b) Defenses; form of denials. - **A party shall state in short and plain terms his defenses to each claim asserted** and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. ….

(c) **Affirmative defenses.** - In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense.

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"It is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

"The aim is to achieve simplicity, speed and financial economy in litigation."

Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).

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TROs and Preliminary Injunctions Rule 65

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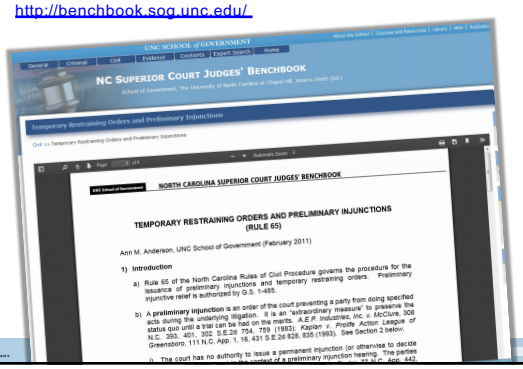

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DID YOU KNOW?

Self test

- A Rule 65 TRO and preliminary injunction are forms of temporary, **ancillary** relief. This means they:

1. Will dissolve if the case is dismissed
2. Are not final orders/adjudications
3. Cannot be granted unless plaintiff has stated a separate civil cause of action
4. All of the above

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TROs and Injunctions

Provide a party some relief while the case is pending.

- Temporary Restraining Orders (TROs)
  - Very short-term relief until a hearing
- Preliminary injunctions
  - Relief until the litigation ends

It's always Ancillary!

- No such thing as a stand-alone Rule 65 claim for injunctive relief
- Remedy attached to a claim or cause of action

Rule 65 TROs

- Judge may issue a TRO *without notice to the adverse party* (*ex parte*) *if:*
  - Clearly appears from affidavit or verified complaint that movant will suffer immediate and irreparable harm;
  - The movant's attorney certifies in writing the efforts made to give notice and the reasons notice should not be required;
  - The movant pays bond (as determined by judge) to protect other party against harm.

TROs

- Bond exceptions:
  - State, county municipality, officer
  - Domestic contexts:
    - Support, alimony, custody, separation, divorce b/b, abs. divorce where "enjoin[s] defendant spouse from interfering with, threatening, or molesting plaintiff during [the action]."
  - Where the TRO will not harm defendant, plaintiff has considerable available assets [rare].
  - To preserve court's jurisdiction.

TROs

- Court must first have *subject matter jurisdiction* over the underlying action.
- The complaint must be filed first!
  - *Revelle, Carolina Freight*

Rule 3. Commencement of action.

(a) A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

TROs

Must:

- Define the injury and state why it is irreparable
- State exact time of expiration
- State why it was entered without notice
- Set forth the reasons for issuance
- Be *specific* in terms
- Describe, in reasonable detail, the act or acts enjoined or restrained.
  - "Not by reference to the complaint or other document."

TROs

- Cannot exceed 10 days.
  - Expire automatically unless extended for good cause.
  - May not be extended for longer than 10 days without consent of other party.
- Restrained party may move for dissolution. Hearing on 2 days' notice.

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Preliminary Injunction

- After TRO is issued, evidentiary hearing (*with notice to adverse party*) is calendared "at earliest possible time".
- Judge can convert the TRO to preliminary injunction or dissolve it.
  - If dissolved, judge may award damages to restrained party. 65(e)

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"It is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

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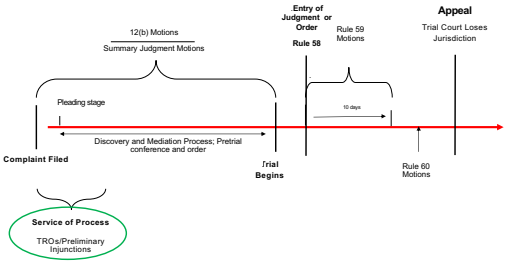
A Civil Case



Service of Process
Rule 4

Service of Process

- Action commences upon filing of complaint. Court obtains jurisdiction over ***the case***. Rule 3.
- Court obtains personal jurisdiction ***over defendant*** with proper service of summons. G.S. § 1-75; Rule 4.
  - Unless service is waived.

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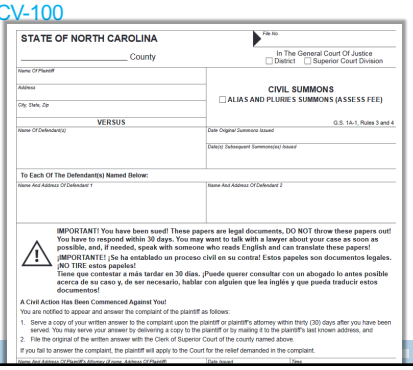


STATE OF NORTH CAROLINA

File No.

_____ County

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

Name Of Plaintiff

Address

City, State, Zip

VERSUS

Name Of Defendant(s)

CIVIL SUMMONS
☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

Name And Address Of Defendant 2

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!
¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)

Date Issued

Time

Rule 4: Service of Process - Methods

- Categories of defendant:
  - Natural Person (j)(1),
  - Natural Person Under Disability (j)(2),
  - the State (j)(3),
  - Agency of State (j)(4),
  - County or City (j)(5),
  - Corporation (j)(6),
  - Partnership (j)(7)
  - Other Association or its Officers (j)(8); or
  - Foreign States (j)(9)

Service of Process - Methods

- Categories of defendant:
  - Natural Person (j)(1),

Methods:

- Personal service to the individual or to her home (very common) or to her designated agent.
- Registered or certified mail, r.r.r.
- Designated delivery service (Fed Ex or UPS)
- USPS signature confirmation delivery
- Publication, if can't be served by another method after due diligence. (j1)
- Attorney may accept service on D's behalf. (j5)

"delivering to the addressee"

"Delivering to the addressee"

Hamilton v. Johnson, 228 NC App 372 (2013)

- Fed ex delivery to Lateef Johnson. Signed for by "KKPOINI," the building concierge. No evidence Johnson actually received it.
- Court of Appeals: No evidence that "KKPOINI" was agent authorized to accept. Not sufficient "delivery to the addressee."

Washington v. Cline, 233 NC App 412 (2014)

- Fed ex delivery to D's home and left at her doorstep.
- "Delivery to addressee" requirement met because Ps proved (under GS 1-75.10) that D had actually received the package.

Deadlines for Service

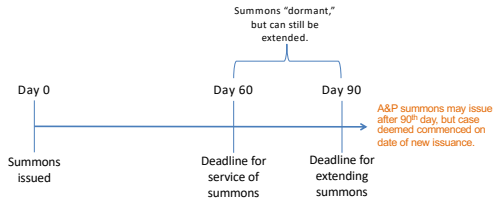
60 days: Time allowed for service after summons is issued. Rule 4(c).

- If service cannot be made by the end of the 60th day, the original summons must be extended.
  - Alias and pluries summons or endorsement.
- After 60 days unserved, the summons is "dormant". Can still be extended. Rule 4(d).

Deadlines for Service

90 days: Time allowed from issuance in which plaintiff must get extension of time to serve summons. Rule 4(d).

- If not, action DISCONTINUED as to defendant not served;
- A new alias and pluries can issue, "but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement." Rule 4(e).



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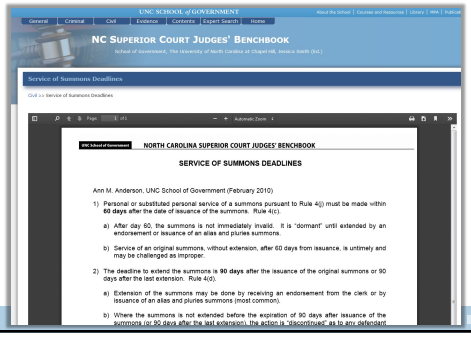

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DID YOU KNOW?

Self test

- You're on the 2nd full day of trial with both parties participating when defense counsel moves to dismiss, telling you he just discovered the summons was dormant at the time it was served upon defendant.
- Do you dismiss?
  1. Yes
  2. No

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A "general appearance" waives arguments as to proper Rule 4 service.

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Service of Process

§ 1-75.3. Jurisdictional requirements for judgments against persons[.]

(b) Personal Jurisdiction. - A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 or G.S. 1-75.7 and in addition either:

(1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure; or

(2) Service of a summons is dispensed with under the conditions in G.S. 1-75.7.

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Service of Process

§ 1-75.3. Jurisdictional requirements for judgments against persons[.]

(b) Personal Jurisdiction. - A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 or G.S. 1-75.7 and in addition either:

(1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure; or

(2) Service of a summons is dispensed with under the conditions in G.S. 1-75.7.

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"General appearance"

§ 1-75.7. Personal jurisdiction - Grounds for without service of summons.

A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

… Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance[.]

Filing an answer that does not contest jurisdiction, filing motion for change of venue, appearing in court, etc.

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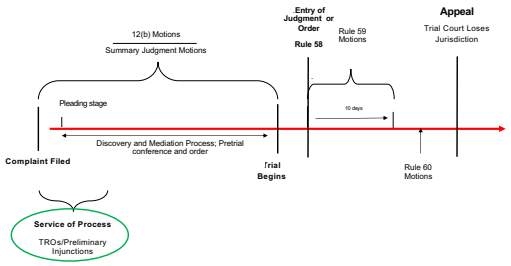
A Civil Case



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"Early" Resolutions
Rules 12 & 56

61

Motions to Dismiss – 12(b)

(1) Lack of subject matter jurisdiction
(2) Lack of personal jurisdiction
(3) Improper venue
(4) Insufficiency of process
(5) Insufficiency of service of process
(6) Failure to state a claim upon which relief can be granted.
(7) Failure to join a necessary party.

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12(b)(6)

Motion to Dismiss for Failure to State a Claim (12(b)(6))

- Only tests whether complaint states a claim "upon which relief can be granted"
- Assumes allegations of complaint are true; *does not look beyond complaint (and incorporated attachments)*

Narrow exception: Court may consider an unattached copy of an "instrument [contract] upon which plaintiffs are suing" if referenced in the complaint. *-Coley*, 41 N.C. App. 121 (1979); *Oberlin*, 147 N.C. App. 52 (2001).

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Raising an affirmative defense *sua sponte*

Unifund CCR, LLC v. Francois

Ms. Francois incurred card debt in May 2013.

Unifund (debt buyer) sued to collect in Nov. 2016. Obtained entry of default.

Default judgment hearing: DCJ ***denied.*** Outside statute of limitations.

COA: REVERSED.

"[T]rial courts have no authority to raise the statute of limitations defense on their own initiative; the defendant must assert this affirmative defense or it is waived."

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Venue: *Sua sponte* change?

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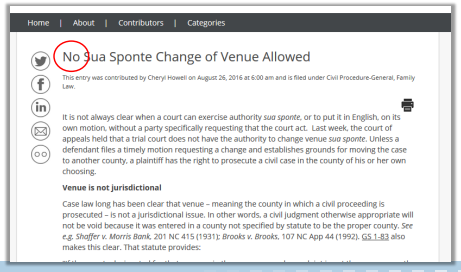

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12(b)(6) and Summary Judgment Comparison

Motion to Dismiss for Failure to State a Claim (12(b)(6))	• Only tests whether complaint states a claim "upon which relief can be granted" • Assumes allegations of complaint are true; *does not look beyond complaint (and incorporated attachments)*
Motion for Summary Judgment (56)	• Looks to *all the materials* before the court to determine if there "is any issue of material fact." (Will there be anything for a jury to decide?) • Examines the evidence in light most favorable to non-movant

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Summary Judgment – 56

1. Summary judgment motions ask the court to examine the record and determine whether any material questions exist for a jury to decide.

2. Standard: Court "shall" grant a motion for summary judgment if "there is no genuine issue of material fact" as shown by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any."

Summary Judgment

- Motion served at least 10 days before hearing
- Adverse party allowed to serve opposing affidavits 2 days before hearing
  - If not, court may continue hearing.

Summary Judgment

"[A]dverse party may not rest upon the mere allegations or denials of his pleading, but…"*must set forth specific facts showing that there is a genuine issue for trial*."

56(e)

S.J. – Contradictory Testimony

"If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."

-*Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1 (1978)

Summary Judgment – Findings of Fact?

Rule 52(a)(2):

- General Rule: Written findings of fact are not required in decisions on motions.
- Exception: When requested by a party, findings of fact are required.

Summary Judgment – Findings of Fact?

Rule 52. Findings by the court

(a) Findings –

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

Summary Judgment – Findings of Fact?

BUT…

Certain types of motions *just can't* properly include findings of fact.

Summary Judgment – Findings of Fact?

- Summary judgment –
  - –The Court only determines *whether* there's a dispute of fact.
  - –Does not *resolve* the dispute (i.e., "find the facts").

Summary Judgment – Findings of Fact?

- So, no findings of fact in a summary judgment order, even if parties request it.
  - – Also 12(b)(6), 12(c), directed verdict, JNOV
- Statement of undisputed facts = okay. Label them "undisputed."

Summary Judgment – Findings of Fact?

"*By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings.*" – *War Eagle (2010)*

(Reiterated in *Good Neighbors v. County of Rockingham*, 774 S.E.2d 902 (N.C. App. 2015))

Summary Judgment

- Court may grant summary judgment against *moving* party.
- May be done on court's own motion.
  - *Carriker*, *ASP*

Voluntary Dismissals (Rule 4

Rule 41(a) Voluntary Dismissals

- A party may dismiss a claim *"at any time before the plaintiff rests"*

"Resting" a summary judgment argument counts! *Troy*, 126 N.C. App. 213 (1997)

- Claim may be refiled within 1 year.

Involuntary Dismissals

- Rule 41(b): almost all involuntary dismissals are adjudications on the merits (meaning with prejudice) unless the court specifically states otherwise
- Exceptions:
  - Dismissal for improper venue
  - Dismissal for failure to join necessary party
  - Dismissal for lack of jurisdiction

When is it appropriate to issue judgment on the merits without a trial?

"It is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

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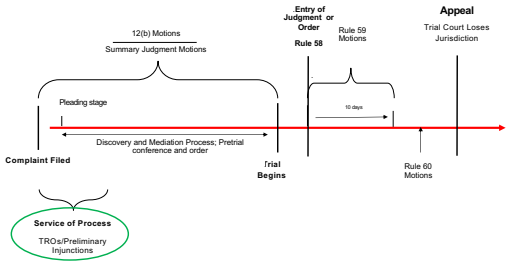

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Discovery Parameters

Rule 26 allows discovery of information:

- Relevant to the subject matter of the case;
- Admissible or "reasonably calculated to lead to the discovery of admissible evidence";
- Not privileged;
  - All traditional privileges: spousal, confessional, attorney-client
- Not attorney work product.

Discovery Methods

- Depositions (Rules 30-32)
- Interrogatories (Rule 33)
- Requests for Production of Documents (Rule 34)
- Physical and Mental Examination of Persons (Rule 35)
- Requests for Admission (Rule 36)
- Subpoenas (Rule 45)

Discovery: Tools for the Court

Rule 26: Protecting the Process and the Parties

- Court has power to:
  - Limit discovery to prevent abuse and undue burdens on parties. (b)(1a)
  - Issue protective orders to prevent unnecessary disclosure of sensitive information. (c)
  - Order a discovery conference to set the parameters and plan of discovery. (f)
  - Issue sanctions for violations of obligation to certify that requests made without improper intent. (g)

Discovery Sanctions

Rule 37: Enforcing the Rules

- Orders compelling discovery
  - When a party fails to respond to a request or responds incompletely, evasively, or without candor.
- Sanctions

  When a party:
  - Just simply didn't respond; or
  - Didn't comply with prior order compelling discovery.

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Discovery Sanctions

- Within the sound discretion of the trial court.
- Reviewed for abuse of discretion.
  - *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299 (2006).

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Discovery Sanctions

But…

- When the sanction is "outcome determinative", ***"the [trial] court must first consider less severe sanctions."***
  - Dismissal of a claim. *Fayetteville Publishing*, 192 N.C. App. 419 (2008)
  - Striking an answer. *Rosner*, 197 N.C. App. 604 (2009)
  - Striking defenses/counterclaims. *Clawser*, 184 N.C. App. 526 (2007).

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"Lesser Sanctions"

- Put your "consideration of lesser sanctions" on the record.
  - –In transcript.
  - –In written order.

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"Lesser Sanctions"

- Sample language:

"[t]he Court has carefully considered each of [the party's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct...."

In Re Pedestrian Walkway Failure, 173 N.C. App. 237 (2005).

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"Lesser Sanctions"

Need not *"list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate."*

– *Badillo v. Cunningham*, 177 N.C. App. 732 (2006).

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"Lesser Sanctions"

Tip: The "lesser sanctions" rule also applies to "dismissals for failure to prosecute" under Rule 41(b).

- See Survival Guide: Civil – **"RULE 41(b) DISMISSAL FOR FAILURE TO PROSECUTE" (September 2010)**

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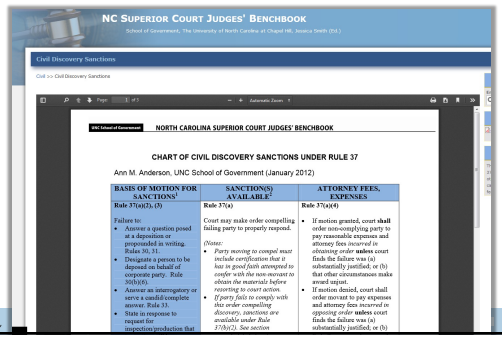

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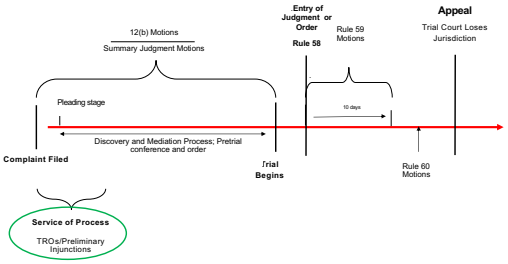

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Directed Verdict, JNOV, and New Trial Rules 50, 59

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Directed Verdict and New Trial

Directed Verdict after Plaintiff's Evidence → Directed Verdict After All Evidence → Judgment Notwithstanding the Verdict (JNOV) → New Trial

Standard: Evidence of plaintiff provides no basis for jury to decide in plaintiff's favor. (There's not "more than a scintilla of evidence" in plaintiff's favor.)

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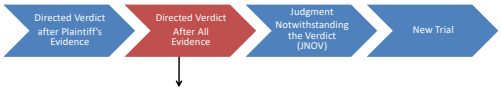
Directed Verdict and New Trial



Standard: After all evidence, no basis in evidence for jury to decide in favor of non-movant. (Again, there's not "more than a scintilla of evidence" in non-movant's favor.)

Necessary in order to preserve right to move for JNOV.

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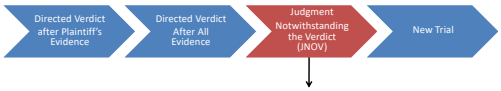
Directed Verdict and New Trial



Standard: Same as directed verdict. (It is a "renewal" of the directed verdict motion.)

Must be made within 10 days of entry of judgment.

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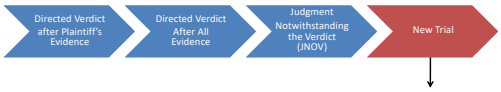
Directed Verdict and New Trial



Standard: Grounds listed in 59(a).

Motion must be *served* within 10 days of entry of judgment.

Often combined with JNOV. *Court must rule on both. 59(c)(1).*

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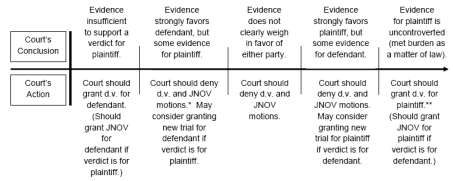
Decision Chart



* This diagram assumes a jury trial. In a non-jury trial, the court, as finder of fact, may grant a Rule 41(b) dismissal for defendant at close of plaintiff's evidence even where the plaintiff has presented evidence that would be sufficient to take to a jury.
** This is a rare occurrence. A court should take extra caution when granting directed verdict or JNOV for the party with the burden of proof.

JNOV *and Punitive Damages*

JNOV standard:

- Whether there was "more than a scintilla" of evidence to support the jury's verdict.
  - Viewing the evidence in the light most favorable to the non-movant.
- Same standard as directed verdict.

JNOV and Punitive Damages

JNOV on a <u>punitive damages</u> verdict:

"Whether the non-movant produced 'clear and convincing evidence' by which the jury could find one of the aggravating factors necessary for punitive damages—fraud, malice, or willful/wanton conduct."

Scarborough v. Dillard's, Inc., 363 N.C. 715, 693 S.E.2d 640 (2009).

JNOV and Punitive Damages

- In making its decision to deny or grant a JNOV on a punitive damages claim, the trial court must issue a written opinion as set forth in 1D-50, or the case **will be remanded** to the trial court upon appeal.

Springs v. City of Charlotte, No. COA-839 (N.C. App. Jan. 18, 2011); *Hudgins v. Wagoner*, 694 S.E.2d 436, 447–48 (N.C. App. June 15, 2010).

JNOV and Punitive Damages

§ 1D-50. Judicial review of award.

When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter. (1995, c. 514, s. 1.)

Rule 59(a) grounds

(a) Grounds.--A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

(1) Any irregularity by which any party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

"against the greater weight of the evidence"

...ons of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

Rule 59(a) grounds

(a) Grounds.--A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

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(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

ALSO: Must have been materially prejudicial error.

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When is it appropriate to take the case away from the jury once trial is underway (and after verdict)?

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"It is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

"The aim is to achieve simplicity, speed and financial economy in litigation."

Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).

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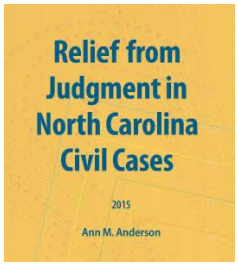
DID YOU KNOW?

Self test

- About a month after you entered judgment in a case, you discover you made a legal error.
- Can you fix it?
  1. Yes
  2. No

Post-judgment motions



- Rule 59
- Rule 60

Rule 59: within 10 days of entry of judgment/order

- (a) Grounds. - A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
  - (1) Any irregularity by which any party was prevented from having a fair trial;
  - (2) Misconduct of the jury or prevailing party;
  - (3) Accident or surprise which ordinary prudence could not have guarded against;
  - (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
  - (5) Manifest disregard by the jury of the instructions of the court;
  - (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
  - (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
  - (8) Error in law occurring at the trial and objected to by the party making the motion, or
  - (9) Any other reason heretofore recognized as grounds for new trial.
- On a motion for a new trial in an action tried without a jury, **the court may open the judgement if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgement.**

Rule 59

- (d) On initiative of court. - Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

- (e) Motion to alter or amend a judgment. - A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment.

Relief from Judgment
Rule 60

Rule 60(b)

- Relief from a "final judgment, order, or proceeding" for reasons relating to circumstances:

One Year

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time for new trial motion;

(3) Fraud, misrepresentation, or other misconduct of an adverse party;

Rule 60(b)

(4) Judgment is void;

(5) Judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

60(b)(6)

- "Grand reservoir of equitable power to do justice in a particular case."
- ~~Catch~~-all

60(b)(6)

Requires:

- Extraordinary circumstances
- That "justice demands it"
- Movant must have "meritorious defense."

Engility Corp. v. Nell, 258 N.C. App. 402, 407 (2018) (citing *Gibby v. Lindsey*, 149 N.C. App. 470 (2002); *Oxford Plastics v. Goodson*, 74 N.C. App. 256 (1985).

60(b)(6)

- Cannot be used to circumvent requirements for (b)(1) to (b)(5).
  - *E.g.*, if argument is newly-discovered evidence ((b)(2)), and more than 1 year has passed, cannot argue under (b)(6).

Bruton v. Sea Captain Prop., Inc., 96 N.C. App. 485, 386 S.E.2d 58 (1989).

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60(b)

KEY LIMITATION:

- NOT to be used to correct errors of law.

Roark v. Yandle, 2022-NCCOA-292, ¶ 21; *Jackson v. Jackson*, 273 N.C. App. 305 (2020); *Catawba Valley Bank v. Porter*, 188 N.C. App. 326 (2008); *Hagwood v. Odom*, 88 N.C. App. 513 (1988).

- NOT a substitute for appellate review or motions for new trial. *Id.*; *Jenkins v. Richmond Cty*, 118 N.C. App. 166 (1995).

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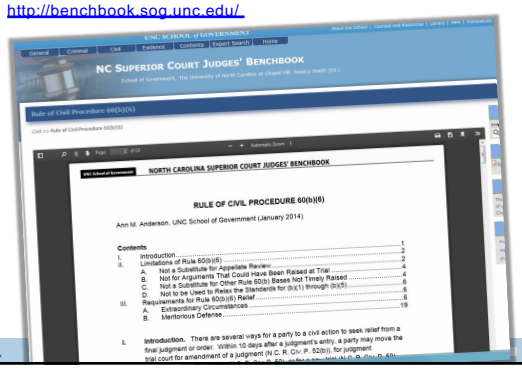
http://benchbook.sog.unc.edu/



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"It is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

"The aim is to achieve simplicity, speed and financial economy in litigation."

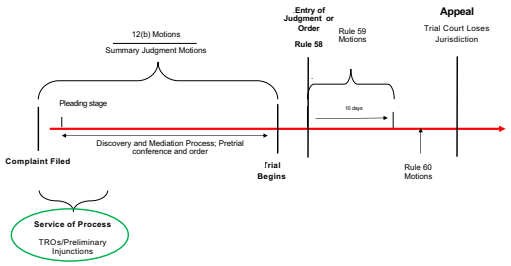
Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).

DID YOU KNOW?

Self test

- After you enter judgment, plaintiff files notice of appeal
- Plaintiff then files a Rule 60(b)(3) motion, asserting defendant committed fraud upon the court during the trial
- Can you rule on the Rule 60 motion?
  - Yes
  - No
  - Kind of……

A Civil Case



Effect of appeal

- Once appeal is filed, trial court divested of all jurisdiction relating to the claim/matter on appeal.
  - *Sink v. Easter*, 288 N.C. 183 (1975).
- If an appeal is withdrawn, dismissed, or deemed abandoned, jurisdiction is regained.
  - -- *Estrada v. Jaques*, 70 N.C. App. 627, 638, 321 (1984); *McGinnis v. McGinnis*, 44 N.C. App. 381, 385 (1980)
- While appeal pending, trial court may conditionally determine how it would rule on Rule 60(b) motion.
  - *Hall v. Cohen*, 177 N.C. App. 456 (2006).

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QUESTIONS?

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Orientation for New District Court Judges
December 15, 2022

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Civil Procedure Essentials for New Superior Court Judges

Quiz Answers

- The rules of procedure for civil proceedings in NC are found in:
    1. Chapter 1 of the NC General Statutes
    2. Chapter 1A of the NC General Statutes
    3. Throughout the General Statutes
    4. Rules of Practice and Procedure for Superior and District Court
    5. Local Rules
    6. All of the above

- A civil action is commenced in NC when:
    1. Defendant is served with process
    2. Plaintiff files the complaint with the clerk of court
    3. Plaintiff pays all filing fees or qualifies to proceed as an indigent
    4. The clerk issues a summons

- A Rule 65 TRO and preliminary injunction are forms of temporary, **ancillary** relief. This means they:
    1. Will dissolve if the case is dismissed
    2. Are not final orders/adjudications
    3. Cannot be granted unless plaintiff has stated a separate civil cause of action
    4. All of the above

- Service in NC can be accomplished by a private process server hired by plaintiff.
    1. True
    2. False
    3. Sometimes

- Service of process in NC can sometimes be accomplished by email.
    1. True
    2. False

- You're on the 2nd full day of trial with both parties participating when defense counsel moves to dismiss, telling you he just discovered the summons was dormant at the time it was served upon defendant.

  Do you dismiss?

1. Yes
2. No

You are about to start a hearing

Defendant has been served but is not present

Plaintiff is ready to proceed but the clerk points out there is no "SCRA" affidavit in the file

Can you proceed with the hearing?

1. Yes
2. No

- At the conclusion of trial, you announce from the bench that defendant must immediately execute certain documents to transfer property to plaintiff. She fails to comply, and plaintiff asks that you hold defendant in contempt.

  Can defendant be held in contempt for not complying with your order?

  1. Yes
  2. No

- About a month after you entered judgment in a case, you discover you made a legal error.

  Can you fix it?

  1. Yes
  2. No

- After you enter judgment, plaintiff files notice of appeal

  Plaintiff then files a Rule 60(b)(3) motion, asserting defendant committed fraud upon the court during the trial

  Can you rule on the Rule 60 motion?

  1. Yes
  2. No
  3. Kind of……

Tab 5
Judicial Ethics

New Superior Court Judges: Judicial Ethics Orientation

Tuesday, January 24, 2023
UNC School of Government

Judge Chris Dillon, Chair
Brittany Pinkham, Executive Director
North Carolina Judicial Standards Commission

1

About the Judicial Standards Commission

2

The JSC Today

- Article IV of the NC Constitution was amended in 1971 to allow the General Assembly to adopt an alternative to impeachment
- The Judicial Standards Commission was created in 1973 and today maintains the central features recommended by the Courts Commission:
  - Mixed composition of judges, lawyers and citizens appointed by the three branches of government
  - Confidentiality of proceedings until the Supreme Court concludes that discipline is warranted
  - Investigation of complaints alleging violations of the Code of Judicial Conduct

3

The JSC and How it Works

- Who we are – Commission Members and Staff
- Review of Complaints
- Investigations & Confidentiality
- Letters of Caution, Disciplinary Proceedings & Recommendations
- Formal & Informal Advisory Opinions

4

What Happens if a Statement of Charges is Filed?

- If a complaint is not dismissed after a formal investigation, a disciplinary recommendation proceeding is commenced by the filing of a statement of charges
- It is a confidential proceeding, and remains so unless the Supreme Court imposes discipline
- You are entitled to answer, engage in discovery, and defend yourself (with or without counsel) at a hearing before a DIFFERENT PANEL than the investigative panel
- At the conclusion of the hearing, the hearing Panel will either dismiss the charges or issue a RECOMMENDATION OF PUBLIC DISCIPLINE to the Supreme Court, and you may request a hearing and file briefs before the Court during its review

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What Ethics Assistance Can I Receive from the Commission?

- **Formal Advisory Opinions**
  - Issued by the Commission as a whole and posted on our website and published in the Appellate Reporter
  - Lengthy process of research, review and approval (6-8 months)
  - Recent FAOs include tardiness in convening court, questioning pro se litigants, conflicts of interest
- **Informal Advisory Opinions**
  - Commission staff receives calls and emails from judges around the state seeking confidential advice on how to proceed in a particular matter

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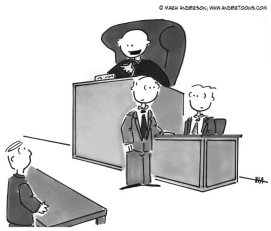
Judicial Ethics – 3 Core Values

- Independence
- Integrity
- Impartiality



"Ok, heads, it's sustained. Tails, overruled."

7

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Code of Judicial Conduct: Overview

- Preamble
- Canons 1-7
  - Canons 1 & 2: Ethical duties of judges both on and off the bench
  - Canon 3: Ethical duties of judges while undertaking official duties
  - Canons 4 & 5: Ethical duties of judges in personal and civic activities
  - Canon 6: Gift and income reporting
  - Canon 7: Ethical duties of judges when engaged in political conduct
- Statute of Limitations
- Scope Note (Judicial Candidates, New Judges)

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Preamble: Goals of the Code

"An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established."

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CANON 1:
A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved.

Key Points:

- General provisions that apply to a judge's conduct ***on AND off the bench***
- Your personal conduct must at all times and in all places, including on social media, be professional, civil and appropriate
- Your actions reflect on the judiciary and can threaten public confidence in the courts

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CANON 2:
A JUDGE SHOULD AVOID IMPROPRIETY IN ALL THE JUDGE'S ACTIVITIES.

Canon 2A
- **Ensures conduct of the judge is lawful at all times and promotes public confidence in the integrity and impartiality of the courts**

Canon 2B
- **Limits outside influence on the judge and abuse of the prestige of the office for personal gain or to help others**

Canon 2C
- **Restricts membership in discriminatory organizations**

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CANON 2A:
"A JUDGE SHOULD RESPECT AND COMPLY WITH THE LAW AND CONDUCT HIMSELF/HERSELF AT ALL TIMES IN A MANNER THAT PROMOTES PUBLIC CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE COURTS"

- **Key Points:** Violations of Canon 2A generally involve:
  - Unlawful conduct – examples:
    - criminal activity (e.g., DWI or more serious crimes)
    - violation of civil laws and regulations (e.g., sexual harassment and anti-discrimination laws, other civil regulations and laws; duty to file SEI)
  - Conduct that shows a lack of integrity or undermines public confidence in the impartiality of the courts – examples:
    - inappropriate commentary on social media
    - any conduct that involves dishonesty or moral turpitude, including lack of candor with the Commission during an investigation

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Canon 2B: Improper Influence & Abuse of the Prestige of the Office

- **Key Points:** Violations of Canon 2B generally involve:
  - Outside influence on the judge's official conduct or judgment – examples:
    - Family or friends asking for favors, either with criminal or civil cases or in order to gain any other benefit (e.g., jobs, access)
    - Making poor decisions in order to please or protect friends and family
  - Abuse of the prestige of the office – examples:
    - Writing recommendations on official letterhead for purposes unrelated to the judge's official duties
    - Improperly invoking the judicial title ("Do you know who I am?")
    - Express prohibition on voluntarily testimony as a character witness

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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 . . .

"I'm calling a recess until tomorrow morning — that's enough justice for one day."

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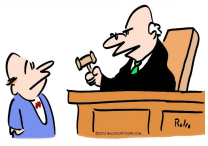
Canon 3:
A judge should perform the duties of the judge's office impartially and diligently.

Key Points: Canon 3 pertains to how you exercise your official duties:

- **Canon 3A** –adjudicative duties
- **Canon 3B** – administrative duties
- **Canon 3C & D** –disqualification



"'Not guilty,' eh? — Color me suspicious!"

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Canon 3A: Adjudicative Duties

Key Points: Judges must always strive to:

- Be **"faithful to the law"** and **"maintain professional competence in it"**
- Accord everyone, even pro se litigants, a **"full right to be heard"**
- Decide cases **"unswayed by partisan interests, public clamor, or fear of criticism"**
- Ensure **"order and decorum"** in the courtroom and ensure that you, everyone who appears before you, and everyone you supervise is "**patient, dignified and courteous"** at all times, even towards pro se litigants and sovereign citizens
- No **ex parte communications**, unreasonable **delays, public comments** on pending cases

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COMMON PROBLEMS

- Decisional delay and tardiness to court or adjourning early
- Excessive continuances
- Professionalism on the bench – demeanor and cell phones
- Abuse of the contempt power
- Abuse of other authority in the courtroom
- Failing to give each party a FULL AND FAIR opportunity to be heard – including pro se parties and sovereign citizens
- Ex parte communications and "telephone justice"

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Decisional Delay

- In re Chapman, 371 N.C. 486, 819 S.E.2d 346 (2018)
- In re Henderson, 371 N.C. 45, 812 S.E.2d 826 (2018)

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Habitual tardiness to court

- North Carolina Formal Advisory Opinion 2017-02: Under what circumstances can delay in convening court sessions rise to the level of a violation of the Code of Judicial Conduct?

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Common Canon 3A(3) problems

Demeanor & Inappropriate Comments

- Patience with pro se parties and sovereign citizens
- Sarcastic comments
- Abusive comments
- Profanity
- Jokes that no one finds funny except the judge

Conduct on the bench

- Cell phone use
- Appearing to be asleep
- Wearing unprofessional attire
- Eating lunch
- Animals in the courtroom
- Chewing gum

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Why the Restrictions on Ex parte communications in Canon 3A(4)?

Problems with *Ex Parte* Communications:

- Undermines Fundamental Fairness
  - denies the absent party the right to respond and be heard
- Undermines Confidence in the Impartiality of the Judge
  - creates perception of ability to influence the judge
- Undermines the Adversarial System
  - Adversarial testing is necessary to vet facts and information presented to the finder of fact and judge
  - In *ex parte communications,* misleading or false information can be given to the judge without the benefit of adversarial testing
  - Jeopardizes search for the truth and justice

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Common scenarios involving ex parte communications

- Communicating with other judges
- Communicating with attorneys or prosecutors
- Communicating with parties or witnesses
- Communicating with *pro se* parties
- Communicating with law enforcement
- Communicating on social media
- Conducting independent research

Canon 3B: Administrative Duties

- **Key Points:**
  - Be professional, courteous and collegial with your judicial colleagues and court staff!
  - Pay attention to best practices in judicial administration, including case management
  - Make sure court staff are also professional, courteous and collegial to each other and members of the public – they should "observe the standards of fidelity and diligence" that you do
  - No favoritism or nepotism in making appointments
  - Inherent authority to discipline attorneys

Common Problems: Canon 3B

- Failure to address rude and abusive behavior by employees/court staff
- How to address attorney misconduct
- How to address misconduct of other judges
- Failure to cooperate with the chief judge and other court personnel with responsibility for fair and efficient court administration
- Lack of collegiality/pettiness

Canons 3C & 3D:
Disqualification & Remittal

"I'm going to recuse myself because I could really use a few days off."

Key Points:

- You have a *duty* to hear and decide cases assigned to you – it is what the taxpayers pay you to do
- But, you MUST disqualify yourself from hearing cases where you have a conflict of interest, or where your "impartiality may reasonably be questioned"
- You CAN and SHOULD disqualify on your own initiative if you know of potential conflicts
- You can, in limited circumstances, seek REMITTAL (waiver) of the conflict

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Canons 3C & 3D:
Disqualification & Remittal

Common Disqualification Issues:

- Family members who are parties or witnesses
- Family members who are attorneys in the case
- Your prior involvement in the case (as an attorney)
- Your personal knowledge of facts of the case
- You or your family's financial interest in the outcome
- Your personal attorney is appearing before you
- Statements you made publicly or on social media that suggest a bias

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Common Problems: CANON 3C and 3D

- When to disqualify:
  - Former colleagues?
  - Family members? Employers of family members?
  - Campaign opponents and staff?
  - Campaign contributors/endorsers?
  - Lawyers helping you with a personal matter?
  - Facebook friends?
- How to disqualify:
  - On your own motion - when and how much to disclose?
  - On motion of a party – when to refer to another judge?

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Connections on Social Media

Potential issues:

- Disqualification – Canon 3C – can your connections create reasonable questions as to your impartiality in the case?
- Ex parte communications – Canon 3A(4) – are you communicating online with the parties about a case?
- Inappropriate personal communications – Canon 1 & 2A - are you personally observing appropriate standards of conduct so as to ensure public confidence in the integrity and independence of the courts?

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Social media & Disqualification

- Core principles judicial ethics: Impartiality * Integrity * Independence
- Common threats to these values from use of social media:
  - Judges viewed as biased based on *connections* or *content* on social media
  - Judges viewed as lacking integrity and honor by *undignified or inappropriate posts*
  - Judges viewed as partisan or mere politicians in robes through *political comments and campaign conduct*

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Connections & Disqualification

Canon 3C provides that disqualification is required where your impartiality could "reasonably" be questioned. Is it "reasonable" to question impartiality based on:

- Mere social media connection?
- Posting messages on a friend's wall or page?
- Trying to connect while the party is appearing before you?
- Connection plus contacts outside of social media?
- Attorney or person frequently appears before you?
- Friends or liking organizations that have Facebook pages?
- Lawyer or party is one of only a few "friends" on social media?

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Connections & Ex parte Communications

- NC Judicial Standards Commission - Public Reprimand by Commission (on consent of the judge):
  - Judge was Facebook friends with one of the attorneys appearing before him in a child custody and child support hearing
  - Within days after the hearing, and with the decision pending, Judge read comments that his attorney "Friend" posted on Facebook about the case and then responded to those comments about the difficulty in deciding the case; and the attorney then posted that he had a "wise judge"
  - Judge also engaged in independent research about the parties on "Google" in rendering his decision and read a poem he found on one of the parties' website in court before announcing the decision

Canons 4, 5A, 5B:
Regulating Your Extra-Curricular and Professional Activities

Key points:

- The Code distinguishes between activities as a judge (Canon 4) and those undertaken in your personal capacity (Canon 5). Most judges are active in their communities and in non-profit organizations, and this is a good thing!
- Things to avoid in all of these activities:
  - Belonging to groups that may cast doubt on your impartiality
  - Helping organizations in fundraising activities
  - Being involved with groups that often appear before you
  - Too much time spent on outside activities, neglecting your judicial duties

Outside Professional Activities – Canon 4

Canon 4 governs a judge's outside activities in their PROFESSIONAL CAPACITIES: a judge may engage in "activities concerning the legal, economic, educational, or governmental system, or the administration of justice."

- Outside activities limited to those that "do not cast substantial doubt on the judge's capacity to decide impartially ***any issue*** that may come before the judge"
- **Permitted outside activities:** speaking, writing, lecturing, appearing at public hearings, consulting with legislative/executive bodies and officials; serving in leadership roles in governmental agencies; making recommendations to grant-funding agencies
- **Prohibited outside activities:** active assistance in fundraising; abusing the prestige of the office to benefit an organization; anything that undermines public confidence in the impartiality of the courts

Expressing your Personal Opinions on current events or hot issues

Other provisions of the Code of Judicial Conduct also inform how judges can engage in issues that may be deemed "controversial" or "sensitive":

- Canon 1: judges must **"personally observe"** standards of conduct that reflect the **integrity and independence** of the judiciary
- Canon 2: judges must **"avoid impropriety"** in ALL of your activities and conduct yourself "at all times" in a way that promotes **public confidence in the integrity and impartiality of the judiciary**
- Canon 3C: disqualification is appropriate where the judge's **impartiality could reasonably be questioned**

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Common Issues

GENERALLY RESTRICTED:

- Participation in Marches and Vigils
- Leadership in Advocacy Organizations that Promote the Interests of a Specific Class of Persons
- Showing Public Support for a Particular Class of Persons Likely to Appear in Your Court (think social media, gofundme, etc.)

PROCEED WITH CAUTION:

- Social Media Use – beware posts that suggest bias in favor of parties or an inability to be fair and impartial

PERMITTED:

- Serving on Task Forces and Community Initiatives
- Consulting with government officials or community stakeholders
- Speaking, writing or lecturing on the impact of a problem on the administration of justice

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Canon 5C-5G:
Regulating Financial Activities, Gifts and Outside Income

Things You Can Do:

- Manage your own personal investments and those for immediate family members
- Be a fiduciary for family members
- Earn outside income in certain circumstances, but it may need to be disclosed annually (disclosure required over $2000)
- Accept most gifts from people not appearing before you (disclosure required in some cases)

Things You Can't Do:

- Be an officer or manager in a for-profit entity business
- Practice law or provide legal advice to ANYONE– even on a pro bono basis or for family members
- Serve as a fiduciary, executor or trustee for non-family members – Judge recently SUSPENDED for serving as executor, collecting fees, and failing to report income
- Accept gifts from parties appearing before you
- Be a mediator or arbitrator, UNLESS you are a retired emergency judge

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Canon 6:
Outside Income & Annual Reporting

Key Points:

- Each year by **May 15**, you MUST FILE with the appropriate Clerk of Court your Annual Gift and Income (Canon 6) Report
  - Describe sources of income in excess of $2000 (e.g., compensation for teaching, rental income)
  - Gifts in excess of $500 (unless from family members or for personal occasions)
  - This is NOT THE SAME as the required SEI form to be filed with the State Ethics Commission each year
- Canon 6 also addresses **expense reimbursement –** if you receive reimbursement for attending an event that is MORE THAN THE ACTUAL COST, it can be considered compensation and is reportable if more than $2000 in excess of costs

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Common Problems: Canon 5 and 6

- Failing to disclose outside income on your SEI or Canon 6 Form
- Promoting for-profit business enterprises or service on for-profit boards
- Serving as an executor or fiduciary for a non-family member
- Providing legal advice to family/friends (including advice on how to handle court matters)
- Managing real estate investments (landlord/tenant issues) and disclosing rental income

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Canon 7:
Permissible Political Conduct

- **You MAY:**
  - Identify yourself as a member of a political party
  - Contribute to political PARTIES (not candidates)
  - Serve as a political party delegate or political party leader or officer
  - Attend, preside over and speak at political party meetings & conventions, campaign events including fundraisers for individual candidates

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Canon 7:
Prohibited Political Conduct

- **You may NOT:**
  - ***Endorse*** other candidates UNLESS you are also a candidate
  - ***Contribute*** to individual campaigns
  - ***Solicit Donations or Engage in Fundraising*** for other candidates, politicians or political organizations, either directly or indirectly
  - ***Misrepresent*** your own qualifications, and as a general rule consistent with Canons 1 and 2, the qualifications of other candidates

NOTE: Your spouse and other family members are permitted to engage in political activity, but be careful that their conduct is not attributed to you – e.g., beware the joint checking account problem in contributions.

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Constitutional Limits on Regulating Political Conduct

- Protection of **First Amendment** rights of judges:
  - *Republican Party of Minnesota v. White* (2002): judicial codes of conduct can violate the First Amendment when regulating campaign speech; applying strict scrutiny and striking down the restriction on "announcing" views on disputed legal issues in judicial elections
  - *Williams-Yulee v. Florida State Bar* (2015): even applying strict scrutiny, there is a compelling state interest embodied in judicial codes of conduct that restrict judicial candidates from personally soliciting campaign contributions

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Common Problems: Political Conduct

- Contributing to campaigns – it is PROHIBITED
- Unprofessional and hyper-partisan attacks on opponents or elected/public officials
- Unprofessional campaign conduct that undermines confidence in the judiciary
- Assisting other candidates for elected office

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Thank You
Brittany Pinkham, bpm@coa.nccourts.org
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Tab 6

Interpreter Issues

Language Access Services in NC Superior Courts

January 24, 2023

1

Topics

- Office of Language Access Services
- Types of Language Access Services
- Role of the court interpreter
- Interpreters in the courtroom
- How to work with a court interpreter

2

Limited English Proficiency (LEP) Individual

- Definition: one who speaks a language other than English as his or her primary language and has a limited ability to read, write, speak, or understand English.
- The need for a court interpreter should not be based upon the individual's ability to converse in basic English.

3

Equal Access to Justice

Using a properly trained court interpreter ensures full and fair participation and facilitates equal access to justice for Limited English Proficiency individuals in the North Carolina justice system.

Equally important is…

4

The Administration of Justice

The North Carolina Judicial Branch agrees "it is essential to remove remaining barriers that deny LEP individuals meaningful access to the court system and that doing so serves the Judicial Branch's interest in ensuring accurate communications in proceedings and operations, protecting the integrity of evidence, delivering justice, and promoting public trust and confidence in the judicial system."

- October 25, 2022, Memorandum of Agreement with U.S. Department of Justice

5

What Does OLAS Do?

The Office of Language Access Services in the NCAOC helps facilitate equal access to justice for LEP individuals by:

- Developing Standards for Language Access Services in North Carolina State Courts
- Providing support and guidance for questions or issues involving interpreting and translating services
- Ensuring qualified court interpreters are provided to the courts
- Administering court interpreter training and certification testing provided by the National Center for State Courts
- Arranging court interpreters for proceedings

6

Who has the right to an Interpreter?

The NCAOC will, "provide a free, timely, and authorized court interpreter for all LEP parties in interest in **all** court proceedings and appropriate language assistance to persons who are LEP in all court operations."

- October 25, 2022, Memorandum of Agreement with U.S. Department of Justice

7

7

Assessing the Need for a Court Interpreter

- The language of the courtroom proceeding is far more complex than the linguistic interactions of everyday conversation.
- The level of English proficiency required to **meaningfully** participate in a legal setting requires Cognitive Academic Language Proficiency (CALP) developed through formal education and years of exposure to the language.

8

8

How to Evaluate the Need for an Interpreter

If you doubt an individual's English proficiency, determine their fluency through questions.

- When is your birthday?
- How old are you?
- When were you born?
- What kind of work do you do?
- Please describe items you see here in the courtroom.

- Be aware that the heighted anxiety of being in a court room diminishes a speaker's ability to comprehend and communicate in a second language.
- **Always err on the side of caution** and ensure a qualified court interpreter is used for all court proceedings for LEP individuals.

9

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What are Language Access Services?

In-Person Interpreting for Court Proceedings	Staff Court Interpreters in 9 counties: Alamance, Buncombe, Chatham, Durham, Forsyth, Guilford, Mecklenburg, Orange, and Wake Contract Court Interpreters
Telephone Interpreting	Use for out-of-court communication or court operations
Current Vendor: Propio (formerly Telelanguage)	Not used for Superior Courts
Video Remote Interpreting	Use for any proceeding conducted via Webex. (Separate audio channels for LEPS is coming)
Translation	Court Forms and vital court documents
Transcription-Translation	Audio/visual evidence for district attorneys, public defenders, or assigned counsel. Court interpreters are prohibited by their ethics from interpreting audio/visual recordings; all audio/visual recordings must be transcribed and translated *prior to the court proceeding*.

10

10

The Role of the Court Interpreter

To provide equal access to justice and court proceedings by linguistically placing the LEP individual on equal footing as an English speaker.

- Equal access does not mean better access.

11

11

What is the Court Interpreter's Job?

- To render everything said in court from the source language into the target language
  - Accurately without distorting the meaning
  - Without omissions
  - Without additions
  - Without changes to style of speech (registry)
  - With as little delay or interference as possible
  - While speaking and listening for the next chunk of language
  - Monitoring their own output

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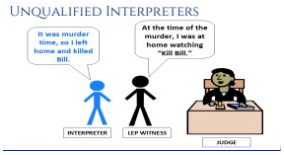
12

Properly Trained Court Interpreter vs. Bilingual Person

Do not allow bilingual law enforcement officers or other untrained bilingual individuals (including court personnel) to serve as interpreters for LEPS.

Why?

1. Avoid any appearance of bias or conflict of interest
2. Ensure the use of qualified, skilled interpreters
3. Ensure full and fair participation



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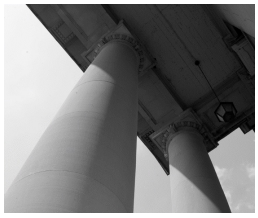
Interpreters in the Courtroom



Three Modes of Court Interpreting

- **Simultaneous**- Appropriate form of interpreting for most court situations. The interpreter listens in the source language while simultaneously interpreting into the target language.
- **Consecutive**- Appropriate form of interpreting for question and answering situations, such as if there is an LEP on the witness stand.
- **Sight Translation**- Appropriate for short documents where the interpreter reads the document in the source language while interpreting out loud in the target language.

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An Interpreter's Tools

- Interpreters might bring with them:
  - A notepad and pen
  - A bilingual dictionary (may be located on their phone)
- Interpreters may ask a speaker (LEP, attorney, or judicial officer) to repeat what they said to ensure an accurate interpretation.

15

Court Interpreter Ethics

Court Interpreters must abide by the Code of Professional Responsibility for Court Interpreter.

- Canon 1: Accuracy and Completeness
- Canon 2: Representation of Qualifications
- Canon 3: Impartiality and Avoidance of Conflict of Interest or Appearance of Conflict of Interest
- Canon 4: Professional Demeanor
- Canon 5: Confidentiality
- Canon 6: Restriction of Public Comment
- Canon 7: Scope of Practice
- Canon 8: Assessing and Reporting Impediments to Performance
- Canon 9: Duty to Report Ethical Violations
- Canon 10: Professional Development

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The Interpreter Ethically Cannot…

- Explain anything to anyone
- Fill out forms
- Advocate

17

17

Expect Team Interpreting When Needed

Interpreter Fatigue:

One of the most serious impediments to court interpreter performance. Studies show that a interpreter's proficiency begins to plummet between 20 to 40 minutes of actively interpreting. EVERY interpreter suffers from this proficiency breakdown, and it largely goes undetected by the interpreter.

Solution:

A team of two interpreters should be scheduled for any proceeding expecting to last more than two hours. If a team has not been scheduled, permit a 10-minute break every 30 minutes of the proceeding to allow the interpreter to rest. This will allow the interpreter to maintain the level of proficiency required to ensure the LEP party has equal access to the proceeding.

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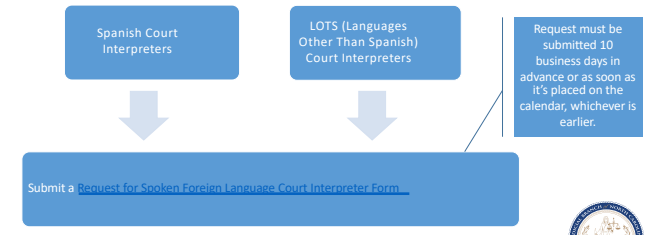
18

Interpreter Request Process



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Requests are Received by the Designated Language Access Coordinator (LAC)

- LACs schedule Spanish court interpreters upon receipt and evaluation of a completed Request for Spoken Foreign Language Court Interpreter
- LOTS interpreters are scheduled by OLAS staff. Many LOTS interpreters must be flown in from out of state, so advance notice is necessary, as is certainty of a trial date.

All court interpreters must be scheduled by the LAC or OLAS in order to be paid for services rendered in AOC covered matters.

20

Out of Court Language Access for Private Counsel in Civil and non-Indigent Criminal Defense Cases

21

- Civil litigants and criminal defendants who have hired privately retained counsel MUST privately retain the services of an interpreter for any out-of-court communication or for any necessary case preparations.
  - This includes settlement conferences which civil attorneys may expected to have before the start of a trial.

AOC INTERPRETERS CANNOT PROVIDE THIS SERVICE AT JUDICIAL BRANCH EXPENSE.

22

What to Expect When Parties Have Non-English Documents OR Non-English Audio Sources

23

Translation Services

- Parties must have non-English written documents translated into English by credentialed (ATA-certified and/or educational credentials) translators who submit a notarized certificate of accuracy setting forth the credentials and statement of accuracy following translation protocols.

24

Transcription-Translation services

- Court interpreters are prohibited by their ethics from trying to interpret audio recordings in court because it is impossible to do so accurately, which would threaten the integrity of the evidence.
- The best evidence format for non-English audio is a properly prepared transcription-translation, accompanied by a notarized certificate of accuracy from the lead translator setting forth the lead translator's credentials.
  - This work requires an extremely high level of skill.

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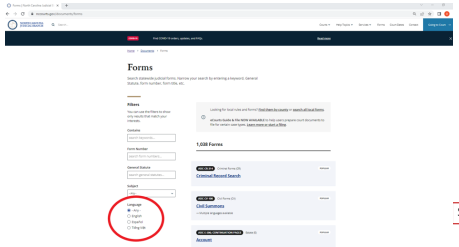
A Note on Translated Court Forms



Select Spanish or Vietnamese

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What to expect with Court Ordered Psychological Evaluations

27

NCAOC does not provide court interpreters for treatment, classes, counseling, or other similar services whether or not ordered by the court.

- Prior to ordering an LEP individual to undergo treatment, you should consider whether the service provider provides language access services that eliminate barriers to accessing the treatment.

Healthcare providers have their own Title VI responsibilities to ensure LEP individuals can access healthcare services.

28

There is one Exception...

Court interpreters will be provided for court-ordered psychological evaluations if:

- counsel is assigned or appointed;
- the appointed or assigned counsel made the motion to have their client evaluated; and
- counsel completes the interpreter request for their client if the court ordered psychological evaluation is granted

Then a court interpreter will be provided at IDS expense.

29

When Using a Court Interpreter

30

Proper Use of the Court Interpreter

- Give instructions to parties and witnesses about the role of the court interpreter as a neutral language conduit
- Be aware that interpreters are ethically prohibited from developing any sort of rapport with the LEP for whom they are interpreting
- Do not ask the interpreter to gauge if they think the LEP individual understands
- Do not allow multiple speakers to talk at the same time or over each other. The interpreter interpret everything that is said and multiple speakers make it impossible to perform this duty.
- NOTE: Please report any inappropriate interpreter behavior to OLAS, including stepping outside the bounds of their scope of service.

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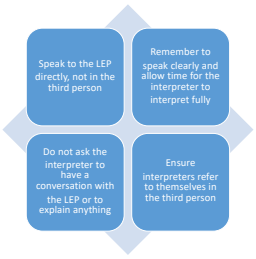

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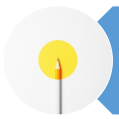
Final Thoughts

Language access services ensure ***full and fair*** participation and provides equal access to justice for LEP individuals



Language access services help you get the information you need to make decisions

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33


THANK YOU
Office of Language Access Services
QLAS@nccourts.org
919-890-1407

34


JUDICIAL BRANCH of NORTH CAROLINA
SUUM CUIQUE TRIBUERE
GENERAL COURT of JUSTICE

35

Language Access Services

Frequently Asked Questions for Judicial Officials

Who is entitled to a court interpreter?
The Judicial Branch is committed to removing barriers that hinder equal access to justice by individuals with limited English proficiency (LEP). The court should require an interpreter for any court proceeding involving a party in interest who speaks a language other than English as the primary language and has a limited ability to read, speak, or understand English.

Who pays for the court interpreter?
The Judicial Branch will provide a court interpreter at state expense and at no cost to the party in the following types of court proceedings:

- All court proceedings heard before the magistrate
- All court proceedings heard before the clerk of superior court
- All court proceedings heard before the district court judge
- All court proceedings heard before the superior court judge

Who is considered a party in interest?
Parties in interest in a court proceeding can be any of the following: a party; a victim; a witness; the parent, legal guardian or custodian of a minor party; the legal guardian or custodian of an adult party.

How do I determine whether a person has limited English proficiency and needs a court interpreter?
To help determine whether to require a court interpreter, the court should conduct a voir dire that asks open-ended questions that cannot be answered with a simple yes or no. Sample questions include, "What kind of work do you do?" or "Why are you here in court today?"

What types of interpreting services are available?
The Judicial Branch offers a number of language access services to meet the needs of LEP individuals, including staff court interpreters, contract court interpreters, telephone interpreting, remote interpreting, translation, and transcription-translation services. Certified staff court interpreters provide Spanish interpreting services in 9 counties: Alamance, Buncombe, Chatham, Durham, Forsyth, Guilford, Mecklenburg, Orange and Wake.

The court proceeding is scheduled for today, but no court interpreter has been scheduled. Is it possible to find an interpreter on such short notice?
The request process set forth in the Standards requires a completed *Request for Spoken Foreign Language Court Interpreter* be submitted by counsel, if applicable, or court personnel to the local Language Access Coordinator at least 10 days in advance of the court date or as soon as the matter is placed on the calendar, whichever occurs first. Court

interpreters are often scheduled well in advance of the court date, so last-minute coverage is unlikely outside of staff court interpreter districts. Attorneys should be instructed to submit a request for a future court date. Court personnel should assist with submitting the request on behalf of self-represented litigants.

If parties bring friends or family with them to interpret, may we use those friends or family as court interpreters?
No. Only court interpreters approved by OLAS may provide interpreting services during a court proceeding. Friends and family may help parties communicate with court staff outside the courtroom, but they *may not serve as court interpreters.*

May court personnel who speak other languages serve as court interpreters in court proceedings?
No. Court personnel who speak other languages may help parties communicate with court staff *outside* the courtroom, but they *may not serve as court interpreters* in court proceedings. Additionally, law enforcement officers, corrections officers, and attorneys may *not serve as court interpreters* in court proceedings.

May I use telephone interpreting to conduct a trial?
The telephone interpreting services may be used for brief matters before the judicial official, such as continuances or first appearances. However, a telephone interpreter should not be used for trials or any other types of evidentiary hearings in district court. Telephone interpreting services are not available in superior court.

What if one of the parties needs an interpreter outside of the court proceeding?
The Judicial Branch will provide an interpreter for out-of-court communications on behalf of the district attorney, Guardian ad Litem Program, and, pursuant to a memorandum of understanding between NCAOC and the Office of Indigent Defense Services (IDS), on behalf of public defenders, assigned counsel, and guardians ad litem representing indigent parties for IDS.

The Judicial Branch does not provide interpreting services to facilitate communications between private counsel and clients, witnesses or other parties *outside of the court proceeding*. Language access services required for all out-of-court communications involving private counsel, including all interviews, investigations, and other aspects of general case preparation, are outside the scope of services provided or funded by the Judicial Branch.

Will the court interpreter maintain the confidentiality of what is said between attorney and client?
Yes. The court interpreter is ethically bound to maintain the confidentiality of any information disclosed between attorney and client.

Where should I direct questions about language access services?
If you have questions about language access services, contact OLAS at 919-890-1407 or OLAS@nccourts.org.

Office of Language Access Services (OLAS)

Spoken Language Court Interpreters

Service Offerings

The North Carolina Administrative Office of the Courts (NCAOC) Office of Language Access Services (OLAS) serves the North Carolina State Court System by helping to facilitate equal access to justice for limited-English proficient (LEP) individuals in our court system by:

- Developing standards for the provision and efficient use of language access services
- Providing daily support and guidance for questions, concerns, and issues involving interpreting and translating services
- Ensuring that proficient and ethical spoken language court interpreters are provided to the courts
- Administering court interpreter training and certification testing for court interpreters provided by the National Center for State Courts

NCAOC offers a number of language access services to meet the needs of LEP individuals including certified staff court interpreters in 9 counties (Alamance, Buncombe, Chatham, Durham, Forsyth, Guilford, Mecklenburg, Orange, and Wake), contract court interpreters, telephone interpreting, remote interpreting, translation, and transcription - translation services. Learn more at http://www.NCcourts.gov.

Terms

- LOTS – Language(s) other than Spanish
- Limited English Proficient (LEP) individual – a person who speaks a language other than English as his or her primary language and has a limited ability to read, speak, write, or understand English
- Interpretation – the accurate and complete unrehearsed transmission of an oral message from one language to an oral message in another language
- Translation – the accurate and complete transmission of written text from one language into written text in another language

Proper Role of Court Interpreter

- The interpreter's job is to render everything said in court from the source language into the target language
  - Accurately without any distortion of meaning
  - Without omissions and additions
  - Without changes to style or register
  - With as little delay or interference as possible

- The interpreter's job is NOT
  - To explain anything to anybody
  - To fill out forms
  - To serve as a "go between"

- Interpreters have an ethical obligation to ask for repetition if speech is unclear
- In order to conserve impartiality and confidentiality, the interpreter should not be asked to be alone with any of the parties
- Interpreters may sight translate a form for an LEP individual, but may not advise the individual on how to complete the form or answer the individual's questions

Do not use untrained bilingual individuals to interpret during court proceedings

- Using an untrained bilingual speaker to interpret during court proceedings creates potential conflicts of interest and may have a negative impact on the case
- Bilingual speakers who are not trained court interpreters are not aware of the role, the demand, the modes of interpreting, the ethics or rules of professionalism required of the court interpreter and therefore cannot interpret accurately and completely, which can significantly impact equal access to justice for the LEP individual

Tips for working with court interpreters

- Speak to the LEP individual directly just as you would an English speaker – e.g., "What time did you call the police?"
- Use plain English, avoid jargon, and do not use acronyms
- Speak slowly and clearly with regular pauses between complete thoughts
- Ask one question at a time
- Do not ask interpreter to explain or summarize what is said
- Provide the interpreter with information about the case; the more information an interpreter has about a case, the better he or she can prepare and perform
- Do not ask the interpreter if the LEP individual understands what you are saying; the interpreter's role is to serve as a language conduit, not to assess understanding
- In order to ensure the accuracy of the interpreting services provided throughout the proceeding, provide a team of two interpreters for any proceeding lasting two hours or more
- Interpreters must be given a break every 20 – 30 minutes to maintain accuracy

Early identification of cases in which an interpreter is needed

- Early identification of the need for interpreting services in an individual case allows for efficient assignment, reduces the number of continuances for lack of an interpreter, and maximizes the possibility that litigants will understand what to do next in their case

- Use interpreter resources efficiently – share interpreters between criminal and civil courtroom calendars and schedule an interpreter only for the time the interpreter is needed; do not request interpreters "just in case" because their services are often needed in another county
- Failure to provide sufficient time to secure a qualified interpreter may result in a delay or postponement of the court proceeding if a qualified interpreter is not available

How to Request a Court Interpreter

The request process for both Spanish and LOTS interpreters is consistent statewide. A **Request for Spoken Foreign Language Court Interpreter** must be submitted to the Language Access Coordinator (LAC) for the county where the case is set to be heard at least 10 days in advance of the court appearance to ensure adequate coverage. More advance notice may be required for LOTS interpreters who are located out of state. The request form can be accessed at https://www.nccourts.gov/request-for-spoken-foreign-language-court-interpreter.

Failure to cancel scheduled services with notice of more than 24 hours will result in cancellation fees. Alert the interpreter and LAC immediately if it is determined services will not be needed.

Contact

OLAS Main: 919-890-1407
OLAS Email: OLAS@nccourts.org
Website: www.NCcourts.gov

Language Access Bench Card

POLICY NOTE: The North Carolina Judicial Branch is committed to removing barriers that hinder equal access to justice by individuals with limited English proficiency (LEP). This bench card addresses the language access services provided by the N.C. Judicial Branch in accordance with the Standards for Language Access Services in North Carolina state courts.

When should the court require an interpreter?

The court should require a qualified interpreter for any court proceeding that involves a party in interest who speaks a language other than English as the primary language and has a limited ability to read, speak, or understand English.

Who is a party in interest?

Parties in interest may be any of the following:

- A party
- A victim
- A witness
- The parent, legal guardian,or custodian of a minor party
- The legal guardian or custodian of an adult party

Who pays for the interpreter?

The Judicial Branch provides interpreters at state expense in all civil and criminal court proceedings before a magistrate, clerk of superior court, district court judge, superior court judge, the Court of Appeals, or the Supreme Court of North Carolina.

The costs for interpreting services shall not be charged to the parties.

The Judicial Branch will provide an interpreter at state expense for child custody mediation, permanency mediation, and child planning conferences.

The Judicial Branch will not provide an interpreter at state expense for probation and parole functions, and for private mediations and arbitrations.

Language Access Services Provided by the North Carolina Administrative Office of the Courts Office of Language Access Services (OLAS)

- In-person interpreting for court proceedings — Judicial Branch staff court interpreters in nine counties: Alamance, Buncombe, Chatham, Durham, Forsyth, Guilford, Mecklenburg, Orange, and Wake; and contract court interpreters
- Telephone interpreting service — use for brief routine matters in district court; use by magistrates and DAs; use in public access areas in clerks' and family court offices
- Translation of court forms and vital court documents
- Transcription-translation of audio / visual evidence for district attorneys and public defenders or assigned counsel (court interpreters are prohibited by their ethics from interpreting audio / visual recordings; upon request to OLAS, all audio / visual recordings must be transcribed and translated *prior to the court proceeding*)

1 Evaluating the Need for a Court Interpreter

To help determine whether to require a court interpreter, the court should ask open-ended questions that cannot be answered with a simple yes or no. For example:

- "Please tell me about your country of origin."
- "What kind of work do you do?"
- "What is the purpose of your court hearing today?"

2 Assignment of a Court Interpreter

If the court determines that the party has limited English proficiency (LEP), the court should require a court interpreter. Any doubts should be resolved in favor of the LEP individual, and an interpreter should be required.

- The court should only allow a Judicial Branch authorized court interpreter to provide interpreting services in court
- The court should never allow family or friends to interpret in court
- Judicial officials or court personnel should not serve as interpreters

3 Obtaining a Court Interpreter

A Request for Spoken Foreign Language Court Interpreter should be submitted electronically to the local Language Access Coordinator (LAC) at least 10 business days prior to the scheduled proceeding, or as soon as the proceeding is placed on the court calendar, whichever occurs first.

Counsel is responsible for submitting the request form for their LEP clients or witnesses. Court personnel should assist self-represented litigants with submitting the request form.

Language Access Bench Card

POLICY NOTE: The North Carolina Judicial Branch is committed to removing barriers that hinder equal access to justice by individuals with limited English proficiency (LEP). This bench card addresses the language access services provided by the N.C. Judicial Branch in accordance with the Standards for Language Access Services in North Carolina state courts.

CLARIFYING THE INTERPRETER'S ROLE TO THE JURY*

This court seeks a fair trial for all regardless of the language they speak and regardless of how well they may or may not speak English. Bias against or for persons who have little or no proficiency in English is not allowed. Therefore, do not allow the fact that the party requires an interpreter to in any way influence you.

**There is no pattern jury instruction on this matter. This form is recommended for your consideration.*

CLARIFYING THE INTERPRETER'S ROLE TO THE WITNESS

I want you to understand the role of the interpreter. The interpreter is here only to interpret the proceedings. The interpreter will say only what is said in your language and will not add, omit, or summarize anything. The interpreter will say in English everything that you say in your language, so do not say anything you do not want everyone to hear. If you do not understand a question asked of you, request clarification from the person who asked it. Do not ask the interpreter.

You are giving testimony to this court; therefore please speak directly to the attorney or to me (the court). Do not ask the interpreter for advice. Speak in a loud clear voice. If you do not understand the interpreter, please tell me. If you need the interpreter to repeat, please make your request to me, not to the interpreter. Please wait until the entire statement has been interpreted before you answer. Do you have any questions?

USE OF INTERPRETER OUTSIDE OF COURT PROCEEDING

Judicial Branch funds are provided for interpreting services for out-of-court communications on behalf of the district attorney, Guardian ad Litem Program, and, pursuant to a memorandum of understanding between the Judicial Branch and the Office of Indigent Defense Services (IDS), on behalf of public defenders, assigned counsel, and guardians ad litem representing indigent parties for IDS.

- Staff court interpreters are prohibited from providing services out of court.
- Authorized Spanish interpreters are listed on the Registry of Spoken Foreign Language Court Interpreters.
- Authorized LOTS interpreters will be assigned upon the submission of a Request for Spoken Foreign Language Court Interpreter electronically.

Language access services required for all out-of-court communications involving private counsel, including all interviews, investigations, and other aspects of general case preparation, are outside the scope of services provided or funded by the Judicial Branch.

To ensure equal access to justice, private counsel are encouraged to privately retain the services of a Judicial Branch registered and qualified court interpreter by contacting directly a contract interpreter from the Registry of Spoken Foreign Language Court Interpreters.

THE INTERPRETER'S OATH**

Do you solemnly swear or affirm that you will interpret accurately, completely, and impartially, using your best skill and judgment in accordance with the standards prescribed by law and the Code of Professional Responsibility for Court Interpreters, follow all official guidelines established by the North Carolina Administrative Office of the Courts for legal interpreting and translating, and discharge all of the solemn duties and obligations of legal interpretation and translation?

***There is no statutory or judicially approved oath. This form is recommended for your consideration.*

QUICK GUIDE

- Evaluate the need for an interpreter.
- Require an authorized court interpreter approved by OLAS.
- Allow the interpreter to meet with the LEP individual briefly prior to the proceeding to confirm the ability to communicate, and to view the court file prior to the proceeding to become familiar with case terminology, names, and dates.
- Allow the interpreter to review any documents that will need to be sight translated during the proceeding.
- Make sure that the interpreter is located in a position that allows the interpreter to see and hear everything that happens in the courtroom.
- Administer the interpreter's oath.
- Have the interpreter state his / her name and qualifications on the record.
- Explain the role of the interpreter to the parties, witnesses, and the jury on the record.
- Advise witnesses to speak clearly and at a moderate pace.
- Emphasize that the record produced by the court reporter or court recorder is the official record of the proceeding.
- Provide breaks every 30 minutes for the interpreter or require a team of two interpreters for proceedings expected to last longer than two hours.
- Observe the interpreter's conduct, communication, and interaction with participants; if problems arise, use a sidebar conference with attorneys and the interpreter or a recess to address and correct the problems.
- Keep in mind that the interpreter may be needed in other courtrooms.

Obtaining a Spoken Foreign Language Court Interpreter for Court Proceedings – Courts

The Judicial Branch **will provide** an interpreter at state expense in all civil and criminal court proceedings before a magistrate, clerk of superior court, district court judge, superior court judge, the Court of Appeals, or the Supreme Court. The Judicial Branch will provide an interpreter at state expense for child custody mediation, permanency mediation, and child planning conferences.

The Judicial Branch **will provide** an interpreter at state expense to facilitate communication involving the district attorney, indigent defendants or respondents and appointed counsel, or the Guardian ad Litem Program.

The Judicial Branch **will not provide** an interpreter at state expense for out-of-court communications between privately retained counsel and their civil clients, privately retained counsel and their non-indigent criminal defendants and respondents, for settlement negotiations between the parties, for probation and parole functions, and for private mediations and arbitrations.

All Spoken Foreign Language Court Interpreters	Submit a *Request for Spoken Foreign Language Court Interpreter** at least 10 business days prior to the scheduled proceeding, or as soon as the proceeding is placed on the court calendar. Requests should be submitted electronically from the website at http://www.NCcourts.gov. The Language Access Coordinator (LAC) for each county can be contacted by sending an email to an address using the following naming convention: County.Interpreter@nccourts.org. For example, Wake.Interpreter@nccourts.org and NewHanover.Interpreter@nccourts.org.
IMPORTANT	➢ **Failure to provide sufficient time to secure a qualified interpreter likely will result in a delay or postponement of the court proceeding if a qualified interpreter is not available.** ➢ **Once services are requested, if it is determined before the court date that the case will not go forward as scheduled, please notify the local LAC and the scheduled interpreter so services can be cancelled in a timely manner (no less than 24 hours) to avoid unnecessary cancellation charges.**

I Speak...

Language Identification Guide

This guide assists literate individuals who are not proficient in English to identify a preferred language.

Homeland Security

Language Identification Guide for DHS Personnel and Others

As employees of the Department of Homeland Security you may encounter a broad range of persons in the course of your work, including individuals who have limited English proficiency (LEP). DHS is both committed and legally obligated to take reasonable steps to provide meaningful access for these individuals. The DHS Office for Civil Rights and Civil Liberties (CRCL) offers this "I Speak" guide and similar posters as practical ways to identify which language an individual speaks so that you can obtain the necessary assistance. Consult your office or component for resources, such as translation or over-the-phone interpretation.

Executive Order 13166 requires DHS to take reasonable steps to provide meaningful access for persons with limited English proficiency and - as also required by Title VI of the Civil Rights Act of 1964 - to ensure that recipients of federal financial assistance do the same.

Contact the DHS Office for Civil Rights and Civil Liberties' CRCL Institute at CRCLTraining@dhs.gov for digital copies of this guide or an "I Speak" poster.

Download copies of the DHS LEP plan and guidance to recipients of financial assistance at www.dhs.gov/crcl.

I speak ...

A

Amharic

እኔ አማረኛ ነው ምናገረው.

Arabic

أنا أتحدث اللغة العربية

Armenian

Ես խոսում եմ հայերեն

B

Bengali

আমী ঝংলা কথা ঝেলতে পারী

Bosnian

Ja govorim bosanski

Bulgarian

Аз говоря български

Burmese

ကျွန်တော်/ကျွန်မ မြန်မာ လို ပြောတတ် ပါတယ်၊

C

Cambodian
ខ្ញុំនិយាយភាសាខ្មែរ

Cantonese
我講廣東話 (Traditional)

我讲广东话 (Simplified)

Catalan
Parlo català

Croatian
Govorim hrvatski

Czech
Mluvím česky

D

Danish
Jeg taler dansk

Dari
من دری حرف می زنم

Dutch
Ik spreek het Nederlands

E

Estonian
Ma räägin eesti keelt

F

Finnish
Puhun suomea

French
Je parle français

G

German
Ich spreche Deutsch

Greek
Μιλώ τα ελληνικά

Gujarati
હુ ગુજરાતી બોલુ છુ

H

Haitian Creole
M pale kreyòl ayisyen

Hebrew
אני מדבר עברית

Hindi
मैं हिंदी बोलता हूँ ।

Hmong
Kuv has lug Moob

Hungarian
Beszélek magyarul

I

Icelandic
Èg tala íslensku

Ilocano
Agsaonak ti Ilokano

Indonesian
syay bisa berbahsa Indonesia

Italian
Parlo italiano

J

Japanese
私は日本語を話す

K

Kackchiquel
Quin chagüic´ká chábal´ ruin´ rí tzújon cakchiquel

Korean
한국어 합니다

Kurdish
man Kurdii zaanim

Kurmanci
man Kurmaanjii zaanim

L

Laotian
ຂອ້ຍປາກພາສາລາວ

Latvian
Es runâju latviski

Lithuanian
Að kal bu lietuviš kai

M

Mandarin

我講國語 (Traditional)

我讲国语/普通话 (Simplified)

Mam

Bán chiyola tuj kíyol mam

Mon

N

Norwegian

Jeg snakker norsk

P

Persian

من فارسی صحبت می کنم.

Polish

Mówię po polsku

Portuguese

Eu falo português do Brasil
(for Brazil)

Eu falo português de Portugal
(for Portugal)

Punjabi

ਮੈਂ ਪੰਜਾਬੀ ਬੋਲਦਾ/ਬੋਲਦੀ ਹਾਂ।

Q

Qanjobal

Ayin tí chí walq´ anjob´ al

Quiche

In kinch´aw k´uin ch´e quiche

R

Romanian
Vorbesc româneşte

Russian
Я говорю по-русски

S

Serbian
Ја говорим српски

Sign Language (American)

Slovak
Hovorím po slovensky

Slovenian
Govorim slovensko

Somali
Waxaan ku hadlaa af-Soomaali

Spanish
Yo hablo español

Swahili
Ninaongea Kiswahili

Swedish
Jag talar svenska

T

Tagalog
Marunong akong mag-Tagalog

Tamil
நான் தமிழ் பேசுவேன்

Thai
พูดภาษาไทย

Turkish
Türkçe konuşurum

U

Ukrainian
Я розмовляю українською мовою

Urdu
میں اردو بولتا ہوں

V

Vietnamese
Tôi nói tiêng Việt

W

Welsh
Dwi'n siarad

X

Xhosa
Ndithetha isiXhosa

Y

Yiddish
איך רעד יידיש

Yoruba
Mo nso Yooba

Z

Zulu
Ngiyasikhuluma isiZulu

Agrupación Lingüística	Variante Lingüística	Frase en español	Frase en lengua
chichimeo jonaz	chichimeco jonaz	yo hablo chichimeca	ikáuj úza' ér~í
mazateco	mazateco del norte	yo hablo mazateco Hablo la lengua de Santa María Chilchotla	Cha'ña enná Cha'ña énn nda xo
maya	maya	Yo hablo maya	teen k-in t'aan maya
mixe	mixe bajo	Yo hablo mixe	Madyakpiëch ayuuk
	mixe alto, de Tlahuitoltpec	Yo hablo mixe	Xaamkëjxpët ayuujk ëts nkajpyxypy
mixteco	mixteco del oeste de la costa	yo hablo mixteco	Yuu kain se'en savi ñu ñundua

Agrupación Lingüística	Variante Lingüística	Frase en español	Frase en lengua
náhuatl	náhuatl de la huasteca veracruzana (se entiende junto con Ve racruz y San Luis Potosí)	yo hablo náhuatl	Na nitlajtowa náhuatl
tojolabal	tojolabal	yo hablo tojolabal	Ja´ke´ni wala kúmaniyon tojol-abál
triqui	triqui de la baja	yo hablo triqui	‘unj a’mii xna’ ánj nu’ a
tseltal	tseltal (variante unificada)	Yo hablo tseltal	Te jo’one ja k’op te bats’il k’op tseltal
tsotsil	tseltal (variante unificada)	Yo hablo tsotsil	Vu’une jna’xi k’ opoj ta bats’i k’op
zapoteco	zapoteco de la planicie costera	yo hablo zapoteco	Naa riné’ diidxazá
chinanteco	chinanteco del sureste medio	yo hablo chinanteco	Jnea lo’n jujmií kiee ’ dsa mo’ kuöo

Limited English Proficiency Resources

www.lep.gov

"I Speak" is provided by the Department of Homeland Security Office for Civil Rights and Civil Liberties (CRCL). Special thanks to the Department of Justice Bureau of Justice Assistance and the Ohio Office of Criminal Justice Services, for inspiration and permission to use their "I Speak" guide as the initial source.

Office for Civil Rights and Civil Liberties

www.dhs.gov/crcl

Toll Free: 1-866-644-8360
Toll Free TTY: 1-866-644-8361
Email: crcl@dhs.gov

State of Ohio
Office of Criminal Justice Services
www.ocjs.ohio.gov

OHIO PUBLIC SAFETY
EDUCATION • SERVICE • PROTECTION

U.S. Department of Homeland Security

Department of Justice Office of Justice Programs

BJA
Bureau of Justice Assistance
U.S. Department of Justice

Guide to Using the Telephone Interpreting Service

- Dial **844-340-2763**

- You will hear an automated system answer and say "For Spanish press 1, for all other languages press 8." If you select 8, the system will ask you to state the language needed.

- The call will then be connected to your interpreter who will ask for the **six digit access code** assigned to your office. The interpreter will then be ready to assist you.

  IMPORTANT NOTE: To the extent possible, preschedule telephonic appointments. Call the above number to preschedule. Unforeseen nationwide surges may create longer queue times than desired.

TIPS FOR WORKING WITH TELEPHONE INTERPRETERS

1. Brief interpreter prior to conversation
2. The interpreter is there to only interpret what is being said
3. Ask interpreter not to change or alter any part of the conversation
4. Speak clearly and in a normal tone
5. Allow more time for interpreted communication
6. Be aware of cultural factors
7. Refrain from using metaphors, acronyms, slang, or idioms
8. Remember to pause between sentences
9. Speak directly to the non-English speaker, not the interpreter
10. Permit only one person to speak at a time
11. Treat interpreter as a professional

NEED SUPPORT?

Tim Bernal
Project Manager
Toll-Free 888.983.5352 | Direct: 503.535.2178
E-mail: tbernal@propio-ls.com

Cultural Competence in the Courtroom: *A Judge's Insight*

By Hon. Gail S. Tusan
& Sharon Obialo

In the wake of the confirmation of Justice Sonia Sotomayor as the first Hispanic and only third female to serve on the U.S. Supreme Court since its founding in 1789, many questions have arisen as to how important cultural sensitivity is in adjudicating justly and fairly. For example, what can a "wise Latina" bring to the bench in terms of cultural background, life experience and global understanding? Are American courts adequately serving their diverse communities? Is justice truly achieved when cultural differences are ignored and misunderstood during legal proceedings?

A Global Courtroom

Certain fundamental practices followed in courtrooms throughout America may prove problematic for individuals who did not grow up in this country. For example, our longstanding practice of requiring a witness to raise his or her hand while swearing to tell the truth prior to testifying is a Judeo-Christian tradition, which inadvertently may be at odds with certain cultural norms adhered to by foreign-born persons. While it is not unusual for a lawyer to point a finger or shake a fist during an argument or lock eyes with a witness during examination, many cultures find it rude to point at others. In East Asia and certain Muslim countries, lack of eye contact toward an authority figure signifies respect and deference. Thus, a prosecutor's argument that a defendant's failure to make eye contact with law enforcement signifies guilt might in truth indicate something very different if the defendant is foreign-born.

The diverse landscape of American culture necessitates an expanded framework of understanding within the legal community. Lawyers, judges and court personnel alike must ensure that we have our global antenna up. We must be tuned in to the increasing cultural nuances underlying today's court filings. Consider the following excerpt from a custody hearing. The Algerian father[1] is reacting to the American mother's request that the court permit her to withhold the children's passports from him because she fears that the father will take the kids back to his native county, without her knowledge:

Mr. Sayad: "OK, but please, your honor, please. Make sure you consider the passport. I'm not a kidnapper, ma'am."

The Court: "I understand."

Mr. Sayad: "I'm not a kidnapper."

The Court: "Sir, I heard you, I did not say you were. Did I suggest you were a kidnapper?"

Mr. Sayad: "No, no. Because of my language, people always treat me like a terrorist."

The Court: "Have I treated you like a terrorist?"

Mr. Sayad: "No, you treat me nothing but the best. I appreciate that. I really do."

The Court: "In our court, we do our best to treat everyone equally and with respect."

The foregoing colloquy highlights the court's need for sensitivity when interacting with individuals who perceive themselves to be members of targeted religious or ethnic groups. In particular, a judge must not inadvertently reward a parent's goal of culturally alienating a child from the other parent. Most important, the court itself must work hard to ensure that there is no appearance of personal hostility or cultural bias emanating from the bench.

Framing the Discussion on Culture

To begin a discussion on cultural competence, it is important to establish definitional clarity. Culture is "a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential."[2] Language, food, customs, religion, clothing and other outward expressions make up a group's culture, in addition to unspoken values and beliefs. There are four key components involved in cultural competence: (1) awareness of one's own cultural worldview; (2) attitude towards cultural differences; (3) knowledge of different cultural practices and worldviews; and (4) cross-cultural communication.

Take, for instance, a divorce and child custody case involving an Indian couple who appeared in the Fulton County Superior Court Family Division. The facts exemplify how a judge's lack of knowledge of certain cultural practices could result in an erroneous conclusion. In this case, the husband testified that his wife was hysterical, claiming that she worshiped blocks of blood and practices voodoo. Casting commonplace Hindu practices in a seemingly negative light was the husband's tactic to persuade the court that his wife was emotionally unstable and unfit to parent the child. It would, however, be a grave error to rely on him as the authority on the significance of the alleged religious practices of his wife. We must be aware of our own cultural assumptions and stereotypes, and avoid letting these beliefs influence our judgment about others. Additionally, we must educate ourselves about others' cultural differences and

practices when they surface in cases in order to maximize our preparedness for assessing testimony and facilitating communication. Indeed, this situation shows how cultural competence can be pertinent in rendering fair decisions in the court.

With the changing faces of cities, communities and courtrooms all over the country, we must recognize and strive towards a greater depth of perspective. The Atlanta metropolitan region,[3] for example, has witnessed remarkable changes in its social demographics over the last several years, which directly illustrate this necessary shift in perspective. According to the 2000 census, approximately 11.7 percent of the Atlanta population is foreign-born, with the largest communities hailing (in descending order) from Mexico, India, Vietnam, Korea, China, Jamaica, Colombia, Nigeria, Guatemala and El Salvador.[4] As a result of this growing diversity, courthouses throughout Georgia may find that they are not as user-friendly as they need to be. Specifically, there is a lack of community education about court processes; language barriers exist for many court users; and divergent religious customs on occasion conflict with court protocol.

Lack of Community Education About Court Processes

Many foreign-born litigants, particularly non-English speakers, have limited access to information about our court system. In many foreign countries, the rule of law and the court systems are more closely associated with corruption than with fairness and justice. Thus, diverse litigants might regard seeking legal relief as futile, particularly if they believe that persons without financial means will not have influence with the judge.[5] Further, if such individuals do decide to seek legal redress, residual feelings of distrust of the court system can lead parties to falter in providing information in advance, frustrating the goals of discovery and due process.

The goal should be to cultivate greater confidence in our legal system. Targeting certain underserved groups through community outreach by judges and court personnel in order to provide direct communication about court rules, procedures and available resources is the most effective approach to educating and preparing these persons for navigating [the] halls of justice.

Language Barriers

Perhaps some of the greatest handicaps for foreign and minority litigants are the language barriers that they often face in attempting to communicate with court personnel and during a court proceeding. We must practice patience, offer a discerning ear and keep an open mind while interacting with those who have limited English proficiency.

Bilingual Documents/Signs

There are also concrete measures that a court can implement to facilitate greater access for non-English speakers. In many states, , , , the international diversity of our communities necessitates the expansion of bilingual personnel and resources in the court. Bilingual directional signs are underutilized in many of our courthouses even though such tools are critical navigational aids for non-English speakers. Moreover, bilingual written materials and forms are not helpful if the persons for whom they are intended cannot find them. Making one's way through a courthouse is difficult enough for the average English-speaking person. The added hurdle of language difficulties makes the process of entering the courthouse burdensome and frightening for those who are non-English speakers. Thus, it is important to consider how much more daunting communicating is for someone whose cultural background or nationality is foreign to the court personnel encountered in the search for justice.

To address this issue of community education, the Superior Court of Fulton County has implemented the Court Ambassador Academy. This program trains citizens (of all ethnic backgrounds and ages) interested in volunteering in the court to act as ambassadors and liaisons to their own communities and throughout the courthouse. These volunteers speak a variety of difference languages and have been successful in raising awareness about the county judicial system and its processes.

Certified Court Interpreters

Additionally, the value of having qualified interpreters in the courtroom cannot be overstated. For court interpreters, bilingualism is not sufficient. Many litigants attempt to use family and friends as interpreters for financial reasons, but an interpreter must be certified or, in certain instances, court-registered. Certified interpreters must undergo training and pass examinations that equip them with the skills to "transfer all of the meaning heard from the source language into a target language [without] … editing, summarizing, adding meaning, or omitting," in just a few seconds.[6]

It is a common misconception that the court is only required to provide interpreters in criminal cases, yet according to the Supreme Court of Georgia's Uniform Rule for Interpreter

Programs, all non-English speakers must be provided with various resources to secure an appropriate interpreter. If the litigant presents a valid pauper's affidavit, the court is required to provide an interpreter at no cost as long as there is a bona fide need.[7] To be sure, a judicial decision based on an evidentiary hearing involving a non-English speaker that is conducted without a certified or court-registered interpreter is not only subject to legal challenges, it also compromises our deeply rooted principle of providing equal access and fairness to all who appear before us.

Conflicts Between Religious Practices and Court Protocol

Although the American legal system was established based on Judeo-Christian values, customs and traditions, with the increasing diversity of religions practiced in this country, we must acknowledge that our Constitution protects an individual's religious freedom. Therefore, a rigid adherence to certain historical practices makes a collision of cultures inevitable. At present, various individuals whose traditions espouse divergent practices are increasingly challenged on an explicit level.

To illustrate, consider the tradition among Muslim women of wearing a headscarf or *hijab*. In December 2008, a woman in Douglasville was held in contempt and arrested for refusal to remove her headscarf in the court. In this instance, the tradition of prohibiting head coverings in the courtroom directly conflicted with this woman's religious obligations and beliefs, and the judicial decision to arrest her created a huge uproar from the Muslim community and advocates, such as the Anti-Defamation League, the Council on American-Islamic Relations and the American Civil Liberties Union. As a result of the press and attention surrounding this incident, in July 2009, the Judicial Council of Georgia made a determination to permit religious attire such as the *hijab* in courtrooms.[8]

The personal decision to appear in court wearing other religious clothing items such as the *burka* (an outer cloth worn in the Islamic tradition, which covers the entire body with the exception of the eyes), however, fuels debate among judges and lawyers as to whether a witness's choice of clothing might violate a party's right to confrontation or whether a trier of fact can assess the credibility of a witness is she is entirely cloaked. While it remains to be determined how these legal issues will be resolved, at present each judge has a responsibility to determine how best to run his or her courtroom in a fair and unbiased manner. In doing so, the judge should proceed thoughtfully in light of the considerations raised in this article.

Serving as a Gatekeeper to Minimize Cultural Bias and Achieve Fairness

An important part of combating communication challenges is identifying cultural biases and stereotypes, which might be sources of perceived hostility. Often, these biases and assumptions exist at unconscious levels, but they still affect our everyday verbal and non-verbal communication in the workplace. Interestingly, 91 percent of minority attorneys believe that racial bias exists, whereas 54 percent of non-minority attorneys do not believe that such a problem exists.[9] Behavioral psychologists will attest to the power of cultural stereotypes on the human mind – stereotypes that are fueled and reinforced by long-held beliefs, messages from the media and selective information in our environments.

Awareness and acknowledgement of others' cultural differences as well as our own assumptions are the critical components in ensuring competence and impartiality while interacting with diverse litigants. Jack Glaser, a professor at the Goldman School of Public Policy, has created several strategies for maximizing objectivity.[10]

- Engage in an intentional thought process
- Use specific communication strategies
- Be conscious of diversity and the differences in people
- Increase accountability
- Allow ample time for judgments
- Confront stereotypes
- Renew the drive to be fair and accurate.

For judges, court officials and the legal community at large, following these steps will collectively contribute to making the experience of foreign-born and diverse litigants in the court equitable. And while becoming aware of and countering the latent biases is not an easy task, the evolving nature of our global community demands that our courtrooms become more primed to cultural cues through education and communication.

My tenure as a judge presiding in the Family Division of the Superior Court of Fulton County has provided me with first-hand experience in adjudicating cases where a battle of culture has been at the forefront, and my perspective as an American judge has been enriched by exposure to and

(Continued on page 44)

From the Bench

(Continued from page 41)

education about cultures different from my own. Regardless of the cultural background of the parties before me, however, my judicial responsibility remains absolute – to listen to and understand both sides of a case, apply the law and make a fair decision in the end.

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Endnotes

1 Name and country of origin have been changed to protect the litigant's privacy.

2 Canadian Commission for UNESCO, *A Working Definition of "Culture,"* in Cultures 78-83 (1977).

3 The Atlanta region includes 10 counties: Cherokee, Cobb, Gwinnett, DeKalb, Fulton, Douglas, Fayette, Clayton, Henry and Rockdale counties. Statistics available at http://www.atlantaregional.com/html/196.aspx.

4 *2000 Census: Foreign Born by Place of Birth*, available at http://www.stlantaregional.com/html/196.aspx. Other large foreign-born populations include individuals from the United Kingdom, Canada and Germany.

5 Interview with Aparna Bhattacharyya, Director of Raksha, Inc. (Aug. 26, 2009).

6 Roxana Cardenas, "*You Don't Have to Hear, Just Interpret*!" *How Ethnocentrism in the California Courts Impedes Equal Access to the Courts for Spanish Speakers*, 38 Ct. Rev. 24-31 (2001).

7 Ga. Sup. Ct. R. App. A, Uniform Rule for Interpreter Programs.

8 Jim Galloway, *Muslim Headscarves to be Allowed in Georgia Courtrooms*, Atlanta J.-Const., July 24, 2009.

9 Ga. Sup. Ct. Comm'n, *Report on Racial and Ethnic Bias in the Court System* (1995), *available at* http://www.ncsconline.org/Projects_Initiatives/REFI/GA1REB.htm#Culture.

10 Jack Glaser, *The Social Psychology of Intergroup Bias* (2007), *available at* http://calswec.berkeley,edu/CalSWEC/2007_FE_SocialPscyhPrejudice.pdf.

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Tab 7

Beginning to Form a Judicial Philosophy

Judicial Philosophy

Judicial Philosophy Discussion Questions

1. What is your job? What does it mean to do a good job in your position?

2. How would do define your judicial philosophy? How has that philosophy affected the way you do (or expect to do) your work?

3. What has been (or is likely to be) the biggest challenge to your using that philosophy in practice?

4. If you are already on the bench, what has been most surprising about your work as judge? Most inspiring? Most disappointing?

Practical Tips for New Judges Making the Transition to the Bench

By Judge Douglas S. Lavine

Hon. Douglas S. Lavine was appointed to the trial bench by Connecticut Governor Lowell P. Weicker Jr. in 1993 and to the Connecticut Appellate Court in 2006 by Governor M. Jodi Rell. The views expressed in this article are strictly his own. He can be reached at Douglas.Lavine@connapp.jud.ct.gov.

Congratulations! You have been appointed to the bench. I can assure you that you will find your new job to be enormously gratifying and challenging. You will have a rare opportunity to use your legal and personal skills, honed by the practice of law, to serve the community. I can honestly say that I have enjoyed going to work on all but a few days of the nearly sixteen years I have been on the bench. Almost all of my judge friends feel the same way.

With your new position comes a significant passage. You are beginning something exciting, but you are also ending an important phase of your life. You will be moving out of your previous comfort zone, one in which you may have had a high degree of control over your daily life and significant confidence in your abilities. In your new milieu, it is likely that almost everyone you deal with—other judges, lawyers, court staff—will initially understand the way the system operates better than you. It will take time to adapt to your new surroundings in what one writer has called the "neutral zone"—a time of reorientation to new circumstances and surroundings.[1] Be patient with yourself. In a relatively short period of time, you will emerge, like the proverbial butterfly from the cocoon, relaxed and confident, ready to fly.

Everyone will call you "Your Honor," doors will be held open, and lawyers will laugh at your jokes—even when they are not funny. *Especially* when they are not funny. You will carry an elevated status in your community, particularly in the legal world you inhabit. People will view you differently, and you will view yourself differently. You will be held to higher, more exacting standards. Everyone will stand when you enter the courtroom. I have a colleague who recalled the first time she headed out onto the bench. Everyone stood. She reflexively turned around, asking herself, "Whom are they standing for?" From now on, they will be standing for *you.* This is heady stuff and can result in a severe attack of early onset robitis, a dreaded disease sometimes afflicting new judges which I will discuss later.

It takes some time to adjust. Presumably, mentors, colleagues, and others you trust will offer advice. Like everyone who came before you, you will need to find your own way. No matter the advice you receive from other judges, every decision you make will be your own. It will become part of your judicial DNA. I wish you the best in ruling on the myriad issues you will confront over the years, issues often critical in the lives of the people who come before you and in the communities in which you live.

I do not claim to have any sage advice when it comes to the art of judging. But in more than fifteen years on the bench—thirteen as a trial judge, and almost three on the Connecticut Appellate Court—I have learned a few things about how to deal with recurring issues, some on the bench and many off, that you are sure to encounter. I claim to speak for no one but myself and underscore that the points raised here are based on my own experiences and observations, and sometimes, mistakes. As a judicial colleague, I hope these nuts-and-bolts suggestions will help you successfully cope with some of the mundane issues that you will face in your new role.

Dealing with Friends

Some people will take your new status in stride. But others, including people you have known your whole life, may act differently. Some acquaintances might be a bit standoffish or appear to be slightly intimidated. Others will tease you about having all the answers. Dealing with lawyer friends and colleagues—people you used to practice with or against—will present special challenges, especially when faced with issues of recusal or disqualification. It is important to be familiar with professional requirements relating to these issues. I recommend speaking to experienced judges with a good sense of local practices and mores before making recusal or disqualification decisions. Of course, judges have a duty *not* to remove themselves from a case merely because a motion has been made. But experience teaches that even if litigants lose their cases, they can accept their disappointment if they think they have had a fair hearing. Appearances matter. Obviously every case is different, but be very careful about remaining in a case if your fairness or objectivity can be reasonably questioned. You must be the guardian of your own reputation for fairness and impartiality.

The Line Between Public and Private Behavior

In a nutshell, it is best, under most circumstances, to act as if this line no longer exists. What I mean is this: whatever you say and do, anywhere and to anyone, can be grist for the mill if it reflects upon your fitness to dispense justice. I suggest the following approach: except, perhaps, when dealing with immediate family and friends, imagine that what you say or do will appear in your local newspaper. Much as you may try, you really cannot be a judge just during the hours you are at court, or in your chambers. You are a judge *all the time.* Let me give a few hypotheticals. (1) Every year, prior to your appointment, you have hosted a big party at which alcohol is served. In the past, if someone was stopped on the way home for a DUI, it might have been a cause for concern. Now, it could mushroom into a major career blemish. (2) In the past, you sat and smiled uncomfortably when someone told an inappropriate joke. Now, doing or saying nothing might be understood by oth-

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ers to be an endorsement of the offensive attitudes expressed by the teller of the joke. (3) In the past, when someone was tailgating at high speeds you might have been tempted to slow down, or yell at them, or gesticulate. Now, taking any of these actions could lead to an allegation that you exhibited "road rage" and lack appropriate judicial temperament. (4) In the past, you might talk freely in an elevator no matter who was in it. Now, any words you utter could have an impact on a case or a juror or could be repeated in another courtroom.

The simple truth is this: the line between private and public behavior has become blurred beyond recognition now that you are a judge. As a judge, you are a public figure. Your private conduct, therefore, is of interest to the public—and the press. Therefore, you must conduct yourself with the utmost care in private matters as well as public.

Requests for Legal Advice

Here is the usual scenario. You are at a party when the friend of a friend approaches you, introduces himself, and states he knows you are a judge. He makes small talk. He says that he knows you are not allowed to give legal advice. Actually, he tells you, he is not seeking legal advice, but he has just one question, and maybe you can assist. It seems that his brother-in-law has been kicked out of the house by his spouse and he wants to go in to get his clothes and other personal belongings. Any problem? Or "a friend's son" got caught in the school bathroom smoking marijuana and was manhandled by the school's personnel. Can't they sue the school? Or his elderly mother got this speeding ticket and . . . . You get the idea. As a lawyer, you have undoubtedly dealt with such questions throughout the years. But as a judge, it becomes more important still that you absolutely, positively say or do nothing that could be construed—or misconstrued—as giving legal advice. First of all, judges are prohibited from giving such advice. Secondly, it is not uncommon for laypeople to misunderstand or misinterpret legal concepts—or to hear what they want to hear. So even if you decide to be polite and give some seemingly innocuous counsel with a disclaimer, the disclaimer is likely to be ignored. The last thing you want to learn is that Joe Smith's friend went into criminal court and told the judge that he went into the house to retrieve his belongings because "Judge Jones told me I could." My advice? Tell the simple truth. Explain that you would like to be of assistance but that you are strictly prohibited, for professional reasons, from giving legal advice. And never, ever succumb to the temptation to do so.

Mentioning that You Are a Judge

Years ago, I worked as an assistant U.S. attorney. Often, I would be sitting next to someone on an airplane and the conversation would be relaxed and friendly until I mentioned that I was a prosecutor. Then everything stopped. I always assumed that people thought that I would initiate a tax investigation if they said the wrong thing. In your new role, people will react differently to you when they learn you are a judge. Some people will want to treat you more favorably because of your position. My advice is to resist, except in social situations where the subject arises naturally, the temptation to tell people that you are a judge unless you are asked. What that means is this. (1) If you are on a waiting list at a local restaurant, do not mention that you are a judge in the hope of getting seated before your time, and don't permit your spouse, significant other, or partner to do so either. (2) If you are pulled over for speeding, do not disclose that you are a judge in the hope of gaining favored treatment. And do not put your judicial credentials next to your driver's license so the officer will inevitably discover that you are a judge. (3) If your spouse has a dispute with the local mechanic because he charged more than he said he would, do not make that angry phone call claiming that, as a judge, you know what he is doing is unlawful, a violation of consumer protection laws, that you decided a case just like this, etc. (4) If your child is arrested for possession of marijuana, do not try to use your status to obtain preferential treatment for him or her. And so on. The bottom line is that the inappropriate use of your position to obtain special treatment is an abuse of power.

Charities

Some people will try to use your presence at an event or your name on a letterhead to raise funds. No matter how worthy the charity or cause, this should be resisted. Check relevant ethical rules, guidelines, and decisions to determine to what extent you can be involved in charitable events, including those with which you have had a long-time involvement.

Political Activities

Different considerations may apply, of course, in states in which judges are elected. But for appointed judges in places like Connecticut, the rule is simple. Political activity is strictly verboten. Avoid rallies, fund-raisers, making contributions, bumper stickers, and signs or posters on your lawn. If your spouse is involved in politics, steer clear of situations in which it appears that you yourself are engaging in political conduct.

Email

It is probable that at home you have received unsolicited email that is offensive to you. Be careful not to allow any such unsolicited material to be forwarded to your work computer. When writing email messages at work, avoid language that would embarrass you if printed in the local newspaper. Tell friends and colleagues *not* to send you jokes, articles, and pictures at work. When online at work, avoid sites or searches that could call up offensive material. Use your home computer to communicate with friends to avoid contamination of your work computer.

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Work Interactions

All of your contacts with everyone in the work setting should be polite, professional, and courteous. You are a role model and should set the appropriate tone. This includes lawyers, secretaries, marshals, probation officers, the cleaning crew, family relations officers, stenographers, court reporters, members of the public, foreign visitors, school children on a class trip—virtually everyone. Court systems are huge echo chambers. Everything you say and do is grist for the mill. Rumors and anecdotes fly from court to court. If you are rude or inconsiderate, that will be known to everyone quickly. Jokes or comments that might have been appropriate in your past life, when talking to longtime associates or employees, are better left unsaid in your new role.

Discussing Cases or Opinions in Public

The scenario is a familiar one. You are out to lunch with judge friends and the discussion turns to a trial you are presiding over. You offer a few tart opinions on the performance of a lawyer or the merits of the case. Oops! You didn't notice, but in the next booth is the very lawyer you have been discussing, or the plaintiff, or a juror. The prospect of a mistrial in your first trial now dangles before you. Be very, very discreet when discussing legal matters, particularly a case, with a colleague. Talking about cases or decisions in a public setting—a restaurant, a hallway, an elevator—frequently invites disaster. Similarly, do not leave files, drafts of opinions, or anything else relating to a case lying around—in a car, at a restaurant, or anywhere.

Ruling Before You Are Ready

Your job is now to analyze arguments and make decisions. In a variety of settings, the problems requiring a decision will come at you very quickly. Nonetheless, my advice is to never rule unless you are comfortable with what you are doing. It is often said that lawyers prefer a timely decision, any decision, even if it is at odds with their positions, to being forced to wait. And there will be times when numerous factors—a heavy docket, a crowded court, the presence of people who have come from a long distance to attend a proceeding—will militate toward just ruling and moving on. I am *not* counseling timidity or indecision. But if that little internal voice that sometime speaks to you tells you that you are not ready to rule, listen to it. Take a recess. Hear more argument and think it over. Seek out advice from a senior colleague. Order additional briefs. Or just sleep on it. Very few decisions are so urgent that they cannot wait a few more hours or days.

Expressions of Personal Opinions on the Bench

During my first judicial assignment, a crusty veteran gave me two bits of advice. First, he said, always stop in the bathroom before going out onto the bench. Second, KYBMS—Keep Your Big Mouth Shut. I leave to you whether you choose to follow his first bit of advice. But over the years I have come to appreciate his blunt advice about keeping personal comments and observations to an absolute minimum. Pleasantries are okay. Occasional conversation can be alright. But always remember that we are *not* being paid to express our personal or political views on the matters of the day or share our thoughts on the pennant race, the state of the economy, or anything else. Nor are we a sort of master of ceremonies in a robe, presiding over an entertainment event. Except for court personnel, lawyers and the like, the people in the courtroom almost always do not want to be there. They are a captive audience. It is, frankly, somewhat egocentric to think otherwise and an abuse of your authority to force people to listen to opinions they would just as soon not hear.

Humor on the Bench or in Written Opinions

Off the bench, a lively and irreverent sense of humor can be charming. I used to think I was funny until my now-twenty-two-year-old daughter somewhere back in the eighth grade or so stopped laughing at my jokes and just sighed. But on the bench, or in written opinions, joke-telling runs the risk of detracting from the solemnity of the proceedings, being boorish, and veering off into abusiveness. A joke—particularly at someone's expense—may earn you snickers from some observers, but what seems funny to you will be deeply offensive to someone else. Criminal defendants, litigants in a divorce, plaintiffs in a malpractice case, and others forced into court, see nothing at all humorous about their situation. Never forget that for most people, a court case represents a traumatic event and frequently involves matters of the utmost importance in their lives. Even when you are acting with the best of intentions or trying to lessen the tension in the courtroom, attempts at humor are almost always likely to be misunderstood. My advice? Avoid the laugh lines; think it, but don't say it. The same applies to written opinions. Jokes, or opinions in verse, may seem clever when written, but they are not likely to seem funny to the people on the receiving end whose cases you are deciding.

Treating Everyone with Courtesy and Respect

You should strive to treat everyone—underline *everyone*—with patience, courtesy, and respect. This includes the corporation president and the convicted felon, the elderly alcoholic and the star athlete, the pro se litigant and the top flight lawyer. You speak for the community, so at times, you will be required to make harsh decisions—particularly when sentencing defendants convicted of serious crimes. But even as you voice the community's concerns, there is never a reason to treat any-

one with disrespect or deprive a person of inherent human dignity or make him or her the butt of jokes or derogatory remarks. Your job is to set the appropriate tone of dignity and fairness in the courtroom and to apply the rules fairly to everyone.

Dealing with the Media

How do you deal with the media? With extreme care. This is particularly the case if you receive a call asking you to comment on a pending matter. In most, if not all, jurisdictions, judges are prohibited from commenting on a pending case. In many jurisdictions, the judicial branch will have designated a person to handle calls and manage press relations. If you are uncomfortable returning reporters' calls, you can delegate that job to someone else. However, as a former reporter who covered legal matters, I can attest to the fact that often reporters are working under tight deadlines. Therefore, even if you cannot or do not wish to comment, the courteous thing to do is to return the call personally or to direct someone else to do it so that the reporter is informed that you cannot, or will not, comment.

Robitis

We turn now to the dreaded disease, robitis. Robitis is defined as a condition that befalls a judge when he or she dons a robe which causes the judge to assume a self-important, arrogant attitude. In your years in practice, you have undoubtedly practiced before judges with this dreaded affliction. Robitis can be fatal to a judge's career. Friends and colleagues will probably be reticent to tell you if you have come down with it. Figure out a way to have someone—perhaps a mentor or more experienced colleague who you respect—close the door and tell you if you are showing symptoms of the disease. Comments from lawyers and jurors, if you have access to them, can be helpful. If you see a recurring theme emerging in these comments, resist the human urge to resent them and ignore them. Also try to step outside of yourself—mentally—on occasion, look dispassionately down at your own behavior, and ask yourself if you like what you see. Your work is important; take it seriously. Try not to take yourself too seriously. A touch of humility goes a long way. So does a willingness to acknowledge that you have made a mistake or misunderstood an argument or would like to be educated on a point of law.

Ethical Concerns

You must be the guardian of your own integrity and reputation. Friends and family may ask you to do things not understanding that a different set of rules applies to you. My wife still makes fun of me when we are walking our dogs because I refuse to walk over a small patch of waterfront property near our home that has a "No Trespassing" sign posted. Explain to your family in emphatic terms that you are now living under a set of rules that is different from other people's and that you need to be scrupulous in ways that others may find excessive. Periodically review the Code of Judicial Conduct. When in doubt about the propriety of conduct, check with a senior colleague or a designated person in your judicial branch. Keep your ethical antennae up. Never do anything if you have qualms about its propriety.

A Final Comment

Again, congratulations to you. I guarantee that you will love being a judge. It is an honor and a privilege to be appointed or elected a judge. It is also a great responsibility. I wish you the best. I hope these suggestions are helpful to you as begin this exciting passage.

Endnote

1. WILLIAM BRIDGES, TRANSITIONS: MAKING SENSE OF LIFE'S CHANGES (1980).

TEN COMMANDMENTS FOR THE NEW JUDGE*

by
Edward J. Devitt

Chief Judge, United States District Court
for the District of Minnesota

I. Be kind

If we judges could possess but one attribute, it should be a kind and understanding heart. The bench is no place for cruel or callous people regardless of their other qualities and abilities. There is no burden more onerous than imposing sentence in criminal cases. Would then that the judge had the wisdom of Solomon. But absent that, and possessing plenary and awesome power, the judge can thank God for a kindly heart. An understanding heart was the gift of God asked by the ancient king, and it is that gift above all others for which a judge should pray.

II. Be patient

Patience is one of the cardinal virtues, and it should be one of the most important commandments for the judge. Viscount Kilmuir of Creich, a former lord chancellor of Great Britain, once remarked: "There is much to be said for the view that a kindly and patient man who is not a profound lawyer will make a far better judge . . . than an ill-tempered genius." One of my associates asserts that there are but three fundamental requisites for a good judge. First, he should have patience; second, he should have patience; and third, he should have patience.

We must constantly keep in mind the marked displeasure we felt as practicing lawyers for the judge who would not hear us out. It may well be a waste of time to listen to extensive arguments on a point of law on which we have already made up our mind. But judges owe it to lawyers to let them make their points. It may well be that they can change our minds. At least they are entitled to try.

Do you recall the irritation you felt toward the judge who "stuck his nose" into your lawsuit? How we all looked askance when he took over the questioning of our witnesses and led them down unwelcome paths, prematurely elicited answers to key questions, and completely disrupted our well-laid plans for the systematic presentation of our case? Minding our own business and permitting lawyers to mind theirs is an essential corollary of patience.

The judge should be particularly patient with the young lawyers who come to court for the first time. The reception we accord them will make a lasting impression, good or bad. We want it to be good.

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III. Be dignified

I don't mean that you must go around with nose on high putting on airs; or that, on assumption of office, you should change your whole manner of life and circle of friends; or that, with monk-like subjection, you should withdraw from the world. I only mean that you must possess an appreciation of the great prestige of the judicial office and of the respect accorded it and its occupant by the American public.

"To the people of his jurisdiction, the judge is the personal embodiment of our American ideal of justice," wrote Arch M. Cantrall, former chief counsel of the Internal Revenue Service. He went on: "People generally, and lawyers as well, want to look up to their judges. They want to admire and respect him for his ability as a judge and for the way he runs his court. The ideal of justice seems to be innate in every American, and part of his nature is to want to look up to, and respect, his court and his judge."

Daniel Webster is quoted as saying that "there is no character on earth more elevated and pure than that of a learned and upright judge and . . . he exerts an influence like the dews of heaven falling without observation."

So long as they know the public's regard for the judicial office, conscientious judges will conduct themselves fittingly.

IV. Don't take yourself too seriously

The transition from bar to bench is a big one, and making the change with equilibrium is not always the easiest task. We must keep our heads about us. Senior Circuit Judge Harold R. Medina writes: "After all is said and done, we cannot deny the fact that a judge is almost of necessity surrounded by people who keep telling him what a wonderful fellow he is. And if he once begins to believe it, he is a lost soul."

Some judges may become so impressed with their importance that they forget the practical facts of their judicial birth. It is a fact that most federal judges are appointed through the influence or approval of the United States senators or other political officials, and many state judges are elected under party labels. This is not to detract from their qualifications, especially in recent years when the absence of objections from the American Bar Association is almost a prerequisite to federal appointment. In practical effect, judicial appointments, federal and state, must now be acceptable to the organized bar.

This is a great step forward, and the persistent work of the Federal Judiciary Committee of the American Bar Association is largely responsible for this meritorious state of affairs in the federal courts. I doubt if federal judges ever will be appointed solely on the basis of merit. That would be the millenium. So long as the United States

Senate has the constitutionally granted authority to advise and consent with respect to judicial appointments, it is unlikely that some politics will not be involved in most of them. But as long as we get qualified Democrats during a Democratic administration and qualified Republicans during a Republican administration we are doing about as well as can be expected.

The truth remains, however, that most judges reach office through politics, and that, I emphasize, is not a sinful thing at all. The point is that it is distinctly unbecoming to claim later that you were chosen solely because of your outstanding ability as a lawyer and leader of the bar, and that you were reluctantly persuaded to give up your lucrative practice and were practically dragged up to the bench. That would be taking yourself too seriously.

The greatest deterrent to taking yourself too seriously in any respect is a wise and observing spouse who periodically remarks, "Don't get so judgey."

V. A lazy judge is a poor one

The road to success on the bench is the same as in any other field of human endeavor. It must be characterized by hard work. Some people, and many lawyers, think that a judgeship is a sinecure--a form of retirement for the hard-working practitioner. That is not the case.

The truth is that you must learn to be a judge. It takes study and time. Things are completely different from the other side of the bench. In this country we are coming to appreciate that which legal leaders of the civil law countries have recognized for a long time--that lawyers should be especially trained for the bench. That is why it is important that new judges be relatively young--preferably in their 40s, I should say. Then they are young enough to learn the art of judging and, after learning it, are able to contribute a substantial period of experienced service before reaching normal retirement age.

VI. Don't fear reversal

If you are appointed to the trial bench, the most shocking experience that awaits you is the opening of your morning mail to find the slip opinion of the appellate court in one of your cases, at the bottom of which you see the ominous word, "Reversed." First you are shocked, later dismayed, then disappointed. Surely those judges could not have made such a mistake!

But after you slowly read the opinion of your superiors, containing logic and good reasoning, together with a tactfully included reference to the "learned trial judge's" proper handling of some aspects of the whole case, the experience loses its shock. And when it has happened a few times, you even come to the honest realization that in most instances the appellate court is justified in reversing you.

Reversal by a superior court now and then keeps us on our toes. It teaches us to be careful and industrious; it curbs our impetuosity and nurtures judicial-mindedness. Every so often, however, even these august appellate judges make mistakes. Thinking they possess a superior wisdom, rather than just a superior commission, they sometimes exceed their error-finding responsibilities and substitute their judgment and findings for those of the trial court. The law says they cannot do this. But they do! We should view their folly with tolerance. Really, there is nothing else we can do.

Here is a word of advice about reversals. Do not keep track of them. The judge who charts a batting average is likely to become hesitant and timid. Record keeping may make you too cautious--so sensitive to committing error that it deprives you of the intellectual courage that should be the hallmark of a good trial judge.

VII. There are no unimportant cases

This is another way of saying that you must give the same conscientious attention to every matter that comes before you. We may think cases can be classed as important and unimportant, but litigants do not feel that way. Their case is very important to them, and it must be to us.

We must not let ennui overcome us. The work of judges is too important and the results of their action too far reaching. "The judge who becomes accustomed to rendering justice is like the priest who becomes accustomed to saying mass," according to Piero Calamandrei, the late Italian lawyer and scholar, whose writings have gained such an appreciative American audience in recent years. He goes on to say:

"Fortunate indeed is that country priest who, approaching the altar with senile step, feels the same sacred turbulation in his breast which he felt as a young priest at his first mass. And happy is that magistrate who even unto the day of his retirement experiences the same religious exaltation in rendering judgment which made him tremble 50 years before, when as a young praetor he handed down his first decision."

I have come to have a great regard for the importance of this commandment after having observed one of my judicial colleagues for many years. He was a veteran of more than 40 years on the federal bench, and he gave the same meticulous care and attention to every case at the end of that time as he did when he first ascended the bench. I need not add that he earned and possessed the highest judicial reputation.

VIII. Be prompt

Perfection is a laudable aspiration, but for a trial judge it is not necessarily a virtue if it causes procrastination and undue delay. We

all want to do the best we can and reach the right decision in every case, but trial judges also must learn to make up their minds and decide issues with reasonable promptness. Indecisiveness is abhorrent to judicial responsibility.

This is not to advocate hasty decisions but to suggest that judges be wary of taking matters under advisement and letting them sit indefinitely. A good judge will read the briefs, listen to the arguments, independently research the issues, thoughtfully consider the relative merits and equities--then decide the case. Don't be hesitant about making bench rulings in appropriate cases. And in drafting opinions don't think it necessary to write a law review type of exposition on each issue presented. Brevity is a commendable brother virtue of promptness.

With the present backlogs and large volume of cases in many state and federal courts, the virtue of promptness is becoming increasingly important. A judge today must also be a good administrator and learn to manage his docket to effect the prompt trial of cases. Chief Justice Burger recently observed, "Ideals and concepts alone are relatively little use without the 'wheels' to make delivery--to deliver justice." As a judge, you are at the focal point of the wheel of justice. It is your job to keep the wheel turning, and this calls for prompt trials and prompt decisions.

IX. Common sense

It may be that in the first blush of assuming the duties of a judge you will be so engrossed with conflicting statutes, inconsistent decisions, and all kinds of government rules and regulations, that you will forget all about using one of the principal tools of a good judge. That is common sense. There is no substitute for it, with all respect to the splendid law books and reports. It has been said, "The law is common sense as modified by the legislature."

"A judge will never go far wrong," wrote the now deceased Chief Justice Udall of the Arizona Supreme Court, "if he applies this test: Does my proposed action square with good, common sense?"

You might be able to get by as a judge if you don't know much law, but you just can't make it without common sense.

X. Pray for divine guidance

If you believe in a Supreme Being, you should pray to Him for guidance. Judges need that help more than anybody else.

The Quality of a Judge's Experience

Making the transition from lawyer to judge is not always smooth. Here are some of the pluses and minuses.

By Robert Satter

BREATHES there a lawyer. . .

• Who never to himself has yearned to be free of the hustle of obtaining clients and the hassle of serving them and, on considering the alternative, longed to exchange the telephone jangle of his office for the peaceful atmosphere of a judge's chambers, or

• Who, independent of a desire to escape the frenetic pace and pressure of the practice, has not dreamed of sitting on Olympian heights and exercising the power of ultimate decision rather than suffering the frustration of attempted persuasion, or

• Who, having earned all the money that could reasonably be spent, has not contemplated the more meaningful life objective of working toward the goal of achieving justice.

These lawyers, when their friends become judges, eagerly ask them, "What is it like to be on the bench? Are you really enjoying it?"

After 28 years in active practice, I, who had asked those questions, now found myself a judge trying to answer them. At first my responses were enthusiastic, having realized a lifetime goal and excitingly undertaking a new career. I gradually became aware that a simple answer was not adequate. The judicial experience has turned out to be much more complex than I had initially perceived, and true ambivalences have arisen. I have found there are minuses and pluses. The minuses have had an immediate and sharper emotional impact because I had not anticipated them. The pluses have developed as intellectual and teleological in nature and on balance have a longer lasting satisfaction.

As one who has served as a trial judge in the state courts of Connecticut for four years, let me relate my views and feelings. My length of service permits a description of the nature of the judicial experience—long enough for me to have sensed the heft and texture of the job; short enough not to have succumbed yet to one of the judicial maladies. My views are personal, but not unique. They may dissolve some of the judicial mystique and give you some insight into the mind and heart of the black-robed eminence ruling over the court.

From the judges' point of view, the judicial experience, at least in the beginning, has to be compared with their former positions as lawyers. As they remain on the bench, the job itself influences their perceptions and affects their personalities.

To lawyers the courtroom is a boxing ring. They enter it to fight. They stand shoulder to shoulder with clients or high on the soapboxes of their causes, doing battle. They may in the end meet triumph or disaster, but there is joy in the fray.

Judges who come to the bench after many years of trial experience are surprised to find the courtroom is no longer a bloody arena but a quiet, dignified place. If they ask questions of witnesses, they must take the bite from their voices and the sharpness from their phrasing so as to seem to be inquiring rather than cross-examining. They have to remain, both in fact and in appearance, above and not participants in the battle.

Neutrality requires impartiality. If as lawyers, they had mainly represented plaintiffs in personal injury cases against insurance companies, or had

formerly been prosecutors in the criminal courts, judges must shed both the biases and the mind-bent of their past practices. They have to give up the whole notion of "winning a case" and must be concerned primarily that the game is played according to the rules. This is the initial cultural shock of the judicial experience and for some judges requires almost a physical rephasing of courtroom behavior and point of view.

The lawyer's job is to present a client's case. The judge's duty is to decide according to the law. Here lies the critical distinction between advocate and judge. An advocate's job is to persuade; a judge's duty is to be right.

Lawyers come into court prepared to make any argument that supports their side of the case. They are entitled to be selective and are not expected to be scholarly accurate. Being right may help them to be persuasive, but their immediate task is to convince, and their ultimate purpose is to win.

In contrast, judges determine what the law truly is or should be. They must warily travel the apparently smooth highways mapped by counsels' briefs, carefully negotiate the twisted curves of arguments, pick their way past the bumps and potholes of specious case citations, and come to correct decisions.

In short, advocates deal in arguments, judges in answers. An attorney can justify an argument on the ground that it is up to the judge to decide. While the winning lawyer usually takes the credit for victory and the losing one rarely takes the blame for loss, the judge must always take the final responsibility for decision.

Fulfilling that responsibility requires countless hours of reflection and research. Reflection goes on all the time: while dressing, while driving alone in a car, by letting some time pass and permitting the case to simmer through both the judge's conscious and unconscious mind. Research, at least for a trial judge, must be done in the evenings and on weekends. A judge's job is never done. It consumes both the central and a major portion of his life.

Attorneys and clients work closely together on a common endeavor. Since many cases are a crisis in the life of a client and the lawyer is intersecting at that critical moment, the sensitive attorney becomes involved and deeply cares about the outcome of the case. Few satisfactions in life equal what a lawyer feels on contributing to the well-being of a client—either by averting a threatened harm or gaining just and deserving compensation. Whatever the ultimate result, if the lawyer has made a determined and honest effort, the client is appreciative.

Judges are deprived of that kind of contact and feedback. Their relationship with litigants is ephemeral and must be uninvolved. They must steel themselves to reject any feelings of warmth or hostility toward the parties. They are expected to apply the law impersonally and not let emotional vibrations affect their rational judgments. Social values can play a part in decisions, but individual personalities cannot.

In every case judges are denied a sense of victory. Their satisfaction is derived from reaching sound decisions, and they neither expect nor are given any expression of appreciation.

Detachment gives judges a sterile atmosphere

The judicial duty then is to be detached, objective, and rational. The judicial experience lacks the color, the tone, the vibrancy, and the richness of emotional involvement with people. This results in a sterility and an antiseptic aspect to the working life of judges.

Lawyers work in permanent offices with partners, associates, secretaries, and other assistants. While not always close friends, the office mates are usually congenial and often convivial.

The judge's job is lonely. Everything conspires to isolate judges—not only emotionally but physically and socially. Like quarantined children with the measles who look out the window at friends playing, judges are often a bit wistful.

Although the status of the office may seem attractive, judges soon learn they are imprisoned by it. People keep their distance as a result of their conception of the high position. Of course, judges have contact with people almost all day. But court clerks are deferential and jurors and litigants remote. The lawyers with whom judges deal in their chambers in an effort to settle cases or discuss aspects of a trial are constrained in their congeniality. It is the judge who most often holds lawyers captive after the business at hand is completed, regaling them with war stories of past cases to the point that the uncomfortable lawyers fret to get free and are bored at having heard the tales before.

In Connecticut and many other states, a judge's feeling of isolation is enhanced by a practice of geographical rotation. The purpose is to avoid permanently inflicting on any one community the sentencing pattern, legal judgment, and foibles of a single judge. The price the traveling judge pays is always to be on the move. ("Have gavel, will travel.") A judge's contact with the personnel in each new court is superficial; generally, he has no friends in the area.

A judge frequently goes to lunch by himself. He cannot go with the prosecutor or with the lawyers, lest he give the appearance of partiality. If he is sitting in a county seat or a large city courthouse with a number of other judges, he may lunch with them. But they are not teammates, like the partners in a law firm; they are not chosen friends but accidental colleagues. At the end of a long day in court, the judge leaves the courthouse with his laden briefcase, alone. He has nobody to say good night to.

The sense of isolation also derives from having to give up many former activities. Politics, which one may have loved, must be dropped. Membership on community or social service organization boards becomes unfeasible because most of their meetings are held at times that conflict with the judge's rigid court schedule.

In living this life, a judge's spouse is treasured as the one to whom the judge relates the experiences of the day, the amusing incidents and unexpected twists of a trial, and the difficult dilemmas of sentencing and decision making.

On weekends, friends are important. Judges yearn to socialize, to engage in both light and serious conversation, to be in the company of people they care deeply about. It fulfills their need for fellowship and fortifies them to face the monastic week ahead.

The positive aspects of the judicial experience derive from the challenging tasks judges are called on to do and the significance of doing them well:

- Conducting trials with scrupulous adherence to all the procedural safeguards, express and inherent, in the concept of due process, and, in addition, generating in the courtroom an aroma, a feeling, an atmosphere that justice is being sought.
- Sentencing the convicted so as to achieve the balance between, on the one hand, the interest of society to protect itself by punishing wrongdoers and de-

terring others from committing crimes and, on the other, the concern for the defendant as an individual, entitled to singular consideration and to have his claims placed on the scales and conscientiously weighed.

- Shaping the common law so as to retain the wisdom of the past and to fulfill the pressing demands of the present, always keeping the rules of law in harmony with enlightened common sense.
- Resolving fundamental social problems that arise in the form of constitutional issues and require resolution in order to keep government properly functioning.

These responsibilities are important, and when they are well performed, judges justifiably sense they are making a contribution to society.

Being a judge is more consuming than being a lawyer or a doctor and about equal to being a clergyman. After they ascend the bench, judges never mentally shed their robes. The office becomes a way of life. As a result, it cannot help having an effect on them. Self-examining judges can observe the changes with almost mesmerized chagrin.

The impact of the office varies with each judge. The experience is special and gives rise to the risk of known occupational maladies. Immunization from these afflictions is achieved only by rigorous self-awareness.

The one judicial malady for which there is no known cure is becoming ponderous. Judges learn it is essential to pause for reflection and let their mental computers click through pertinent considerations before deciding. They acquire the habit of thinking before speaking and thinking a lot before coming to conclusions.

During a trial everything judges say is on the record and can be the basis of an appeal. A verbatim transcript is a humbling document. To see in cold print how one talks—the incoherence, fractured syntax, split injunctives, uncompleted sentences—is enough to make one blush. The result is that judges, both on and off the bench, start to space out their words and to speak more s-l-o-w-l-y.

Sitting on the bench for a trial is like being strapped in an astronaut's chair. The sedentary confinement itself contributes to slowing judges down. The necessity to be serious in court affects their sense of humor. As a consequence, judges acquire a heavy quality to their personalities ranging from the solemn to the sonorous. On the scale of the most lively personalities to the least, legislators are first, lawyers second, and judges (all of whom were lawyers and some legislators) a distant third. If the truth were known, judges, as a group, are a leaden lot and the job must make us so.

The necessity to be emotionally uninvolved and detached also takes its toll on judges. A practice of emotional denial diminishes emotional responsiveness. What starts out as a professional discipline ends up as a personality trait. The occupational habit of keeping people at a distance and raising an invisible wall of self-protection causes unnatural stiffness and loss of spontaneity.

On the other hand, the experience of observing from the bench the variety of peoples' woes and tribulations leads to deeper understanding and fuller sympathy. As a result, judges can develop an enriched sense of humanity and a greater quality of humaneness.

Who am I to judge? Where do I get the wisdom?

The power judges have is great. Although decisions are subject to appeal, few cases in fact are appealed. Particularly in sentencing, where judicial discretion is wide, judges are rarely challenged. The exercise of power develops in judges an air of authority. When they start to believe that their concept of justice is absolutely right, they may succumb to the dangerous judicial malady of arrogance.

But the same experience can induce a sense of profound humility. They may constantly ask themselves: Who am I to judge? Where do I get the wisdom? Although they recognize the office fixes the responsibility, they may undertake it with an awareness of their own fallibility. If they do, they are following the example of Learned Hand, who kept under the glass top of his desk the words of Lord Oliver Cromwell uttered to the stubborn Scots before the Battle of Dunbar: "I beseech ye, in the bowels of Christ, think ye that ye may be mistaken."

Role playing is a necessary ingredient of the office. When judges start living their roles offstage, it can induce the malady of pomposity. The first sign is when they allow others to call them judge in informal social gatherings and get a secret satisfaction from it. The affliction is well along when they start referring to themselves as judge. It reaches the acute stage when they begin thinking of themselves as an institution and substituting status for self.

The office, of course, cannot help judges escape the fundamental realities of life—marriage, relationships with children and friends, and a sense of self-worth. On the other hand, attaining the office may be the realization of a lifetime goal that enables them to feel inner contentment and achieve self-fulfillment.

The stresses of the position and the exercise of its powers accentuate deficiencies and strengths. A stupid person may become arbitrary as a judge, a weak one vacillating, and an insecure one tyrannical. By the same token, the judicial experience may enable an intelligent person to become wiser, a strong one more sensitive.

A good person does not necessarily make a good judge because the job requires more than virtue; but a good judge—especially a good trial judge—is usually a good person because the office requires, in addition to temperament and intelligence, compassion and concern.

The day-by-day life of judges is not altogether enjoyable. Lawyers, like blondes, have more fun. The biggest price judges pay is detachment. They may not lose their love for people, but in their working life, they do not live that love; they implement it. The satisfactions of the office are more internal than external, more cerebral than emotional, more teleological than immediate. But when judges gave up being lawyers, they made the conscious choice that they wanted more meaning in their lives. They chose to measure the remainder of their years not by the profitability of a practice but by the worthiness of public service. As judges they have the opportunity to devote all their time and talents to the high mission of trying to administer justice.

Judges, in seeking justice, are like artists—striving for beauty. Artists do not paint beauty; they paint a picture and hope to achieve beauty. Judges do not determine justice; they try and decide cases and hope to achieve justice. The ultimate satisfaction of the judicial experience lies in the constant aspiration. ▲

(Robert Satter is a superior court judge in Connecticut, where he also lectures on the legislative process at the University of Connecticut School of Law.)

Tab 8

Evidence: A Judge's Perspective

Evidence

Evidence Update

New Superior Court Judges School

January 24, 2023

Presented by Bryan Collins

George.B.Collins@nccourts.org

919-369-3632

Expert Testimony in child sex case- Plain error

State v. Clark, 380 N.C. 204 (2022) The defendant was convicted at trial of indecent liberties with a minor. The trial court allowed an expert witness for the State to testify the minor child had been sexually abused, despite a lack of physical evidence. The defendant did not object at the time. The same expert testified about her treatment recommendations for the minor victim, which included that the child have no contact with the defendant, again without objection. The defendant argued that the admission of this evidence was plain error, or alternatively that the record showed ineffective assistance of counsel based on trial counsel's failure to object to the challenged testimony. A majority of the North Carolina Supreme Court reversed and granted a new trial.

An expert may not testify that a child has been sexually abused without physical evidence of sexual abuse, and admission of such testimony is PLAIN ERROR where the case turns on the victim's credibility. See State v. Towe, 366 N.C. 56 (2012). While evidence was presented concerning the victim's behavioral and social changes following the alleged crime (and such evidence may properly be circumstantial evidence of abuse), this did not amount to physical evidence of sexual abuse. The expert testimony here that the child was sexually abused despite a lack of physical evidence was therefore improper vouching for the victim's credibility. Given the lack of physical evidence in the case, this was plain error and required a new trial. The expert's testimony that she recommended the victim to stay away from the defendant improperly identified the defendant as the perpetrator and similarly constituted plain error. While an expert in a child sex case may testify that physical symptoms of a victim are consistent with the victim's report, an expert cannot explicitly or implicitly identify the defendant as

the perpetrator. See State v. Aguallo, 322 N.C. 818 (1988). "[S]ince this case turns on the credibility of the victim, even an implicit statement that the defendant is the one who committed the crime is plain error necessitating a new trial."

Attorney-client privilege- No Prejudicial Error

State v. Graham, 283 N.C. App. 271 (2022)

It is error for the State to cross examine a defendant about a conversation he had with his attorney. Period. In this case, it was found to be not a prejudicial error but don't let that confuse you. We should strive not to commit error.

Residual hearsay- Rule 803 (24)

Motion for Appropriate Relief

State v. Reid, 380 N.C. 646 (2022)

There is a six part test for whether evidence is admissible under Rule 803 (24):

(1) whether proper notice has been given,

(2) whether the hearsay is not specifically covered elsewhere,

(3) whether the statement is trustworthy,

(4) whether the statement is material,

(5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and

(6) whether the interests of justice will be best served by admission.

The correct standard for admissibility in a MAR hearing is whether the evidence is material, competent and relevant in a future trial and not at the MAR hearing itself.

Opening the door

State v. McKoy, 281 N.C. App. 602 (2022)

The issue is whether the State opened the door to texts between the defendant and the victim indicating that the victim carried a gun given a self defense argument in a shooting case. The State had offered evidence from the victim's family that he didn't carry a gun. A majority of the Court of Appeals found no prejudicial error. There is a dissent, so look for a case out of the Supreme Court this year.

Hemphill v. New York, 595 U.S. ___, 142 S.Ct. 681 (2022)

The issue here is whether the defendant opened the door to a third party's plea allocution in which he admitted to possessing a gun to explain why a 9mm cartridge was found in the third party's bedroom. The defendant had put on evidence that the third party was the actual murderer. The court assumed without deciding that the plea allocution was testimonial, and that the defendant had not opened the door to its introduction and granted a new trial. The court stated that it "has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense."

Probation violation hearings

State v. Jones, 382 N.C. 267 (2022)

A probation revocation proceeding is not a criminal trial and defendants are not entitled to full Sixth Amendment rights.

Traditional rules of evidence do not apply.

N.C.G.S. § 15A-1345(e) establishes the procedural requirements for a probation revocation hearing. In particular, N.C.G.S. § 15A-1345(e) provides that

defendant “may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.”

Update To Judge Cobb's Evidence Manuscript

January 2018

I. Rule of Evidence 414- This new rule implements N. C. Gen. Stat. § 8-58.1 which was passed in 2011. It limits the admissibility of medical bills in personal injury actions to those "amounts paid or required to be paid." I find that the parties ordinarily stipulate as to the amount of medical bills in personal injury cases. Both sides have incentives to do so.

A. Practice pointer Number One- The pattern jury instructions give excellent guidance as to how to deal with this issue.

B. Practice pointer Number Two- There is pending litigation as to the facial constitutionality of this Rule. You will see many cases in which there is a facial challenge. Keep in mind that you are to proceed with every issue in the case that can be resolved, including the trial on liability and maybe even the trial on all other damages in the case.

II. Confrontation issues in child abuse cases- Ohio v. Clark (referenced in Judge Cobb's paper) was decided by the U. S. Supreme Court in 2015. It held that a victim's statements to her preschool teacher were not testimonial, even in a state such as Ohio where there is a mandatory reporting requirement of child abuse. Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173 (Jun. 18, 2015). Always see Professor Smith's Criminal Case Compendium for the most current law. https://www.sog.unc.edu/sccc.

III. Authentication of Social Media-In State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016), the Court has a long discussion of the issues concerning the authenticating of web pages. The short answer is that circumstantial evidence will support a trial court's ruling that a web page is authentic. The long answer is that this issue is complicated and evolving and you need to find out ahead of time whether a party is offering social media and whether anyone objects, so you can be ready to rule when the time comes.

IV. Expert opinion in child sex cases- This is a hot topic. State v. Watts, ___ N.C. App. ___, 783 S.E.2d 266 (Apr. 5, 2016) temp. stay granted, ___ N.C. ___, 783 S.E.2d 747 (Apr 13 2016), contains a good discussion of some of the issues. The crux of the issue is whether state's experts are "vouching" for the credibility of the child victim and/or expressing an opinion about whether the child was sexually assaulted. The analysis is very fact specific.

ORIENTATION FOR NEW SUPERIOR COURT JUDGES
School of Government, Chapel Hill, NC
January 22-26, 2018

EVIDENCE: A JUDGE'S PERSPECTIVE[1]

Presented by
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Superior Court Judge
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Materials Prepared by
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[1] Primary resources: *Brandis & Broun on North Carolina Evidence*, Sixth Edition, by Kenneth S. Broun (2004); *North Carolina Evidentiary Foundations*, Second Edition, by Mostellar, Beskind, Eagles, Ross, and Imwinkelreid (2006); *North Carolina Evidence 2010 Courtroom Manual*, by Blakey, Loven, and Weissenberger (2010); and *North Carolina Superior Court Judges' Benchbook*, UNC School of Government (2014).

I. WHEN DO THE EVIDENCE RULES APPLY?

Rule 101. Scope. These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101.

Rule 1101. Applicability of rules.

(a) Proceedings generally. – Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.

(b) Rules inapplicable. – The rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary Questions of Fact. – The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a)

(2) Grand Jury. - Proceedings before grand juries.

(3) Miscellaneous Proceedings. – Proceedings for extradition or rendition; first appearances before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. – Contempt proceedings in which the court is authorized by law to act summarily.

What's the evidence rule that tells us when the evidence rules apply?[2] Rule 101 says Rule 1101 controls.

Not many people have walk around knowledge of exactly when the rules apply. But it came up recently in a 2012 Court of Appeals case, *State v. Foster*.[3] In *Foster*, the Defendant argued that the prosecutor's trial outline constituted inadmissible hearsay and that the trial court erred in using it as a basis for its ruling denying his motion for DNA testing. The State, however, argued that the rules of evidence didn't apply to post-conviction motions for DNA testing under G.S. 15A-269 and that the outline should have been considered. Specifically, the State argued that a motion didn't constitute a "proceeding." The court disagreed, concluding that the hearing on the motion constituted a proceeding and that a motion for DNA testing didn't fall within any of the exceptions set out in Rule 1101(b). The court held that the outline should not have been admitted, but held its admission harmless in affirming the trial court.

[2] See Jessica Smith, *When Do The Evidence Rules Apply?*, UNC School of Government Blog (September 4, 2012), available at http://nccriminallaw.sog.unc.edy/?p=3853.
[3] NO. COA11-1227, 729 S.E. 2d 116; 2012 N.C. App. LEXIS 940.

II. MAKING YOUR RULINGS

Rule 102. Scope.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 102 provides the foundation for justice and fairness. The purpose of Rule 102 is to establish the spirit within which the rules should be applied and construed. It grants the judge an implied flexibility to making certain evidentiary rulings.

You will regularly encounter situations not explicitly covered by the rules of evidence or by statutory provision; and not covered in any reported cases. It will be up to you to determine what is or isn't admissible in those circumstances.

In order to determine whether or not certain evidence is admissible, you should use Rules 401 through 414, which will provide you with the basic standards for admissibility.

Rule 401. Definition of "relevant evidence."

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In conjunction with Rule 402, Rule 401 represents the cornerstone of our evidentiary system. Rule 401 provides that in order for evidence to be admissible, it must meet the threshold of relevancy. Once relevancy is established, however, it may be excluded for the affirmative reasons in Rule 402. Relevant evidence is presumptively admissible. The proponent of evidence must establish its relevancy, and the opponent must seek to

establish its inadmissibility on one of the bases cited in Rule 402.

Determining whether evidence is relevant is not a question of law, but one of common sense and logic. The term "any tendency" in the Rule 401 indicates that the slightest tendency will suffice, which is a broad definition. This definition is tempered however, by Rule 403, which excludes relevant evidence which is remote, misleading, or unfairly prejudicial.

A. The exercise of discretion

Some of your evidentiary rulings will be based on a specific rule of evidence. But most of your rulings will be blended using Rules 102, 401, 402, and 403. Contained somewhere within these rules is the inherent power to enter your rulings.

During trials you will rule on many objections from both sides. Many of these will be snap judgments made by you in the heat of battle in order to keep the proceedings moving. Most of these objections require, at a minimum, that you find the evidence is relevant and has probative value. You have wide latitude in most of these rulings and will not be overturned unless you abuse your discretion. This does not mean that you have to be perfect, but you cannot be so far out of bounds that a party does not get a fair trial.

In the exercise of your discretion, remember that:

- You are in the best position to judge credibility and have a feel for the facts of a case.
- You should assure that the rules are properly construed to permit flexible approaches to the problems and issues that arise.
- You should do what is right under the circumstances, and do what a reasonable person would view as fair, just, and proper.
- You should be directed by circumspection; and must not be arbitrary or capricious.
- You should not gratify your own passions; or be partial, whimsical, vindictive, or idiosyncratic.
- You should give effect to the will of the law; and
- You should balance the facts and legal implications and determine what is fair and just.

There are statutes specifically requiring you to exercise your discretion. In most instances these are codifications of long-standing common law rules that lie within the discretion of the trial court.

The following statutes require you to exercise your discretion in determining whether you should:

- Grant a request by the jury for a review of certain testimony or other evidence;[4]
- Permit any party to introduce additional evidence at any time prior

[4] N.C. Gen. Stat. § 15A-1233(a).

to verdict;[5]
- Permit a jury view;[6]
- Permit the jury to take exhibits and writings to the jury room;[7]
- Allow the parties additional jury arguments if additional instructions are given to the jury which change permissible verdicts;[8] and,
- Appoint standby counsel for a defendant representing himself.[9]

Always be aware of statutes that state, **"The judge in <u>his</u> discretion," "A judge in <u>his</u> discretion," "The judge may in <u>his</u> discretion," and "is within the discretion of the judge."**

In exercising your discretion, you should expressly state on the record that you are granting or denying the request **"in your discretion."** No further explanation is required.

On appeal, whether or not you properly exercised your discretion in a case will normally turn upon whether the content and context of the request to the court is for some material evidence; and also upon the specific language used by the court in granting or denying the request. If the appellate court finds the trial court failed to exercise its discretion in denying the request, and that such denial resulted in prejudice, a new trial most likely will be granted.

You should memorize the following language: **In the exercise of my discretion, I am allowing/denying your request**. **<u>Do not</u> utter any other accompanying language.** Use this language even if you don't think it is necessary**.**

B. The abuse of discretion

In exercising your discretion, do not abuse it.

In North Carolina cases, the standard of review is almost always going to be either **abuse of discretion**, *de novo*, or plain error. Abuse of discretion is the standard of review by which most judges' evidentiary rulings are evaluated.

The standard of review is the measure of deference the appellate court will extend to the ruling of the trial court. When a court reviews an argument under an abuse of discretion standard of review, the appellate court gives the trial court's decision great deference. Under the de novo standard of review, the appellate court reviews an argument affording the trial court's decision considerably less deference.[10] And for a defendant to prevail on appeal

[5] G.S. 15A-1226(b).
[6] G.S. 15A-1229(a)(b).
[7] G.S. 15A-1233(b).
[8] G.S. 15A-1234(c).
[9] G.S. 15A-1243.
[10] See *Avoiding Controversy Over The Standard of Review*, prepared by Jane Allen, Assistant Appellate Defender, July 2006.

under plain error review, he has to show the error was so fundamental that it denied him a fair trial or had a probable impact on the jury's verdict.[11]

The range of allowable discretion seems to expand or contract depending on the case and the particular rule of evidence at issue. Your rulings in high-profile cases will more likely get closer appellate scrutiny.

The decision to admit evidence is within the sound discretion of the trial judge and will not be disturbed absent a showing of abuse.[12]

Abuse of discretion has been defined by our courts as a test, which requires the reviewing court to determine whether the decision of the trial court is **manifestly unsupported by reason or is so arbitrary that it cannot be the result of a reasoned decision**.[13]

You will be called upon to rule on many, many evidentiary matters. Make sure your decision is well reasoned and not arbitrary. Some of the most common evidentiary matters to resolve are:

- Preliminary questions (Rule 104)
- Remainder of or related writings or recorded statements (Rule 106).
- Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time (Rule 404).
- Admission of 404(b) evidence under Rule 403 after making findings of fact and conclusions of law.
- Methods of proving character (Rule 405) after Rule 403 balancing test.
- Habit evidence (Rule 406)
- Prior sexual behavior (Rule 412) after *in camera* hearing and Rule 403 balancing test.
- Competency to testify (Rule 601)
- Who may impeach (Rule 607)
- Witness interrogation (Rule 611)
- Witness interrogation by the Court (Rule 614)
- Sequestration of witnesses (Rule 615)
- Lay witness testimony (Rule 701)
- Expert witness testimony (Rules 702-705)
- Residual hearsay exception after making findings of fact and conclusions of law Rule 803(24) and 804(b)(5)

Again, remember to say, **"In the exercise of my discretion, I am allowing/denying your request to . . ."**

[11] *State v. Odom,* 307 N.C. 655, 660 (1993).
[12] *Duke Power Company v. Smith*, 54 N.C. App. 214, 216 (1981).
[13] *State v. Locklear*, 331 N.C. 239 (1992).

III. YOU ARE IN CONTROL[14]

Rule 611. Mode and order of interrogation and presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The order of presentation of evidence and mode of witness examination rests in your discretion under Rule 611(a). You have the responsibility to control the interrogation of witnesses, the presentation of evidence, the scope of cross-examination, and the use of leading questions. Your goal is to afford both parties the opportunity to present their own evidence and to meet the evidence put forth by their opponent.

Rule 611(a) seeks to advance goals similar to those in Rules 102 and 403. You have the discretion whether and to what extent to allow re-direct and re-cross-examination, whether a witness can be recalled, and whether a party may re-open its case.

Normally the State (or plaintiff) has the burden of proof and goes first. The defendant does not have to put on evidence but may elect to. The defendant has the right to introduce evidence to impeach the State's (or plaintiff's) witnesses, to negate the State's (or plaintiff's) case, or to prove any relevant defense, contention, or claim. The State (or plaintiff) may offer rebuttal evidence and the defendant may offer surrebuttal evidence.

Beware of attorneys who may offer evidence in rebuttal, which is not actually rebuttal. They may offer evidence that is in fact cumulative of the case-in-chief, or try to introduce evidence of a new ground of liability.

As you can imagine, multiple plaintiffs and multiple defendants will complicate matters and necessitate alternating the presentation of evidence that deviate from the trial's normal flow. When faced with these convoluted situations, the sequence of presenting the evidence is left to your sound discretion. You must do what is necessary to produce a proper understanding of the issues.

[14] N.C.R. Evid. 611(a).

Occasionally attorneys request that a witness be examined during an opponent's case-in-chief. Or a party may request the opportunity to recall a witness for additional examination.[15] And at other times it is difficult to know just where a particular item of evidence fits into the sequence of the trial.

Be cautious if an attorney offers evidence that depends on some other evidence that the attorney assures will be "connected up" at a later time. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person charged with notice actually heard it. The relevancy of the spoken statement is conditioned on it having been heard by the person charged with notice.

Rule 104(b) allows you to admit this type of evidence under the principle called "conditional relevancy." Where evidence is conditionally relevant, its probative value depends upon not only satisfying the basic requirement of relevancy, but also upon establishing the existence of some other fact. In other words, one item of evidence is relevant only if another item of evidence is established.

But what if the person charged with notice never testifies? Be prepared for the problems that may arise if you admit this type of evidence and the attorney does not connected it later as he or she promised.

You may have to strike the questionable evidence and give a curative instruction. The attorney who offered the evidence should probably be allowed to make an offer of proof. Do not be surprised (and be prepared) if opposing counsel moves for mistrial.

Attorneys may ask to examine witnesses out of turn, and out of sequence. Typically, the attorney wants to examine the witness about his or her lack of qualifications, personal knowledge, or competency; or about the lack of foundation as to the authenticity or identification of an exhibit.

If you allow the attorney's request, you should conduct a *voir dire* and permit the other attorney to cross-examination the witness if you deem it necessary. If you exclude some or all of the witness's testimony, you have prevented the jury from exposure to inadmissible evidence and streamlined the proceedings. The witness will either testify or be released from subpoena.

So the entire matter of the order of presentation of evidence and the mode of witness examination rests within your discretion. Abuse of discretion will be found only if the opportunity to present evidence, impeach witnesses, support the

[15] G.S. 15A-1226(b).

credibility of impeached witnesses, or refute new points raised by the opponent is completely denied.[16]

IV. WHEN TO SEQUESTER WITNESSES[17]

Rule 615. Exclusion of witnesses.

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice.

G.S. § 15A-1225. Exclusion of witnesses.

Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently.

When a witness is sequestered, the witness is excluded from the courtroom so that he or she cannot hear the testimony of other witnesses. The goal of sequestration is to discourage and expose fabrication, inaccuracy, and collusion. First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses; and second, it aids in detecting testimony that is less than candid.

Rule 615 states, "the court may order," and "determined by the court to be in the interest of justice." 15A-1225 states, "the judge may order." It is therefore within your sound discretion to sequester all, or some of the witnesses.

The general practice should be to sequester witnesses on request of either party unless some reason exists not to. And you have the power to exclude only some witnesses in the exercise of your discretion.

Your sequestration order should prohibit the witnesses from communicating with each other outside the courtroom. You should also order them not to read a transcript of the trial testimony of any other witness.

If a witness has not completed his or her testimony when you take a recess, be sure to instruct the witness not to discuss the testimony with anyone during the recess, except maybe his or her attorney.

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[16] *North Carolina Evidentiaty Foundations*, by Mostellar, Beskind, Eagles, Ross, and Imwinklereid (2006).
[17] See *Sequestration of Witnesses*, North Carolina Superior Court Judges' Benchbook, by Jessica Smith, UNC School of Government (December 2011).

You should indicate in the record what witnesses are to be sequestered and whether they are to be excluded from presentation of all evidence, or only during certain testimony. You should also indicate whether they are allowed to remain in the courtroom after testifying.

The order should explicitly state whether to limit contact among witnesses while sequestered. You must make sure that accommodations are provided to protect the integrity of your ruling. Separate rooms may be required. You'll likely need a bailiff, or someone from each side of the case to serve as a court liaison to carry out your order. The liaison must communicate with the witnesses about when they will testify, and the times of lunch and adjournment. In my opinion, a bailiff is best suited for this role.

Remember, the more explicit your sequestration order, the easier to deal with violations of your order. If you are confronted with a witness who violates your sequestration order, you might consider the following remedial measures:

- Exclude the testimony of the witness (you have the inherent authority in civil cases--be careful in criminal cases, however, not to violate the defendant's constitutional right to present a defense).
- Find the witness in contempt; or
- Instruct the jury to evaluate the credibility of the witness in light of his or her transgression.

V. HANDLING OBJECTIONABLE EVIDENCE

A. Pretrial Motions *in limine*

If an attorney anticipates that certain objectionable evidence may arise at trial, he or she may raise an objection by a pretrial **motion *in limine***. The attorney seeks to exclude anticipated prejudicial evidence before it is actually offered at trial in front of the jury. Consequently, your ruling will likely have an affect on the attorney's trial strategy.

The motion is usually an oral motion made before jury selection. It is in your discretion to rule on the motion before or during trial. My practice is to hear only those motions that might affect jury selection so as to not impose on the jury's time. All others I reserve until such time as the evidence is offered at trial.

During the presentation of the evidence the attorney who made the motion should object again and request that a *voir dire* be conducted. At the hearing, the evidence will be more fully developed and you will be in a better position to hear further legal arguments and make your ruling. You should announce it clearly and precisely and give the reasons for your decision in the record. Do not be afraid to

reconsider your preliminary rulings. Your evaluation of the motion might be different after hearing the evidence during trial.

B. Trial objections

After the jury has been selected, it is a good idea to give the *Remarks to Jurors After Jury Impaneled*[18] in your introductory remarks. This instruction explains the procedures that will unfold regarding sustaining or overruling objections, rulings on motions to strike, and resolving questions of law outside their presence.

When attorneys believe a question is improper, they of course object. Some of the most common **trial objections** are to questions that may be leading, too broad, compound, repetitive, or argumentative. Or the questions may call for a narrative answer, speculation, hearsay, or facts not in evidence. Some are simply unintelligible.

When objections arise, allow the attorneys to use simple references to the generic evidentiary doctrine they claim the opposing attorney is violating, such as "leading," "foundation," or "hearsay." The attorneys are only required to clearly present the alleged error to you.[19]

Do not tolerate **speaking objections**. Speaking objections are designed as arguments to the jury rather than briefly stating the legal ground for the objection. Attorneys may try to speak a complete thought in an effort to provide additional information to the jury, to aggravate opposing counsel, or to give additional information to the judge. Usually, it will be all of the above, at the same time.

It might be necessary to instruct the attorneys outside the presence of the jury regarding speaking objections. My advice is to first conduct a **bench**

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[18] See excerpts from North Carolina Pattern Jury Instructions (N.C.P.I.) – Criminal 100.25: *Precautionary Instructions to Jurors (To Be Given After Jury Is Impaneled)*; and Civil *Remarks To Jurors After Jury Impaneled*, North Carolina Superior Court Judges' Benchbook:

It is the right of the attorneys to object when testimony or other evidence is offered that the attorney believes is not admissible. When the court sustains an objection to a question, the jurors must disregard the question and the answer, if one has been given, and draw no inference from the question or answer or speculate as to what the witness would have said if permitted to answer. When the court overrules an objection to any evidence, you must not give such evidence any more weight than if the objection had not been made.

If the court grants a motion to strike all or part of the answer of a witness to a question, you must disregard and not consider the evidence that has been stricken.

During the course of the trial, it may be that questions of law will arise that need to be considered by the court out of the presence of the jury. When this happens, I may ask you to go to the jury room for a few minutes. You should not worry or speculate about what takes place in the courtroom during your absence – we will merely be considering questions of law that have to be heard outside of the presence of the jury. All of the competent evidence in the case will be presented while you are present in the courtroom.

18 N.C.R.Evid. 103(a)(1).

conference and instruct the attorneys what you intend to allow. If either attorney wants to be heard further, excuse the jury from the courtroom and allow him or her to argue. Then enter your ruling on the record.

When conducting bench conferences, you might want to consider a few practical tips:

- If full recordation has been allowed in non-capital or civil cases, exclude the bench conferences from the recordation order unless a need is shown for recording a particular dialogue at the bench.
- Since full recordation of all bench conferences is required in capital cases (and the defendant is required to be present at the conference), suggest ruling on your own motion that there will be no bench conferences during trial (after the first few days of trial, you will find there are few requests by either side for evidentiary hearings, which will obviate the need to repeatedly excuse the jury).

Remember, in order for an attorney's objection to be preserved for review on appeal, you must rule on the objection. All you have to say is "sustained," or "overruled." You owe no explanation (but may give one if you prefer). Do not get lazy and fail to state your ruling. The attorneys deserve a complete record.

1. Offer of proof

> **Rule 103. Rulings on evidence.**
>
> **(a)(2) Offer of proof. - In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.**

If you sustain an objection at trial, you most likely will cut off a line of testimony the attorney deems relevant and important to proving his or her case. If you exclude evidence, don't be surprised if the attorney approaches the bench and requests permission to make an **offer of proof**. If requested, you should immediately excuse the jury from the courtroom.

The attorney should be allowed to make part of the record the testimony the witness would have given. Make certain the court reporter records the offer. The witness should be allowed to testify as if you had not sustained the objection. The proponent is required to make known to the court by offer the substance of the evidence.[20]

If you realize during the offer the testimony of the witness will be lengthy, you may want to conduct the offer at a later time so as to not waste the jury's time. It may be more efficient to conduct the offer during a recess, or after you excuse the jury for the day.

[20] N.C.R.Evid. 103(a)(2); N.C.R. Civ. P. 43(c) is made applicable to criminal cases by G.S. 15A-1446(a).

Be sure to consider the practical consequences of delaying the offer of proof, however. If the witness is an expert, delaying the offer may result in additional expense. The witness may have a scheduling conflict, or a flight to catch. Or, the witness may become upset about having to wait to testify.

Do not be afraid to reconsider or change your ruling after hearing the testimony of the witness during the offer. You may not have realized where the attorney was going with the witness when you sustained the objection.

The offer of proof is essential if the case is to be appealed. If the attorney is not allowed to conduct the offer of proof, he or she might lose the right to raise the issue.

Be sure that your reasoning is fully explained and included in the record. The appellate court will be in a better position to evaluate the effect of your ruling and determine whether or not you committed prejudicial error.

Remind the attorney that he or she must renew on the record at trial any offer of proof (or any pretrial objection) in order to preserve error.

2. Motion to strike and curative Instructions

Occasionally, in response to a proper question, a witness might give an improper answer, might answer too fast for an objection, or give an answer that seems proper at first, but is determined later to be improper. In such a situation, if you sustain the attorney's objection he or she might make a **motion to strike** the improper answer.

If you grant the motion to strike and the attorney requests, you should immediately give a **curative instruction** informing the jury that the answer by the witness was improper or irrelevant and instruct them to disregard and not consider it.

As a practical consideration, you should be sure the attorney does in fact want you to give the instruction. Giving a curative instruction sometimes calls more heightened attention to the improper answer. The attorney may prefer to let the matter go instead.

If you sustain an objection and the attorney does not request a curative instruction, you should consider whether to give the instruction on your own motion. If you deem it necessary under plain error, or to fully inform the jury, you should, in your discretion, give an instruction.

3. Limiting Instructions

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party of for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

During your trials you will undoubtedly admit evidence objected to by an attorney who believes the evidence is inadmissible. In turn, the attorney may request you to instruct the jury to consider the evidence only for a specific purpose. This is called a **limiting instruction (or admonition)** and is authorized by Rule 105.

The rule contemplates that you give such an instruction upon request. A limiting instruction is often used as a second line of defense after an attorney has unsuccessfully attempted to exclude evidence under Rule 403, which balances probative value against such adverse influences as unfair prejudice.

It is within your sound discretion to determine when and whether to give the instruction. You can do so immediately upon the admission of the purportedly objectionable evidence, or give it later in your final instructions to the jury. In my opinion, the better practice is to give the instruction when requested.

If the attorney fails to request the instruction, he or she cannot complain later upon appeal.

a. Commonly used limiting instructions

Some of the most commonly used limiting (or informational) instructions in criminal and civil cases appear below. It is a good idea to have these readily available and accessible upon short notice. You should have them in a prominent position in your trial notebook, or bookmarked on your computer.

They can all be found in the North Carolina Pattern Jury Instructions at the following sections:

<u>Criminal</u>

- 100.30: Making Notes
- 100.31: Admonition to Jurors at Recess
- 105.40: Evidence of Similar Acts or Crimes (404(b))
- 104.50: Photographs, Diagrams, Maps, Models
- 104.96: Limitation on Expert Opinion Testimony.
- 105.20: Impeachment or Corroboration by Prior Statement.
- 105.35: Impeachment of a Witness - Proof of Crime (Rule 609)

- 105.40: Impeachment of Defendant - Proof of Crime (Rule 609)

Civil

- 100.70: Taking of Notes by Jurors
- 100.20: Recesses
- 100.21: Recesses
- 101.32: Evidence - Limitation as to Parties (Rule 105)
- 101.33: Limitation as to Purpose (Rule 105)
- 101.36: Impeachment of a Party or Witness (Rule 609)
- 101.40: Illustrative and Substantive Evidence.
- 101.41: Stipulations.
- 101.43: Deposition Evidence.

VI. MAKE A RECORD OF YOUR REASONING

At times, you need to explain your reasoning. You should make definite what you have decided in order to allow for meaningful appellate review.[21]

As you try more cases you will develop your own philosophy about how you enter rulings. It is important to listen carefully to the testimony of the witnesses and the arguments of the attorneys.

Take good notes. When appropriate you should consider ordering the parties to submit proposed findings of fact and conclusions of law, citing the relevant rules, statutes, and case law. Compare your notes to their submissions in arriving at the final order for the record. Remember, the attorneys are helping you draft your order.

The following are some common examples of when it is important to make a record:

A. Rule 403 evidence

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[21] *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382 (2001); *Hill v. Lassiter*, 135 N.C. App. 515 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560 (1991).

You may exclude logically relevant evidence if, in your judgment, the dangers of the evidence outweighs its probative value. The underlying premise of the rule is that certain relevant evidence should not be admitted to the jury where the admission would result in an adverse effect upon the fact finding process.

You must initially determine the probative value of the evidence offered. You must consider how clear the evidence is, how strong the logical link is between the evidence and the fact it is offered to prove, and how positive the witness is.

If you deem the evidence probative, you must then consider whether the probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. If the risks substantially outweigh the probative value, you should exclude the evidence. If not, the evidence should be admitted.

There is no precise definition of the term "substantial," but it seems clear that, at least symbolically, the rule favors a presumption of admissibility by mandating that the negative attribute of the evidence must substantially outweigh its probative value before exclusion is justified.

You should consider giving a limiting instruction pursuant to Rule 105 if you deem it necessary to diminish the danger of prejudice, confusion, or inefficiency.

A *voir dire* is not required as part of the Rule 403 balancing test, but should be done if requested so as to create a record on appeal.[22] Whether you admit or exclude the evidence, it is the better practice to make a record of your findings. At a minimum, be sure to state on the record that you "engaged in the Rule 403 balancing test," and say "In the exercise of my discretion I am allowing/denying…"

B. Rule 404(b) evidence

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

[22] *State v. Hope*, 189 N.C. App. 309, 316 (2008).

As you know, in criminal trials the district attorney cannot use proof of other crimes or wrongs by the defendant to prove that the defendant is a law-breaking, immoral person of bad character.[23]

But the DA may introduce evidence of other crimes (charged or not) or wrongs for other purposes if the evidence is logically relevant to a fact in issue, and the probative value of the evidence is not substantially outweighed by its prejudicial effect. In other words, such evidence may be admitted unless the only probative value of the evidence is to show that the defendant had the disposition or the propensity to commit the charged offense.

In order for 404(b) evidence to be relevant:

(1) There must be sufficient evidence that the defendant committed the other act in question;
(2) It must not be used to prove the character of the person (used to show disposition or propensity);
(3) It must be sufficiently similar to the act in question; and
(4) It must not be too remote.

If you determine the evidence is offered for a proper purpose (proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident), you must then engage in a Rule 403 balancing of probative value against the danger of undue prejudice, confusion, etc., or the "balancing test."

The ultimate test for admissibility of 404(b) evidence is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under Rule 403.[24]

You should enter the reasons for your ruling in the record. Be sure to go through your 404(b) analysis (defendant did it, purpose other than propensity, similarity, and not too remote), and say, at a minimum, that you "engaged in the Rule 403 balancing test."

Remember, when you make findings of fact and conclusions of law supporting admission of 404(b) evidence, the appellate court looks to whether the evidence supports your findings and whether the findings support your conclusions. The court reviews *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). If the court determines the evidence is covered under Rule 404(b), the court then reviews your Rule 403 determination for abuse of discretion.[25]

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[23] N.C.R.Evid. 404(a).
[24] *State v. Boyd*, 321 N.C. 574, 577 (1088).
[25] *State v. Beckelheimer*, 366 N.C. 127, 726 S.E. 2d 156, 159 (2012).

You should also consider a limiting instruction to the jury to guard against the possibility of unfair prejudice. Instruct the jury to consider the evidence only for the purposes allowed by Rule 404(b).[26]

C. Competency of a child witness

Rule 601. General rule of competency; disqualification of witness.

(b) Disqualification of witness in general. A person is disqualified to testify as a witness when the court determines that the person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth.

The general rule is that every person is competent to be a witness unless the trial court determines that the person is disqualified under the evidence rules. This standard sometimes is stated as requiring that the witness "understands the obligations of an oath or affirmation and has sufficient intelligence to give evidence."[27] The witness is only required to have some ability to communicate and some understanding of the duty to tell the truth. There is no fixed age limit below which a witness is incompetent to testify.

If an attorney challenges the competency of a child witness, you have a preliminary obligation to make a competency determination. You should conduct a *voir dire* examination. You may not accept a stipulation as to competency.[28] You may also want to hear testimony from parents, teachers, and others.[29]

Pay close attention and observe the child during the hearing. After the attorneys have concluded their examinations you should conduct your own. Your inquiry must be sufficient to allow you to determine whether the witness meets the standard for competency.[30]

You are not required to make formal findings as to competency,[31] but it is highly advised. Many judges use the sample *voir dire* questions composed by Bob Farb regarding competency of a child witness.[32] After the hearing you

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[26] See N.C.P.I. – Criminal 105.40: *Evidence of Similar Acts or Crimes*
[27] *State v. Higginbottom*, 312 N.C. 760, 765, (1985).
[28] *State v. Fearing*, 315 N.C. 167, 172-74 (1985).
[29] *State v. Roberts*, 18 N.C. App. 388, 391 (1973).
[30] *State v. Pugh*, 138 N.C. App. 60, 66 (2000).
[31] *State v. Rael*, 321 N.C. 528, 533 (1988).
[32] Sample *voir dire* adapted from *Robert L. Farb, North Carolina Prosecutor's Trial Manual* 456-57 (UNC-CH School of Government, 4th ed. Jan. 2007):

- What is your name?
- How old are you?
- When is your birthday?

should make conclusions as to whether or not the child is alert, is intelligent, has the capacity to observe, remember, and relate; and is fully aware of the necessity to tell the truth.

If at the end of the presentation of the evidence you decide the child witness is incompetent, you sustain the defendant's objection, disqualify the child from testifying, and direct him or her to leave the stand. If you rule the child competent to testify, you overrule the objection, and the child takes the normal oath and testifies. The competency determination is entrusted to the trial judge and will be reversed on appeal only upon a showing of abuse of discretion.

Let's assume for this manuscript that after a hearing you find a child witness incompetent to testify in his own child abuse case because of his young age (3½ years). Notwithstanding, the District Attorney calls to the stand the child's preschool teacher. He seeks to introduce the child's statements to her identifying the defendant as the perpetrator in response to her concerns about potential child abuse.

Defendant objects, argues the statements are "testimonial," and thus inadmissible under Crawford[33] without a showing of unavailability, and a prior opportunity to cross-examine.

The prosecution argues the child's statements are not testimonial, and thus do not implicate the Confrontation Clause. The DA also argues the out-of-court statements are admissible under the residual exceptions to the hearsay rule.

Do the child's out-of-court statements to his teacher qualify as testimonial statements under *Crawford*? Will the defendant's confrontation clause rights be violated if the out-of-court statements are admitted?

- Do you have any brothers or sisters?
- What are their names?
- Do you go to school?
- What school do you go to?
- What grade are you in?
- Who is you teacher?
- Where do you live?
- Do you know the difference between right or wrong?
- Do you know what a lie is?
- Is it right or wrong to tell a lie?
- What happens if you tell a lie?
- Do you know what a promise is?
- What happens if you break a promise?
- Do you know what it means to tell the truth?
- Do you promise to tell the truth today about what happened between you and [defendant's name]?

[33] *Crawford v. Washington*, 541 U.S. 36 (2004).

In October 2014, the United States Supreme Court granted certiorari in *Ohio v. Clark*,[34] a case in which the Court will decide these questions. It is the first *Crawford* case involving child abuse.[35]

In *Crawford* and later cases, the United States Supreme Court has expressly left open whether the Confrontation Clause applies at all to statements to non-law enforcement personnel. It has yet to decide under what circumstances statements are testimonial when made to people other than the police or their agents.

In *Clark*, the Ohio Supreme Court held that the child's statements were testimonial and that the trial court violated the defendant's Confrontation Clause rights when it admitted the child's out-of-court statements, after finding the child incompetent to testify.

Clark's main focus is on the confrontation issue. Little attention is given to the evidence rules, and specifically which hearsay exception allowed for admission of the child's statements. Remember, the *Crawford* rule, by its terms, applies only to testimonial evidence. Non-testimonial evidence falls outside of the confrontation clause and need only satisfy the rules of evidence for admissibility.

In child abuse cases, the most commonly applicable hearsay exceptions are the excited utterance exception, the statement for purpose of medical examination and treatment exception, and the residual exceptions. It is not clear from the Ohio Supreme Court opinion which hearsay exception was utilized. It does not appear that a foundation was laid for admission under the excited utterance or medical examination and treatment exceptions. Logical deduction would suggest the court allowed the testimony under the residual exceptions.

Thus, the issue to be considered is as follows: If the child was incompetent to testify, should his statements have been admitted under the residual exceptions? Hopefully, the Supreme Court will provide guidance.

If you are confronted with a similar scenario in North Carolina, what analysis should you use in determining admissibility of an incompetent child's testimony under the residual exceptions to the hearsay rule.

Admissibility of such evidence under the residual exceptions is explored below.

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[34] 999 N.E. 2d 592 (Ohio 2013), *cert. granted* _____ U.S. _____, 135 S. Ct. 43 (2014).

[35] See Jessica Smith, *Competency and the Residual Hearsay Exception*, UNC School of Government Blog (January 6, 2015), available at http://nccriminal law.sog.unc.edu/competency-and-the-residual-hearsay-exception/

D. Residual exceptions to the hearsay rule[36]

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) Other Exceptions. – A statement not specifically covered by any of the forgoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rule 804. Hearsay exceptions; declarant unavailable.

(b)(5) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts ; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

As you know, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." The evidence rules provide that hearsay is inadmissible except as provided by statute or the rules themselves, or under an exception to the rule.

Even if an out-of-court statement does not fall within a specific hearsay exception, it still may be admissible under the residual hearsay exceptions, called "catch all exceptions."

The first exception is found in Rule 803(24), for which unavailability is immaterial.

And the second is found in Rule 804(b)(5), which requires unavailability.

[36] See *Criminal Evidence: Hearsay,* in the North Carolina Superior Court Judges' Benchbook, by Jessica Smith, UNC School of Government (October 2013).

In North Carolina, before admitting proffered hearsay evidence pursuant to the residual exceptions, the trial judge has to engage in a six-step inquiry and determine that:

(1) Proper written notice was given to the adverse party;
(2) The hearsay statement is not specifically covered by any other hearsay exception;
(3) The proffered statement possesses circumstantial guarantees of trustworthiness, specifically:
    a. Whether the declarant had personal knowledge of the underlying events,
    b. Whether the declarant is motivated to speak the truth or otherwise,
    c. Whether the declarant has ever recanted the statement, and
    d. The practical availability of the declarant at trial for meaningful cross-examination.
(4) The proffered evidence is offered as evidence of a material fact;
(5) The proffered evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, specifically:
    a. Were the proponent's efforts to procure more probative evidence diligent?
    b. Is the statement more probative on the point than other evidence that the proponent could reasonably procure?
(6) The proffered evidence will best serve the general purposes of the rules of evidence and the interests of justice.

If you admit this type of hearsay evidence, you must make findings of fact and conclusions of law under (3) and (5) above. You are not required to make findings of fact in determining (1), (2), and (6), but you must at least include a statement in the record of your conclusions as to those elements in the six-step test. Failure to adhere to these requirements is error.

VII. SUPPLEMENT

Always reserve the right to supplement the record when pronouncing your rulings. It is not a bad idea to take notes during all evidentiary hearings conducted during trial. You may want to add something to the record later after reviewing your notes.

VIII. PLAIN ERROR

And always be vigilant when listening to the evidence. Take appropriate action when circumstances arise unexpectedly, without any apparent reason, to prevent plain error from occurring. Plain error arises when "the error is so basic, so prejudicial, so lacking in its elements that justice cannot have been done." You are required to be faithful to the law and maintain professional competence in it.

Even in the absence of a request from an attorney, never shirk from your responsibility to instruct the jury *ex mero motu* that they should disregard and not consider the incompetent or inadmissible evidence.

IX. OBSERVATIONS

Outside of those occasions when you are required to give your reasoning on the record, I believe you need only five words in your judicial vocabulary: "allowed," "denied," "sustained," "overruled," and "next." If you succumb to temptation, the more you exceed this minimum, the more you run the risk of talking yourself right out of a job.

Always be mindful that you are not the only important one in the courtroom. You work with some very dedicated public servants. Most have families, as well as interests outside of court. Do not over impose upon their schedules.

You would be wise to observe a consistent schedule each day for recesses, lunch, and adjournment so the personnel know what to expect. Court is always unpredictable, however. If you do go off schedule, consult with them before making a decision.

Allow the attorneys appearing in front of you to try their cases. They are under immense pressure to represent their clients with zeal.

And be aware that all who come to the courthouse know there will be a decision in every case. Your decision will not be a surprise. If you deliver it in a fair and courteous way, justice will be well served.

KEY REFERENCES FOR SUPERIOR COURT JUDGES

1. North Carolina Rules of Civil Procedure (N.C.G.S. § 1A-1, Rule 1 through 84)

2. Criminal Procedure Act (G.S. 15A-1 through 15A-2012)

3. North Carolina Rules of Evidence (G.S. 8C-1, Rules 101 through 1102)

4. General Rules of Practice for the Superior and District Courts (Rules of Practice)

5. North Carolina Code of Judicial Conduct (Canons 1 through 7)

6. Revised Rules of Professional Conduct of the North Carolina State Bar (Chapter 2 of the Rules and Regulations of the North Carolina State Bar)

7. NC Superior Court Judges page (www.sog.unc.edu/faculty/smithjess/)
   a. Materials from Past Schools & Conferences
   b. North Carolina Superior Court Judges' Benchbook
   c. Criminal Case Compendium
   d. Legislation
   e. Justice Reinvestment Resources
   f. Expunction & Related Relief
   g. SOG Criminal Law Page
   h. Criminal Law Blog
   i. Web Links & Reference Materials
   j. Jessie Smith on Twitter

8. The North Carolina Superior Court Judges' Pattern Jury Instructions (on your computer)
   a. Research Assistant
   b. Criminal Instructions
   c. Civil Instructions
   d. Motor Vehicle Instructions

TRIAL TIPS FOR ATTORNEYS

- Ask simple questions in jury selection.
- Do not drag your questioning out.
- When you begin jury selection, tell the prospective jurors how long you estimate the trial will last to see if any juror has a conflict with the length of trial.
- When excusing a juror from the panel, always call their last name and what designated seat they are in.
- In civil cases, prepare a one-paragraph description of the case (e.g., this case arises out of a motor vehicle collision, which occurred on July 28, 2011, at the intersection of Elm and Market Streets. Plaintiff seeks to recover money damages resulting from the collision, which Plaintiff contends was caused by the negligence of Defendant. Defendant contends the collision was caused by the negligence of Plaintiff, which bars any recovery by Plaintiff).
- Stipulate to as many facts as possible (including expert testimony).
- Submit all witness lists prior to jury selection to the Court, court reporter, and clerk.
- Submit a copy of expert witness reports to the court reporter to insure accuracy in spelling of technical, medical, or scientific terms.
- Submit case citations to opposing counsel, court reporter, and Court at the time of citation.
- If a trial notebook is submitted to the Court, submit one to the court reporter for ease of reference.
- Speak distinctly and loud enough that all parties and jurors can hear.
- Do not speak out of turn or at the same time as another attorney.
- Have all witnesses spell their full names.
- Make sure the witness speaks loudly enough so that the juror farthest away can hear the testimony.

- Make sure the witness answers the question with an affirmative answer. Otherwise, the court reporter will report, “witness shakes head,” or “witness nods head,” which is not sufficient for the record.

- Allow a witness to explain their answer, if they wish to do so.

- Do not ask the court reporter to repeat a question--that is the Court’s function.

- Have all exhibits marked before trial.

- Make sure the judge sees each exhibit before showing it to a witness to identify.

- Make at least 13-18 copies of any exhibit to be published to the jury (including pictures, unless unique or to be shown by video or PowerPoint).

- Be sure all audio or video equipment works properly. Have backup equipment, if necessary.

- Submit proposed jury instructions to the court for consideration as soon as possible.

- Submit written requests for criminal verdicts (e.g. lesser included offenses) to the district attorney and Court; and written requests for civil issues to opposing counsel and Court as soon as possible

- Before you begin a legal argument, present the judge with a copy of your brief and/or authority. Do not make the judge thumb through the file to find it.

- Let bailiffs know if you need to use a podium.

- Have no gaps of time between witnesses who testify.

Update To Judge Cobb's Evidence Manuscript

I. Rule of Evidence 414- This new rule implements N. C. Gen. Stat. § 8-58.1 which was passed in 2011. It limits the admissibility of medical bills in personal injury actions to those "amounts paid or required to be paid."
I find that the parties ordinarily stipulate as to the amount of medical bills in personal injury cases. Both sides have incentives to do so.

A. Practice pointer Number One- The pattern jury instructions give excellent guidance as to how to deal with this issue.
B. Practice pointer Number Two- There is pending litigation as to the facial constitutionality of this Rule. You will see many cases in which there is a facial challenge. Keep in mind that you are to proceed with every issue in the case that can be resolved, including the trial on liability and maybe even the trial on all other damages in the case.

II. Confrontation issues in child abuse cases- Ohio v. Clark (referenced in Judge Cobb's paper) was decided by the U. S. Supreme Court in 2015. It held that a victim's statements to her preschool teacher were not testimonial, even in a state such as Ohio where there is a mandatory reporting requirement of child abuse. Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173 (Jun. 18, 2015). Always see Professor Smith's Criminal Case Compendium for the most current law. https://www.sog.unc.edu/sccc.

III. Authentication of Social Media-In State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016), the Court has a long discussion of the issues concerning the authenticating of web pages. The short answer is that circumstantial evidence will support a trial court's ruling that a web page is authentic. The long answer is that this issue is complicated and evolving and you need to find out ahead of time whether a party is offering social media and whether anyone objects, so you can be ready to rule when the time comes.

IV. Expert opinion in child sex cases- This is a hot topic. State v. Watts, ___ N.C. App. ___, 783 S.E.2d 266 (Apr. 5, 2016) temp. stay granted, ___ N.C. ___, 783 S.E.2d 747 (Apr 13 2016), contains a good discussion of some of the issues. The crux of the issue is whether state's experts are "vouching" for the credibility of the child victim and/or expressing an opinion about whether the child was sexually assaulted. The analysis is very fact specific.

Tab 9
Contempt

Contempt

in North Carolina Courts

New Superior Court Judge Training

January 2023

UNC SCHOOL OF GOVERNMENT

www.sog.unc.edu

1

SOG contempt resources (selected)

- North Carolina Trial Judges' Bench Book, DCJ Volume 2, Chapter 4, Contempt (most comprehensive)
- Contempt (overview), AOJ Bulletin, M. Crowell 2015: (http://sogpubs.unc.edu/electronicversions/pdfs/aojb1503.pdf)
- Contempt of Court - Online training module (https://www.sog.unc.edu/courses/online-modules/contempt-court)
- Numerous blog posts at "On the Civil Side": (civil.sog.unc.edu/)
- Numerous blog posts at Criminal Law Blog (nccriminallaw.sog.unc.edu)

UNC

2

Contempt authority is statutory

NC Gen. Stat. Chapter 5A

Criminal Contempt

Civil Contempt

Contempt by Juveniles

3

CRIMINAL	CIVIL
To *punish* for an act already committed	To *coerce* compliance with court order
G.S. 5A-11 to 5A-17	G.S. 5A-21 to 5A-26

UNC SCHOOL OF GOVERNMENT

4

A person can't be held in civil *and* criminal contempt for same act.

-G.S. 5A-12(d), -21(c), -23(g)

UNC SCHOOL OF GOVERNMENT

5

Kolczak v. Johnson, 260 NC App 208 (2018)

- Trial court found civil contempt for violations of custody order:
  - failing to inform father of certain events as required by the custody order,
  - failing to give father the right of first refusal when she needed childcare for the child as specified in the custody order,
  - allowing her husband to be present when the children were at her home when order provided that children were to have no contact with the husband, and
  - scheduling the children for camps during times that interfered with father's custodial time with the children.
- Court of Appeals stated:
  - It is not "apparent how an appropriate civil purge condition could coerce the defendant to comply with the court order as opposed to punishing her for a past violation."

6

Reynolds v. Reynolds, 356 NC 287 (2002), adopting dissent in 147 NC App 566 (2001)

- Criminal or Civil ???:
- "Defendant is guilty of … contempt and ordered an active sentence of thirty days in [jail] suspended on the following conditions:
  - Defendant's posting of a cash bond or security of at least $75,000.00 to secure and assure the timely payment of future cash child support;
  - Defendant immediately paying Plaintiff's attorney the sum of $212.52, "representing interest on the four delinquent child support payments";
  - Defendant timely paying each cash child support amount due; and Defendant immediately paying $10,000.00 in attorney's fees."

UNC SCHOOL OF GOVERNMENT

7

CRIMINAL

To *punish* for an act already committed

G.S. 5A-11 to 5A-17

UNC SCHOOL OF GOVERNMENT

8

Criminal contempt - Grounds

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

(9a) Willful refusal by a defendant to comply with a condition of probation.

(9b) Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision by a prisoner whose offense requiring post-release supervision is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes. … "Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision" includes, but is not limited to, knowingly violating the terms of post-release supervision in order to be returned to prison to serve out the remainder of the supervisee's sentence.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

G.S. 5A-11(a)

UNC SCHOOL OF GOVERNMENT

9

Criminal contempt - Grounds

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, direction, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court which is inaccurate and which presents a clear and present danger of immine[illegible] and serious threat to the fairness, [illegible] or with reckless disregard of whether it is inaccurate and of [illegible] proceedings in a court.

(6) Willful or gr[illegible] in office, [illegible] duties in an official transaction.

(7) Willful or gr[illegible] and practices of the court resulting in substantial interference with the business of [illegible]

(8) Willful refusa[illegible] or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful commu[illegible] with a juror in an improper attempt to influence his deliberations.

(9a) Willful refusal by a defendant to comply with a condition of probation.

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(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

EXCLUSIVE

G.S. 5A-11(a)

Criminal contempt - Grounds

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

Examples:

- Attorney repeatedly demanding to be heard (after warnings to stop) and inciting his purported client to disrupt proceedings. *In re Nakell* (1991).
- Mobile phone ringing? *See State v. Phair* (2008)

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

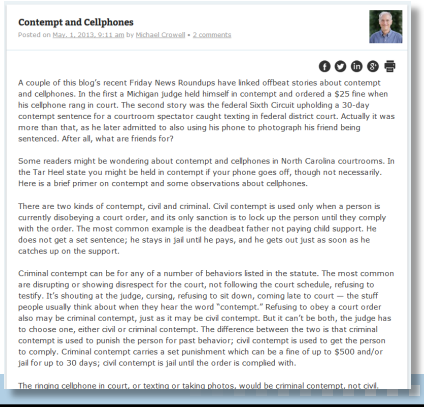
(9a) Willful refusal by a defendant to comply with a condition of probation.

(9b) Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision by a prisoner whose offense requiring post-release supervision is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes. … "Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision" includes, but is not limited to, knowingly violating the terms of post-release supervision in order to be returned to prison to serve out the remainder of the supervisee's sentence.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

G.S. 5A-11

http://nccriminallaw.sog.unc.edu



Contempt and Cellphones

Posted on May. 1, 2013, 9:11 am by Michael Crowell • 2 comments

A couple of this blog's recent Friday News Roundups have linked offbeat stories about contempt and cellphones. In the first a Michigan judge held himself in contempt and ordered a $25 fine when his cellphone rang in court. The second story was the federal Sixth Circuit upholding a 30-day contempt sentence for a courtroom spectator caught texting in federal district court. Actually it was more than that, as he later admitted to also using his phone to photograph his friend being sentenced. After all, what are friends for?

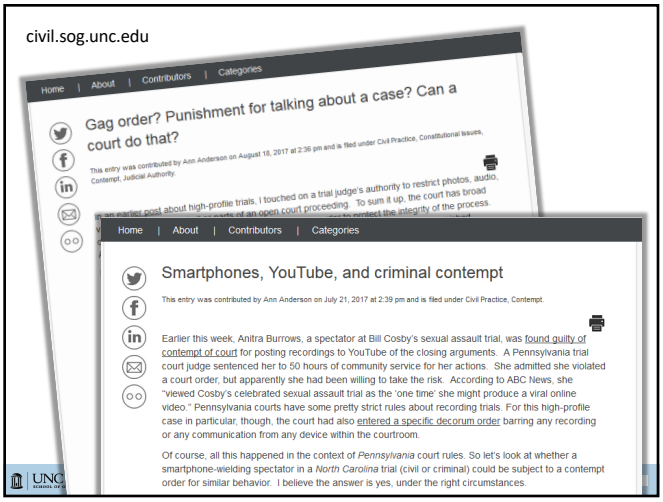
Some readers might be wondering about contempt and cellphones in North Carolina courtrooms. In the Tar Heel state you might be held in contempt if your phone goes off, though not necessarily. Here is a brief primer on contempt and some observations about cellphones.

There are two kinds of contempt, civil and criminal. Civil contempt is used only when a person is currently disobeying a court order, and its only sanction is to lock up the person until they comply with the order. The most common example is the deadbeat father not paying child support. He does not get a set sentence; he stays in jail until he pays, and he gets out just as soon as he catches up on the support.

Criminal contempt can be for any of a number of behaviors listed in the statute. The most common are disrupting or showing disrespect for the court, not following the court schedule, refusing to testify. It's shouting at the judge, cursing, refusing to sit down, coming late to court — the stuff people usually think about when they hear the word "contempt." Refusing to obey a court order also may be criminal contempt, just as it may be civil contempt. But it can't be both, the judge has to choose one, either civil or criminal contempt. The difference between the two is that criminal contempt is used to punish the person for past behavior; civil contempt is used to get the person to comply. Criminal contempt carries a set punishment which can be a fine of up to $500 and/or jail for up to 30 days; civil contempt is jail until the order is complied with.

The ringing cellphone in court, or texting or taking photos, would be criminal contempt, not civil.

civil.sog.unc.edu



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Criminal contempt - Grounds

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

Examples:

- Yelling at/insulting the judge.
- Coming to court drunk. *State v. Ford* (2004)
- Racial slur directed at court officer. *State v. Johnson* (2015) (unpub'd)
- Refusal to rise/stand when directed. *State v. Randall* (2002)

(9b) Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision by a prisoner whose offense requiring post-release supervision is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes. ... "Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision" includes, but is not limited to, knowingly violating the terms of post-release supervision in order to be returned to prison to serve out the remainder of the supervisee's sentence.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

G.S. 5A-11

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14

Criminal contempt - Grounds

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

"Courtroom decorum and function depends on the respect shown by its officers and those in attendance. Unexcused refusal[] to stand creates a rift in that respect and interrupts the normal proceedings of the court."

- Racial slur directed at court officer. *State v. Johnson* (2015) (unpub'd)
- Refusal to rise/stand when directed. *State v. Randall* (2002)

(9b) Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision by a prisoner whose offense requiring post-release supervision is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes. ... "Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision" includes, but is not limited to, knowingly violating the terms of post-release supervision in order to be returned to prison to serve out the remainder of the supervisee's sentence.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

G.S. 5A-11

UNC SCHOOL OF GOVERNMENT

15

Criminal contempt - Grounds

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

Examples:

- Attempting to coerce witness not to obey subpoena. *State v. Wall* (1980)
- Disobeying order to turn over control of assets to receiver. *Osmar* (1979)
- Disobeying order to keep children away from sex offender. *State v. Mastor* (2015)
- Juror conducting own investigations. *State v. Pierce* (1999)

of Chapter 14 of the General Statutes. … "Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision" includes, but is not limited to, knowingly violating the terms of post-release supervision in order to be returned to prison to serve out the remainder of the supervisee's sentence.
(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

G.S. 5A-11

UNC SCHOOL OF GOVERNMENT

16

Criminal contempt - Grounds

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.
(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

with the business of the court.

Examples:

- Attorney twice attempting to introduce polygraph results in criminal trial. *In re Cogdell* (2007)
- Attorney repeatedly failing to comply with Rape Shield Statute when questioning witness. *State v. Okwara* (2012)

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

G.S. 5A-11

UNC SCHOOL OF GOVERNMENT

17

Criminal contempt - Grounds

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
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(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.
(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.
(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

Example:

- Attorney abandoned client just before probation hearing because hadn't been paid. *State v. Key* (2007)
- But, *State v. Chriscoe* (1987): Failure of witness to appear promptly at 9:30 was not violation of order because not subpoenaed, not disruptive to schedule.

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18

Criminal contempt - Grounds

"[T[hat degree of interference with the court's business that is **real, and not momentary or illusory**."

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

Example:

- Attorney abandoned client just before probation hearing because hadn't been paid. *State v. Key* (2007)
- But, *State v. Chriscoe* (1987): Failure of witness to appear promptly at 9:30 was not violation of order because not subpoenaed, not disruptive to schedule.

Criminal contempt - Punishment

- Imprisonment up to 30 days;
- Censure; and/or
- Fine up to $500

Suspended sentences allowed with conditions.
-State v. Key (2007)
If appealed, bail hearing required.
-5A-17

Judge can withdraw or reduce a sentence any time "if warranted by the conduct of the contemnor and the ends of justice."
-5A-12(c)

sog.unc.edu

Criminal contempt - Procedure

Summary proceeding

- Direct contempt *only*

Plenary proceeding

- *All* indirect contempt
- Direct contempt (at court's option)

Criminal contempt - Procedure

Summary proceeding

- Direct contempt *only*

"Direct criminal contempt" is act of contempt committed:

- Within sight or hearing of presiding judicial official; *and*
- In, or in immediate proximity to, room where proceedings are being held; *and*
- Likely to interrupt or interfere with matters before the court.

Summary proceeding appropriate "when necessary to restore order or maintain dignity and authority of the court."

Criminal contempt - Procedure

Summary proceeding

- Direct contempt *only*

1. Judge gives person summary notice of charges
2. Judge *must* give "summary opportunity to respond."

Criminal Contempt - Procedure

"summary opportunity to respond"

"…[i]ntended not to provide for a hearing, or anything approaching that…but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort." -Official commentary to 5A-14 (quoted often in cases)

For an SOG instructional video see https://www.sog.unc.edu/courses/online-modules/contempt-court

Video

"Summary opportunity to respond"

In re Korfmann, 786 S.E.2d 768 (N.C. App. 2016).

Trial judge:

This Court takes the strong position that technology is not to be utilized by jurors and, in fact, this jury has been warned several times not to use.

In my opinion the utilization by the juror is blatantly disrespecting the Court's order not to use.

Sir, I think that what I am going to do with you is I am going to send you to Wilson County Jail for 30 days for failing to follow the order given to you by this Court.

The ladies and gentlemen of this jury are now excused. You can get a certificate as to where you have been for the last several days. You are excused.

This gentleman is in your custody.

Court of Appeals:

Contempt order VACATED:

"The trial court did not give appellant the necessary 'summary notice of the charges and a summary opportunity to respond[.]"

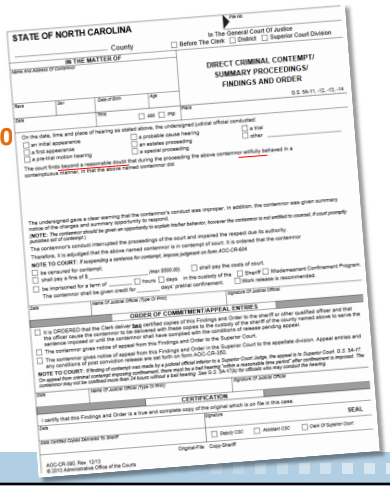
Criminal contempt - Procedure

Summary proceeding

- Direct contempt *only*

1. Judge gives person summary notice of charges
2. Judge *must* give "summary opportunity to respond."
3. Judge finds facts supporting summary imposition of measures.
   - Must find willfulness. (Failure is fatal.)
   - Must state facts found "beyond reasonable doubt." (Failure is fatal.)

AOC-CR-390


STATE OF NORTH CAROLINA

DIRECT CRIMINAL CONTEMPT/ SUMMARY PROCEEDINGS/ FINDINGS AND ORDER

ORDER OF COMMITMENT/APPEAL ENTRIES

CERTIFICATION

Criminal contempt - Procedure

Plenary proceeding

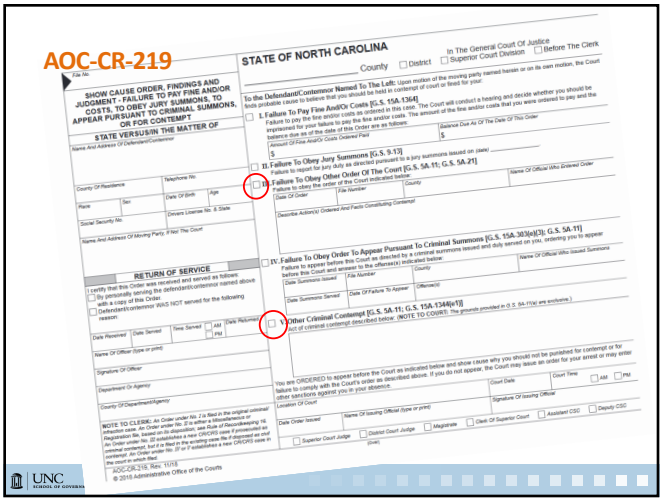
- All indirect contempt
- Direct contempt (at court's option)

Criminal contempt - Procedure

- Show cause order
  - Must state facts upon which order is based.
  - Form: AOC-CR-219
- Hearing (non-jury trial)
  - Burden of proof on State
  - Beyond a reasonable doubt
  - Indigent entitled to counsel
  - Self-incrimination protection applies.
- Order
  - Guilty or not guilty
  - Findings of fact required.
    - *Must* find willfulness (or prior warning).
  - *Must* state "beyond reasonable doubt." Failure is fatal.

Plenary proceeding

- All indirect contempt
- Direct contempt (at court's option)



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Criminal contempt - Appeal

District court → Superior Court (*de novo*)

Superior court → Court of Appeals (on the record)

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CRIMINAL	CIVIL
To *punish* for an act already committed	To *coerce* compliance with court order
G.S. 5A-11 to 5A-17	G.S. 5A-21 to 5A-26

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CIVIL

To *coerce* compliance with court order

G.S. 5A-21 to 5A-26

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Civil contempt

- Only purpose is to coerce compliance with a court order after court concludes party has the present ability to comply with the order

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Civil contempt – The Remedy

- Imprisonment
  - –Until complies with purge condition(s)
    - For child support – indefinite
    - For non-monetary orders – indefinite
    - For other monetary orders – indefinite
      But re-commitment required at 90 days with de novo hearing. One year maximum.

- **NO DAMAGES** (*e.g., Blevins v. Welch*, COA 2000)
- **NO FINES** (5A-21(d))
- **Attorney fee-shifting allowed only in**:
  - Very limited general civil?
  - Certain domestic judgments

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Civil contempt – The basis

Failure to comply with an order of a court *if*

(1) The order remains in force;

(2) The purpose of the order is served by compliance;

(3) Noncompliance by the person to whom the order is directed is willful; ***and***

(4) The person to whom the order is directed is able to comply *or* is able to take reasonable measures to comply.

G.S. 5A-21(a)

UNC

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Civil contempt – The basis

Failure to comply with an order of a court *if*

(1) The order remains in force;

"entered" *(e.g., Spears v. Spears*, COA 2016)

(2) The purpose of the order is served by compliance;

(3) Noncompliance by the person to whom the order is directed is willful; ***and***

(4) The person to whom the order is directed is able to comply *or* is able to take reasonable measures to comply.

G.S. 5A-21(a)

UNC

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Consent Orders

General rule:

- If court approves and adopts agreement of parties, contempt is not available
  - *See Crane v. Green,* 114 NC App 105 (1995)
- If court makes findings of fact and conclusions of law, contempt is available
  - *See Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188 (1995)

Domestic Relations Cases

- All consent orders are enforceable by contempt
- *Henderson v. Henderson*, 307 NC 401 (1983)
- *Walters v. Walters*, 307 NC 381 (1983)

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Civil contempt – The basi

Failure to comply with an order of a cc

(1) The order remains in force;

(2) The purpose of the order is served b

(3) Noncompliance by the person to whom the order is directed is willful; ***and***

(4) The person to whom the order is directed is able to comply *or* is able to take reasonable measures to comply.

- Intentional/ deliberate failure to comply
- Had *ability* to comply

G.S. 5A-21(a)

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Civil contempt – The basi

Failure to comply with an order of a cc

(1) The order remains in force;

(2) The purpose of the order is served b

(3) Noncompliance by the person to whom the order is directed is willful; ***and***

(4) The person to whom the order is directed is able to comply *or* is able to take reasonable measures to comply.

- Intentional/ deliberate failure to comply
- Had *ability* to comply

G.S. 5A-21(a)

Which often means "to *pay*"

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Civil contempt – "Ability" to pay

Inadequate findings

- Able to work ("able-bodied")
- "not incompetent"
- "x amount of education and experience"
- "able to work in x industry"
- "is employed" (or "has been employed since…")

- *Clark*, 171 N.C. App. 120 (2005); *Hodges*, 64 N.C. App. 550 (1983)

More specificity needed

- Liquid assets
  - Or, [for purge] assets that *can be liquidated* ("reasonable measures")
- Available/disposable income
- Other available funds/resources
- Other reasonable steps

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Civil contempt – Court's order

Court must include:

- *Findings* as to elements in G.S. 5A-21(a).

  Non-compliance with order that
  - (1) Remains in force;
  - (2) The purpose of the order is served by compliance;
  - (3) Noncompliance by the person to whom the order is directed is willful; ***and***
  - (4) The person to whom the order is directed is able to comply *or* is able to take reasonable measures to comply.

- If contempt found, *how the contemnor may purge*.

What are the *facts* constituting the non-compliance?
- What acts/omissions?
- How was it willful ?
  - Intent
  - Ability

Civil contempt – Court's order

Court must include:

- *Findings* as to elements in G.S. 5A-21(a).

  Non-compliance with order that
  - (1) Remains in force;
  - (2) The purpose of the order is served by compliance;
  - (3) Noncompliance by the person to whom the order is directed is willful; ***and***
  - (4) The person to whom the order is directed is able to comply *or* is able to take reasonable measures to comply.

- If contempt found, *how the contemnor may purge*.

What are the *facts* constituting the non-compliance?
- What acts/omissions?
- How was it willful ?
  - Intent
  - Ability

Civil contempt – purge conditions

Defendant must "hold the keys to the jail"

Civil contempt – purge conditions

- *Present* ability to do (not future, open-ended, or "indefinite" (*Wellons*, 229 N.C. App. 164 (2013))
  - Yes: D must "pay $1000"; or D must "turn over the car to plaintiff"
  - No:
    - "D must pay child support obligations *as they come due*"
    - "D must pay $500 *per month*"
    - "D may not remove the child from North Carolina in the future without court permission." *Ning Gao* (2013)
- *Clear* conditions.
  - Yes: "Pay $x." "Deliver car to Plaintiff's home." "Execute x document." "Pay child's outstanding tuition." "Pay existing credit card balance." (*Watson* 2007)
  - No:
    - "D shall not harass or interfere with Plaintiff's custody of the children." *Scott v. Scott*, 157 N.C. App. 382 (2003)
    - "D shall not at any time…punish the minor children in any manner that is stressful, abusive, or detrimental." *Cox v. Cox*, 133 N.C. App. 221 (1999)

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GS 5A-22(a)

- A person imprisoned for civil contempt must be released when his civil contempt no longer continues.
- The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt.

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Watson v. Watson
187 NC App 55 (2007)

- "A civil contempt proceeding does not command the procedural and evidentiary safeguards that are required by criminal contempt proceedings."
- Why??

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Civil contempt

- Contemnor must 'hold the keys to the jail'
- Because contemnor can walk out of the jail at any time, there is no right to counsel or other safeguards required in criminal cases where liberty is in jeopardy
  - *Turner v. Rogers*, 564 US 431 (2011)(no right to counsel for child support contempt)
  - *Cf. McBride v. McBride*, 334 NC 124 (1993)(right to counsel for child support contempt)
  - *Wilson v. Guinyard*, 254 NC App 229(2017)(right to counsel in non-child support civil contempt is determined on a case-by-case basis)

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Civil Contempt Procedure

- Civil initiated either by:
  - Motion filed by a party.
    - GS 5A-23(a1)
  - Show cause order from court.
    - GS 5A-23
    - No statutory authority to issue order for arrest for failing to show up
- If initiated by motion, moving party has burden of going forward at hearing
- If initiated by show cause order, respondent obligor has burden of going forward at hearing.

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Civil Contempt Procedure

Show cause cannot issue unless judicial official determines, based on verified motion and sworn statement, there is probable cause to believe obligor is in civil contempt.

The finding of probable cause justifies the shifting of the burden of presenting evidence in the contempt trial

- Requires information sufficient to warrant a prudent man in believing obligor is in civil contempt

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Civil Contempt

- Order of civil contempt must contain findings of fact supported by evidence in the record establishing defendant has the present ability to comply with the purge ordered
  - *See Durham DSS ex rel Alston v. Hodges*, COA January 2, 2018
- There is no contempt by default
  - http://civil.sog.unc.edu/no-default-judgment-in-contempt/
  - https://civil.sog.unc.edu/contempt-establishing-ability-to-pay/
  - *Tigani v. Tigani*, 805 SE2d 546 (NC App 2017)

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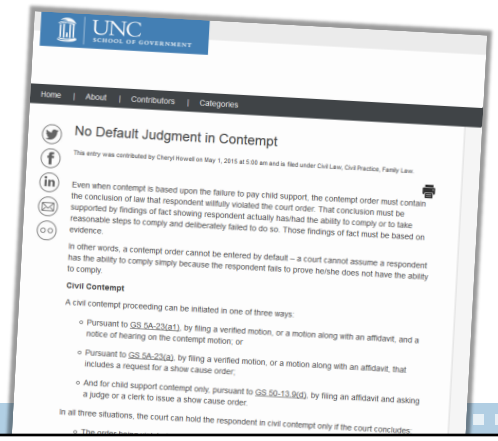
"On the Civil Side" blog: civil.sog.unc.edu



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Civil contempt - Appeal

To Court of Appeals

- Within 30 days
- Immediately appealable due to "substantial right"
- "On the record" review

UNC

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NORTH CAROLINA TRIAL JUDGES'

Bench Book

District Court Volume 2

Powers, Duties, and Conduct
Criminal Law and Procedure
Civil Trial Law and Procedure

Chapter 4. Contempt of Court (2014)*

* Date denotes when chapter last updated.

Section I
Chapter 4
Contempt of Court

For an ONLINE MODULE on the law of contempt, *see* https://unc.ncgovconnect.com/p30019876/.

CHECKLIST

CONTEMPT ORDER

1. **Civil contempt**
    a. **Act alleged to constitute contempt**
    b. **Party advised of possibility of incarceration, of right to counsel, and of right to court appointed counsel if indigent**
    c. **Unless party waived right to counsel, counsel appointed if defendant indigent**
    d. **Finding on each element in G.S. § 5A-21:**
        i. **Order remains in force**
        ii. **Purpose of the order may still be served**
        iii. **Noncompliance was willful**
            1. **Party had actual ability to comply with the court order at the time of the party's noncompliance or had ability to take reasonable measures that would enable the party to comply**
            2. **Deliberate and intentional failure to comply**
    e. **Party is being held in civil contempt**
    f. **Order finds the facts that constitute contempt**
    g. **Party is to be confined immediately for an indefinite and open-ended period until purge conditions are met**
    h. **Purge conditions:**
        i. **Specific action party must take to purge contempt and be released from imprisonment**
        ii. **Party has the present means to comply with the purge conditions**

2. **Criminal contempt**
    a. **Generally**
        i. **Standard of proof applied was beyond a reasonable doubt**
        ii. **Finding of guilty or not guilty**
        iii. **That defendant is being held in criminal contempt**

iv. **Punishment ordered, either censure, fine not to exceed $500, or imprisonment for a definite and fixed term not to exceed 30 days, or any combination thereof**
v. **Imprisonment for up to 120 days authorized for failure to pay child support, provided sentence suspended upon conditions reasonably related to payment of child support**
vi. **Purge conditions are improper (only imposed for civil contempt)**
vii. **Contempt matter heard before another judge if alleged contemptuous acts so involve the judge that his or her objectivity may reasonably be questioned**
viii. **If imprisonment is suspended, clear statement of all conditions of the suspension**

b. Direct criminal contempt/summary proceeding
i. **Act alleged to constitute contempt**
ii. **Facts established beyond a reasonable doubt**
iii. **Defendant acted willfully**
iv. **Defendant given summary notice of the charges and summary opportunity to respond**

c. Indirect criminal contempt or direct criminal contempt/plenary proceeding
i. **Act alleged to constitute contempt**
ii. **Facts established beyond a reasonable doubt**
iii. **Defendant advised of possibility of incarceration, of right to counsel, and of right to court appointed counsel if indigent**
iv. **Unless party waived right to counsel, counsel appointed if defendant indigent**
v. **If direct criminal contempt heard at a plenary proceeding, party was informed of judge's intent to institute a plenary proceeding**
vi. **Finding that party's conduct was willful**

1. **Party had actual ability to comply with the court order at time of the party's noncompliance or had the ability to take reasonable measures that would enable party to comply**
2. **Deliberate and intentional failure to comply or conduct that was done deliberately and without authority, justification or excuse**

Chapter 4
Contempt of Court

I. Distinction Between Criminal and Civil Contempt

A. Purpose of the action determines whether contempt is civil or criminal.

1. Contempt of court may be civil or criminal in nature, but the line of demarcation is "hazy at best." [*O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985) (citation omitted); *File v. File*, 195 N.C.App. 562, 673 S.E.2d 405 (2009), *quoting O'Briant*.] It can be difficult to distinguish between civil and criminal contempt, in part, because willful disobedience of a court order constitutes criminal contempt under G.S. § 5A-11(a)(3) and willful failure to comply with a court order is grounds for civil contempt under G.S. § 5A-21(a).

2. A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. [*Bishop v. Bishop,* 90 N.C.App. 499, 369 S.E.2d 106 (1988), *quoting O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985).]

3. If a contempt action is brought to:

a) Force compliance in the future with a court order, the action is for civil contempt and G.S. §§ 5A-21 through 25 apply.

(1) Civil contempt is a civil remedy used exclusively to enforce compliance with court orders. [Official Commentary to G.S. § 5A-21; *Jolly v. Wright,* 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *Shippen v. Shippen,* 204 N.C.App. 188, 693 S.E.2d 240 (2010), *citing Scott v. Scott,* 157 N.C.App. 382, 579 S.E.2d 431 (2003) (purpose of civil contempt is not to punish, but rather to coerce the defendant to comply with an order of the court); *Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969) (citation omitted) (civil contempt proceedings look only to the future).]

b) Punish conduct that has already occurred that violated a court order or showed disrespect to the court or otherwise challenged its authority, the action is for criminal contempt and G.S. §§ 5A-11 through 17 apply.

(1) Criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. [*Brower v. Brower,* 70 N.C.App. 131, 318 S.E.2d 542 (1984).] Criminal contempt is generally applied in punishment of an act already accomplished, tending to interfere with the administration of justice. [*File v. File,* 195 N.C.App. 562, 673 S.E.2d 405 (2009), *quoting O'Briant*.]

(2) Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt.

[*O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985), *citing Blue Jeans Corp. v. Amalgamated Clothing Workers,* 275 N.C. 503, 169 S.E.2d 867 (1969).]

4. Distinguishing civil contempt orders from criminal contempt orders.

a) Civil contempt.

(1) If the relief is imprisonment for an indefinite period of time, which the contemnor may avoid or terminate by performing some act required by the court, such as complying with a previous court order, the contempt is civil in nature.

b) Criminal contempt.

(1) If the relief is imprisonment for a definite period of time, which the contemnor has no possibility of avoiding or terminating by performing some act required by the court, the contempt is criminal in nature.

(2) If relief is imprisonment for a definite period of time and imprisonment is suspended, and one of the conditions of the suspended sentence is compliance with a prior court order during the suspended sentence, the contempt is criminal in nature.

(3) An order sentencing defendant to 30 days in jail, suspended on the condition that he make future child support payments in compliance with an earlier court order, post a cash bond in the amount of $75,000, and pay $10,000 attorney fees to plaintiff was an order for criminal contempt. [*Reynolds v. Reynolds,* 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (reversing court of appeals decision that order was civil contempt); *Hancock v. Hancock* 122 N.C.App. 518, 471 S.E.2d 415 (1996).]

B. Importance of the distinction between civil and criminal contempt.

1. Distinguishing between civil and criminal contempt is important because whether the proceeding is for civil or criminal contempt determines in large part:

a) The procedures that must be followed by the court;

b) The legal rights accorded to the alleged contemnor;

c) The elements that must be proved to establish contempt;

d) The burden of proof;

e) The available sanctions and remedies; and

f) The procedure applicable to an appeal. [John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series No. 17, School of Government, February 2004; *Reynolds v. Reynolds,* 356 N.C.

287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting).]

2. Examples of the different procedures and rights include:

a) Criminal contempt is a crime, and constitutional safeguards are triggered accordingly. A civil contempt proceeding does not command the procedural and evidentiary safeguards that are required by criminal contempt proceedings. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (citations omitted) (discussing the difference in protections).]

b) Under G.S. § 5A-15(e), a person charged with criminal contempt may not be called to be a witness against himself at the show cause hearing. [*See* section III.H.7 at page 76.] In civil contempt proceedings, an alleged contemnor may assert the right against self-incrimination and refuse to testify but the court may draw an adverse inference of fact from the failure to testify. [*McKillop v. Onslow County*, 139 N.C.App. 53, 532 S.E.2d 594 (2000); *see* section II.F.9 at page 31.]

c) A person found in criminal contempt in district court may appeal to superior court for a trial de novo. [G.S. § 5A-17; G.S. § 15A-1431; *see* section III.L at page 84.] A person found in civil contempt may appeal the district court's order to the court of appeals. [*See* G.S. § 5A-24; *see* section II.K at page 45.]

d) The burden of proof in a criminal contempt proceeding is beyond a reasonable doubt and this burden does not shift to the defendant after the entry of a show cause order. [*See* section III.H.11 at page 78.] In a civil contempt proceeding initiated under G.S. § 5A-23(a), a judicial official's finding of probable cause shifts the burden of proof to the defendant. [*See* section II.F.6 at page 30.]

3. Practical reasons that may help decide which type of contempt to use.

a) Criminal contempt should be used when:

(1) An order for arrest is necessary to ensure a defendant's appearance. [*See* G.S. § 5A-16(b) (OFA authorized in criminal contempt statute when there is probable cause to believe that the defendant will not appear at a show cause hearing).]

(2) A person cannot be held in civil contempt because that person does not have the ability, at the time of the contempt hearing, to comply with the order violated.

(3) The court wants to suspend a contemnor's incarceration and impose conditions of probation. [*See* III.I.1 at page 80.]

(4) There are no acts that the court wants the contemnor to take, i.e., there are no purge conditions to include in the order.

(5) The person subject to contempt is not a party to a court order, i.e., is a witness, a spectator, a lawyer, etc. Note, however, in *Marshall v. Marshall*, __ N.C.App. __, 757 S.E.2d 319 (2014), defendant was found in civil contempt of a marital dissolution agreement for his harassment of two individuals not parties to the agreement or to related court orders, based on the trial court's finding that the individuals were third party beneficiaries of the agreement.

(6) The alleged contemnor has not violated a court order or the order that is the subject of the contempt proceeding does not address the specific conduct of the contemnor.

b) Civil contempt should be used when:

(1) There are acts that the court wants to encourage the contemnor to take, i.e., purge conditions, such as the payment of money.

(2) The alleged contemnor testifies and asserts the right against self-incrimination. [*See* section II.F.9 at page 31 allowing inference of guilty from assertion in a civil contempt proceeding.]

4. For a table distinguishing criminal and civil contempt, *see* page 89.

C. Simultaneous action for civil and criminal contempt.

1. Although a person may be cited for both civil and criminal contempt for the same conduct, a person may not be held in both civil and criminal contempt for the same conduct. [*See* G.S. §§ 5A-12(d), 5A-21(c), 5A-23(g)]

a) A person may be held in both civil and criminal contempt when each contempt is based on different acts. [*Adams Creek Associates v. Davis,* 186 N.C.App. 512, 652 S.E.2d 677 (2007), *review denied, appeal dismissed, stay dissolved,* 362 N.C. 354, 662 S.E.2d 900, 901 (2008) (act supporting civil contempt was defendants' violation of a court order requiring defendants to stay off certain real property; act supporting criminal contempt was defendants' testimony that they would continue to violate court orders requiring them to stay off the land).]

2. G.S. § 5A-23(g) permits, in essence, a consolidated hearing for civil and criminal contempt. Thus, a judge who has begun a civil contempt hearing is permitted to find a person in criminal contempt even though the person is beyond the reach of civil contempt because of inability at that time to comply with the order. [Official Commentary to G.S. § 5A-23]

3. The statutes do not indicate whether the procedural requirements for criminal contempt are to be applied in a consolidated hearing when the defendant could be found in criminal contempt. Case law has established only that when a defendant was found in civil, not criminal, contempt, the defendant was not entitled to the constitutional protections and notice required in a criminal contempt proceeding. [*See Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310

(2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008) (where the notice of hearing did not clearly state whether the proceedings were criminal or civil but defendant admits she was found in civil contempt, she was not entitled to all the protections and safeguards of a criminal contempt proceeding); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam,* 328 N.C. 729, 403 S.E.2d 307 (1991) (since relief granted was wholly civil in nature and defendant was not, in fact, subject to criminal penalties, the trial court was not required to afford defendant all procedural and evidentiary safeguards required for criminal contempt proceedings, nor was court of appeals required to examine whether, in this case, defendant's fifth amendment rights were adequately protected during the contempt proceeding).]

4. To protect a defendant's rights, the extra due process requirements of a plenary hearing for indirect criminal contempt should be applied in contempt proceedings that might result in a finding of criminal contempt. [*See* section III.H on plenary hearings starting at page 72, setting out right against self-incrimination, the reasonable doubt standard of proof, that the burden of proof remains with the State, and the parameters for the right to appointed counsel).] [*But cf. Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (stating that "[s]ince the contempt proceeding in this case can rest on either the criminal or civil foundations, we conclude that compliance with either the procedural requirements of civil contempt or criminal contempt will validate the proceedings") (prior version of contempt statute that allowed both civil and criminal contempt for the same conduct).]

5. The procedural protections required in criminal contempt proceedings recognized by the U.S. Supreme Court include the requirement of proof beyond a reasonable doubt, protection from double jeopardy, and a jury trial where the result is more than six months imprisonment. [*Turner v. Rogers,* __ U.S. __, 131 S.Ct. 2507 (2011) (citations omitted).] As to double jeopardy:

a) The double jeopardy clause constitutes a bar to a subsequent criminal prosecution if the elements of the offense at issue in a previous contempt proceeding match the elements of the subsequently charged criminal offense. [*See State v. Freeland,* 316 N.C. 13, 340 S.E.2d 35 (1986) (defendant could not be punished for both first-degree kidnapping and the underlying sexual assault, which is an element of first-degree kidnapping).]

b) When wife in criminal contempt for violating provision in civil consent order that prevented her from "coming to" the residence of her ex-husband, double jeopardy precluded subsequent prosecution for domestic criminal trespass as elements of the offenses in both proceedings the same. [*State v. Dye,* 139 N.C.App. 148, 532 S.E.2d 574 (2000).]

c) Double jeopardy precluded conviction for assault on a female in light of defendant's prior adjudication of criminal contempt based upon violation of a DVPO that prohibited defendant from assaulting his wife.

[*State v. Gilley*, 135 N.C.App. 519, 522 S.E.2d 111 (1999), *cert. denied*, 549 S.E.2d 860 (2001).]

D. Consent judgments.

1. Generally.

a) Except in domestic relations matters discussed below, a consent judgment or order that merely recites the parties' settlement agreement and does not adjudicate the parties' respective rights is treated as a contract between the parties. As such, it is enforceable by an action for breach of contract and not through the contempt powers of the court. [*Ibele v. Tate*, 163 N.C.App. 779, 594 S.E.2d 793 (2004); *Crane v. Green*, 114 N.C.App. 105, 441 S.E.2d 144 (1994) (viewed from its four corners, clear that the consent agreement and order was merely a recital of the parties' agreement and not an adjudication of rights and thus was not enforceable by contempt).]

b) This is so even if the consent order provides that it is enforceable by contempt. [*Ibele v. Tate*, 163 N.C.App. 779, 594 S.E.2d 793 (2004) (attempt by parties to overcome the general law on consent orders by providing consent order enforceable by contempt not successful; contempt is an inherent power of the court that the parties cannot grant or accept).]

c) If, however, the trial court makes findings of fact and conclusions of law, thereby adjudicating the parties' rights, the contempt power may be used to enforce a consent judgment. [*Ibele v. Tate*, 163 N.C.App. 779, 781 n.2, 594 S.E.2d 793 (2004).]

d) The contempt power has been used to enforce a consent judgment that did not contain findings and conclusions when either:

(1) The parties waived those provisions [*GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (in light of the parties' express waiver of findings and conclusions in the consent order and in the absence of any evidence rebutting the presumption of adoption, the consent judgment was adopted by the court and was enforceable through contempt proceedings)]; or

(2) The trial court actually determined and adjudicated the parties' rights. [*See PCI Energy Serv., Inc. v. Wachs Technical Serv., Inc.*, 122 N.C.App. 436, 470 S.E.2d 565 (1996) (it was clear from the procedural history and language of the consent judgment, which adopted and incorporated the parties' agreement, even without findings, that the trial court had not merely "rubber-stamped" the parties' private agreement but had transformed the parties' agreement into the court's own determination of the parties' respective rights and obligations).]

2. Consent judgments in domestic relations matters.

a) In a domestic relations action, any consent judgment entered by the court is enforceable by civil contempt. [*Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983) (under rule announced in the case, every court approved separation agreement is to be considered a court ordered consent judgment enforceable by civil contempt in same manner as any other judgment in a domestic relations case); *Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (enforcing a consent judgment by civil contempt); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (finding defendant in contempt for violating a consent judgment providing for property distribution); *Barker v. Barker*, __ N.C.App. __, 745 S.E.2d 910 (2013) and *Ross v. Voiers*, 127 N.C.App. 415, 490 S.E.2d 244, *review denied*, 347 N.C. 402, 496 S.E.2d 387 (1997) (in both cases, father in contempt for violating consent order requiring payment of child's college expenses); *Fucito v. Francis*, 175 N.C.App. 144, 622 S.E.2d 660 (2005) (for practical purposes, in *Walters*, the court fashioned a "one-size fits all" rule applicable to incorporated settlement agreements in the area of domestic law, holding that when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment); *GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (consent judgment that required wife to specifically perform her obligation under an unincorporated separation agreement to satisfy certain indebtedness, which was akin to an ED provision, enforceable by contempt).]

II. Civil Contempt

A. When used.

1. The purpose of civil contempt is not to punish, but rather to coerce a defendant to comply with an order of the court. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *citing Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003).] Unlike criminal contempt, civil contempt is not a form of punishment. [Official Commentary to G.S. § 5A-21]

a) Where the trial court itself described the civil contempt action it took as "punishment," order for civil contempt reversed. Civil contempt is not proper as a means of punishment. [*Atassi v. Atassi*, 122 N.C.App. 356, 470 S.E.2d 59 (1996) (noting that criminal contempt would have been appropriate on the facts presented).]

2. Civil contempt may be used in civil or criminal proceedings.

3. The nature of the proceeding does not determine whether contempt is civil or criminal. Both civil and criminal contempt are available in both civil and criminal proceedings.

a) A defendant may be charged criminally but be in civil contempt. [*See State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992) (defendant

charged with criminal nonsupport found in civil contempt for failing to comply with an order for blood testing).]

b) A person may be held in criminal contempt for willfully failing to comply with an order entered in a civil proceeding. [*See* G.S. § 50-13.4(f)(9) (child support); G.S. § 50-13.3(a) (custody); G.S. § 50-16.7(j) (alimony).]

B. Grounds for civil contempt.

1. A person may be found in civil contempt for failure to comply with a court order if the following elements are met:

a) The order remains in force;

b) The purpose of the order may still be served by compliance with the order;

c) The noncompliance by the person to whom the order is directed is willful; and

d) The person to whom the order is directed is able to comply, or able to take reasonable measures that would enable the person to comply, with the order. [G.S. § 5A-21(a)]

2. Willfullness.

a) Effective December 1, 1999, willfullness was added as a necessary element of contempt. [G.S. § 5A-21(a)(2a), *amended by* 1999 N.C. Sess. Laws 361, § 1, effective December 1, 1999, and applicable to all proceedings for civil contempt held on or after that date.]

b) Prior to that, case law had interpreted the statutes to require an element of willfulness. [*See McKillop v. Onslow County*, 139 N.C.App. 53, 532 S.E.2d 594 (2000).]

c) Willfulness is, in the context of civil contempt:

(1) An ability to comply with the court order; and

(2) A deliberate and intentional failure to do so. [*Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005); *see also Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered); *Teachey v. Teachey*, 46 N.C.App. 332, 264 S.E.2d 786 (1980), *citing Lamm* (to find willfulness, must establish as an affirmative fact that defendant possessed the means to comply with the order at some time after its entry).]

d) Thus, in a civil contempt proceeding, a person's ability to comply with an order often is subsumed within the issue of willfulness. [*See* John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series

No. 17, School of Government, February 2004 (noting this in the context of child support).]

e) In the child support context, a finding of willful failure to pay court-ordered child support must be based on evidence that the obligor is purposefully, deliberately, stubbornly, or in bad faith disobeying a child support order or disregarding a court-ordered obligation to pay child support despite the present ability to do so. [*See* G.S. § 5A-21(a)(3); *Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *citing Forte v. Forte*, 65 N.C.App. 615, 309 S.E.2d 729 (1983) (willfulness involves more than deliberation or conscious choice; it imports a bad faith disregard for authority and the law); *Barker v. Barker*, __ N.C.App. __, 745 S.E.2d 910 (2013), *Meehan v. Lawrance*, 166 N.C.App. 369, 602 S.E.2d 21 (2004) and *Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (citations omitted) (all noting that willfulness imports knowledge and a stubborn resistance).] *See Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

f) Willfulness based on refusal to work when capable of doing so.

(1) Father who admitted that he was physically and mentally able to be employed, and in fact was employed full-time when the child support order was entered, but who voluntarily quit his job after entry of the support order to become a member of a religious community that prohibited its members from earning outside income, and who testified that he would not take outside employment under any circumstances, willfully failed to pay support and was properly held in civil contempt. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010) (that father's religious beliefs were sincerely held was irrelevant).]

(2) However, evidence that an obligor is able-bodied, not incapacitated, presently employed, or able to work is generally insufficient, standing alone, to support a finding that the obligor has willfully failed to pay court-ordered child support despite his or her present ability to do so. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (findings that defendant had ability to earn good wages, had been continuously employed as of a certain date, and had not made a motion to modify court order requiring him to pay support, were not sufficient to support conclusion that defendant's failure to pay was willful); *Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (findings that defendant was an able-bodied, 32 year old with tenth grade education, with work experience in the furniture industry, insufficient); *Hodges v. Hodges*, 64 N.C.App. 550, 307 S.E.2d 575 (1983) (finding that defendant able-bodied at least part of the time and "was capable of and had the means or should have had the means" to make support payments not sufficient); *Self v. Self*, 55 N.C.App. 651, 286 S.E.2d 579 (1982) (while evidence established that defendant was

physically able to work, it did not establish that work was available to him so conduct not willful).]

g) Willfulness based on a party's voluntarily taking on additional financial obligations or divesting him or herself of assets or income after entry of an order requiring support or other payments.

(1) A party who has the ability to pay court-ordered support a when support order is entered but later becomes unable to pay after voluntarily taking on additional financial obligations, or divesting assets or reducing income, engages in willfull conduct and may be held in civil contempt. [*See Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *quoting Faught v. Faught*, 67 N.C.App. 37, 312 S.E.2d 504, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984) (*Faught* reviewed well-established line of cases so providing).]

(2) Contempt order affirmed when defendant's income situation at time of contempt hearing was "of his own making" since he had voluntarily changed jobs twice since entry of the support order, the first change resulting in a lower salary and the second change resulting in "undisclosed compensation." Moreover, defendant had remarried and had a child by the second marriage and applied his income to matters other than the support called for in the parties' agreement, including payment on a home titled to his second wife. [*Williford v. Williford*, 56 N.C.App. 610, 289 S.E.2d 907 (1982).]

h) A party's noncompliance may not be willful when the party shows valid reasons for his or her noncompliance. [*See Spencer v. Spencer*, 133 N.C.App. 38, 514 S.E.2d 283 (1999) (obligor's unilateral reduction in court-ordered child support payments when obligor obtained physical custody of one of the parties' two children did not constitute willful failure to comply with child support order); *see also Meehan v. Lawrance*, 166 N.C.App. 369, 602 S.E.2d 21 (2004) (where parties orally agreed to modify defendant's child support obligation, trial court's finding that defendant did not act willfully affirmed).]

3. Present ability to comply.

a) The present ability to comply includes not only the present means to comply, but also the ability to take reasonable measures to comply. [G.S. § 5A-21(a)(3); *Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

b) The court must determine a party's ability to comply during two periods of time. The trial court must find that the party:

(1) Possessed the means to comply with the court's order during the period the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (requiring a finding that defendant possessed the means to comply with alimony and child support orders during the period when he was in default); *Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (to address the requirement of willfulness, the trial court must make findings as to the ability of the party to comply with the order at issue during period of default); *Sowers v. Toliver*, 150 N.C.App. 114, 562 S.E.2d 593 (2002) (contempt order vacated when it lacked findings as to plaintiff's ability to comply with order during period when in default)]; and

(2) Has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *quoting McMiller v. McMiller*, 77 N.C.App. 808, 336 S.E.2d 134 (1985) ("[t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages"); *Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009) (citation omitted) (G.S. §§ 5A-21 and 5A-22, construed together, require that a person have the present ability to comply with purge conditions before he or she may be imprisoned for civil contempt); *Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Bennett v. Bennett*, 21 N.C.App. 390, 204 S.E.2d 554 (1974) (findings taken as a whole showed that court considered husband's ability to comply at the time of the hearing with an order requiring him to pay $20,000 of unpaid alimony within 60 days of entry of the order); *Bishop v. Bishop*, 90 N.C.App. 499, 369 S.E.2d 106 (1988) (contempt reversed when no findings as to defendant's ability to pay at date of hearing); *Hodges v. Hodges*, 64 N.C.App. 550, 307 S.E.2d 575 (1983) (contempt order vacated when court did not determine ability to pay as of date of hearing).]

(3) Because a trial court must find that an alleged contemnor has the present ability to comply, a party cannot bring a civil contempt action to enforce an order against a person who is deceased when the contempt action is initiated. [*MacMillan v. Thompson*, __ N.C.App. __, 753 S.E.2d 741 (2013) (**unpublished**) (motion in the cause interpreted to initiate a civil contempt action to enforce an incorporated separation agreement).]

c) General finding of present ability to comply sufficient in certain circumstances.

(1) A general finding of present ability to comply with a support order is sufficient when there is evidence in the record regarding defendant's assets. [*Watson v. Watson*, 187 N.C.App. 55,

652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008), *citing Adkins v. Adkins*, 82 N.C.App. 289, 346 S.E.2d 220 (1986); *see also Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010) (finding that "[d]efendant has the ability to comply or take reasonable efforts to do so" while making no finding that defendant had the present ability to pay the arrearage and purge himself of contempt, was not as specific or detailed as might be preferred but was minimally sufficient); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (although specific findings as to the contemnor's present means are preferable, findings that that "[d]efendant ha[d] at all times been fully capable and able of complying with all provisions of the Court's decree" and that "[d]efendant ha[d] the present ability and continuing capability to comply with all remaining provisions of the Court's decree with which he ha[d] not heretofore complied" sufficient when supported by competent evidence of assets that could be sold); *Lee v. Lee*, 37 N.C.App. 371, 246 S.E.2d 49 (1978), *citing Moore v. Moore*, 35 N.C.App. 748, 242 S.E.2d 642 (1978) (failure to include a finding as to contemnor's present ability to perform the order not fatal when evidence introduced that would justify such a finding).]

d) Use of findings from an earlier hearing of present ability to comply.

(1) Prior findings of a present ability to pay may be res judicata as to future proceedings on that issue, at least when the proceedings are close in time. [*Abernethy v. Abernethy*, 64 N.C.App. 386, 307 S.E.2d 396 (1983) (finding of a present ability to pay at March hearing was res judicata on that issue at a June hearing, defendant not having appealed the March judgment).]

e) A finding that a party "has had" the ability to comply, without more, not sufficient support for a finding of present ability to comply at the time of the hearing.

(1) The sole finding, that the defendant "has had" the ability to comply with the support order, did not, standing alone, support the conclusion that defendant had the present ability to purge himself of contempt by paying arrearages owed. [*McMiller v. McMiller*, 77 N.C.App. 808, 336 S.E.2d 134 (1985) (since no finding was made as to defendant's present ability to pay the arrearages necessary to purge himself from contempt, judgment vacated); *Thompson v. Thompson*, __N.C.App. __, 735 S.E.2d 214 (2012), *citing McMiller* (finding that "Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount" was insufficient because it speaks to past ability to pay and was not a finding about

defendant's present ability to pay); *cf. Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (findings taken as a whole showed that court considered husband's present ability to comply with an order requiring him to pay alimony arrearages even though contempt order stated that defendant "*had* the present ability to comply" with the order, rejecting plaintiff's argument that trial court's use of "had" was fatal to its judgment; findings addressed plaintiff's various sources of income, that his expenses and debts were paid by his closely held corporation and that he voluntary made mortgage and rent payments for his adult children and mother instead of paying alimony arrearages as ordered).]

f) A failure to seek modification of a support order cannot, without more, be the basis for finding a present ability to comply.

(1) A present ability to pay may not be presumed based solely on the existence of a prior support order and the absence of a motion to modify that order. [*See Smithwick v. Smithwick*, 218 N.C. 503, 11 S.E.2d 455 (1940) (right to move for modification does not sustain conclusion that failure to comply was willful and contemptuous); *Graham v. Graham*, 77 N.C.App. 422, 335 S.E.2d 210 (1985) (noting that while a defendant who lacks means to make required payments should move for modification, failure to do so is not evidence of willful contempt).]

g) Ability to work, standing alone, generally not sufficient to show willfulness or present ability to comply.

(1) Evidence that an obligor is able-bodied, not incapacitated, presently employed, or able to work is generally insufficient, standing alone, to support a finding that the obligor has willfully failed to pay court-ordered child support despite his or her present ability to do so. [*See Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (findings that defendant was an able-bodied, 32 year old with tenth grade education, with work experience in the furniture industry, insufficient); *Hodges v. Hodges*, 64 N.C.App. 550, 307 S.E.2d 575 (1983) (finding that defendant able-bodied at least part of the time and "was capable of and had the means or should have had the means" to make support payments not sufficient); *Self v. Self*, 55 N.C.App. 651, 286 S.E.2d 579 (1982) (while evidence established that defendant was physically able to work, it did not establish that work was available to him so conduct not willful).]

h) Inability to comply must be genuine.

(1) A person's inability to comply at the time of the contempt hearing must be genuine and not deliberately effected. [*See Bennett v. Bennett*, 21 N.C.App. 390, 204 S.E.2d 554 (1974) (affirming

contempt in child support context, noting that a defendant may not deliberately divest himself of property and in effect pauperize himself for appearance at a contempt hearing).]

i) Ability to part of arrearage.

(1) Ability to pay part of arrearage is insufficient to support incarceration until entire amount is paid. [*See Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902) (where court found that husband could pay at least a portion of alimony owed, it was error to imprison him until he should pay the whole amount); *see also Brower v. Brower*, 70 N.C.App. 131, 318 S.E.2d 542 (1984) (order that required defendant's imprisonment until he paid entire arrearage vacated when supported only by finding that defendant has present ability to pay a portion of that amount).] Note, however, that ability to pay part of arrearage is sufficient to support incarceration until that part is paid. [*But see Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (emphasis in original) (court's finding that "the Plaintiff has the present ability to comply *with at least a portion* of the Orders of this Court" insufficient to support a finding of willfulness; case remanded for specific findings addressing plaintiff's willful noncompliance, including findings regarding his ability to pay during the period that he was in default).]

j) Party had the present ability to comply with an order or purge condition requiring the payment of money when he or she had:

(1) Sixty days from entry of contempt order to pay $20,000 of unpaid alimony, he had $15,000 in monthly income, a portion of which could be used to pay the amount ordered, he had personal debts and expenses paid by his business, a closely held corporation, and he could take reasonable measures to comply by accessing cash from lines of credit associated with credit cards and by ceasing to voluntarily make monthly mortgage and rent payments for his adult children and mother. [*Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014).]

(2) The ability to pay some of the costs associated with the numerous lawsuits he filed, there was no evidence showing that he could not have been gainfully employed, and further that he actually satisfied the judgment by payment of $2,000 after serving only one day in jail. [*Ward v. Jett Properties, LLC*, 698 S.E.2d 768 (2010) (**unpublished**).]

(3) At the time of the hearing, a $2,000 cashier's check, a boat and a car that could readily be converted to cash, and at least $6,200 from his 401(k) plan. [*Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009) (payment of $10,000 in alimony arrears required for defendant to purge himself of contempt).]

(4) Equity in real property that exceeded $500,000. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (defendant given 90 days to sell real property to pay plaintiff's attorney fees and to pay credit card debt she was ordered to pay in ED).]

(5) $60,000 in equity and several items of personal property of value. [*Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam,* 328 N.C. 729, 403 S.E.2d 307 (1991) (payment of approximately $36,000, representing sums owed under a consent decree for taxes and attorney fees, required for defendant to purge himself of contempt).]

(6) Several assets (automobiles and real estate) at the time of the hearing that could have been sold or liquidated, as well as consistent and recurring deposits and monies from a "friend," and present income from service on a city council. [*Onslow County obo Eggleston v. Willingham,* 199 N.C.App. 755, 687 S.E.2d 541 (2009) (**unpublished**).]

(7) Stock valued in excess of $30,000, which had defendant sold it, could have been used to pay a required installment payment of $7,000 for wife's attorney fees, as well as the entire amount owed on that debt. [*Hudson v. Hudson,* 193 N.C.App. 454, 667 S.E.2d 340 (2008) (**unpublished**).]

4. Ability to take reasonable measures that would enable a person to comply.

a) "Reasonable measures" that would enable a person to comply with an order for support or to pay arrearages may include:

(1) Liquidating equity in encumbered assets. [*Adkins v. Adkins,* 82 N.C.App. 289, 346 S.E.2d 220 (1986) (rejecting father's argument that he could not be imprisoned for civil contempt unless court found that father had unencumbered property that could be used to purge himself of contempt).]

(2) Borrowing money, selling property or liquidating other assets. [*Gordon v. Gordon,* __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Teachey v. Teachey,* 46 N.C.App. 332, 264 S.E.2d 786 (1980).]

b) Party had the ability to take reasonable measures to enable the party to comply:

(1) With a discovery order when the documents were readily available from third-party sources, such as banks, brokerage houses, and accountants. [*Milks v. Mills,* 681 S.E.2d 865 (2009) (**unpublished**) (requiring defendant to obtain the discovery materials from third-party sources was not unreasonable).]

(2) With an order requiring defendant to purchase certain residential properties when defendant could have sold or encumbered other real property he owned, could have enlisted the financial support of his partner, and could have been more diligent in efforts to procure financing through an institutional lender. [*Banana Wind Properties, LLC v. K&T Real Estate Investments*, 191 N.C.App. 399, 663 S.E.2d 12 (2008) (**unpublished**).]

C. When civil contempt is not available.

1. Civil contempt is not available when:

a) *The required action has been performed, in other words, the alleged contemnor is in compliance on the date of the hearing.*

(1) A court may not find a party in civil contempt after the required action has been performed. [*Ruth v. Ruth*, 158 N.C.App. 123, 579 S.E.2d 909 (2003) (error for trial court to find mother in contempt for failing to return children after visitation when she had returned children to father before the contempt hearing); *Vaughn v. Vaughn*, 176 N.C.App. 409, 626 S.E.2d 876 (2006) (**unpublished**) (husband's marriage before the contempt hearing meant that he was in compliance with custody order that prohibited opposite sex overnight guests).] But criminal contempt may be available, *see* section III.E at page 62 and immediately below.

(2) An obligor ordered to show cause for failing to pay court-ordered child support may not be held in civil contempt if he or she pays the full amount of the arrearage before the contempt hearing is held. [*See Reynolds v. Reynolds*, 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd on other grounds per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002) (father's payment of arrearages after contempt motion filed eliminated option of civil, but not criminal, contempt); *Hudson v. Hudson*, 31 N.C.App. 547, 230 S.E.2d 188 (1976) (no contempt where between filing of contempt motion and hearing thereon the defendant brought the support payments up to date).]

(3) The "compliance by date of hearing" argument was not successful when the alleged contemnor was ordered to refrain from certain behavior, in this case, unsupervised visitation, as opposed to an order requiring an affirmative act, for example, bringing support up to date. [*See Helms v. Landry*, 681 S.E.2d 566, *review denied*, 363 N.C. 744, 688 S.E.2d 454 (2009) (**unpublished**) (rejecting mother's argument that since she had not attempted to visit the minor child after the motion in the cause was filed, she was in compliance at the time of the hearing with the court's prior orders requiring supervised visitation).]

b) *No underlying order has been entered pursuant to G.S. § 1A-1, Rule 58, in other words, no order was "in force" when contempt order entered.*

(1) Contempt reversed when trial court gave an oral judgment for plaintiffs but never reduced the judgment to writing or entered it. Since an order is not enforceable by contempt until entered pursuant to G.S. § 1A-1, Rule 58, defendants could not be in contempt of it. [*Carter v. Hill*, 186 N.C.App. 464, 650 S.E.2d 843 (2007); *see also Carland v. Branch*, 164 N.C.App. 403, 595 S.E.2d 742 (2004) (citations omitted) (custody arrangement announced in open court on 11/19/01 not an enforceable order until it was entered on 5/13/02); *Hassell v. Hassell*, 149 N.C.App. 972, 563 S.E.2d 100 (2002) (**unpublished**) (defendant could not be found in contempt in October 2000 of an August 2000 decision that was not entered as an order until January 2001).]

(2) Contempt reversed when it was based on conduct by defendant occurring prior to entry of the underlying order. [*Onslow County v. Moore,* 129 N.C.App. 376, 499 S.E.2d 780, *review denied,* 349 N.C. 361, 525 S.E.2d 543 (1998) (order was not "in force" until it was entered in March; conduct occurring in January and February could not be basis for contempt).]

(3) A party cannot be held in civil contempt of a temporary order following termination of the action by a Rule 41 voluntary dismissal. [*See Collins v. Collins*, 18 N.C.App. 45, 196 S.E.2d 282 (1973) (father could not be held in contempt of a temporary custody order after mother voluntarily dismissed the action under Rule 41(a)(1); mother's voluntary dismissal, after being awarded temporary custody but before claim for permanent custody was decided, was a final termination of that action and no valid orders, including adjudications of contempt for violation of the temporary order, could be made thereafter in that cause).]

c) *The alleged contemnor is not the person "to whom the order is directed" as required by G.S. § 5A-21(a)(2a) and (3).*

(1) When the order that was the subject of the contempt proceeding allowed mother to travel out of the country with the child, arose upon mother's motion, and was solely directed at the conduct of mother, error to find father in civil contempt of the order for filing for, and obtaining custody, in a foreign country during a visit there by the mother and child. [*Atassi v. Atassi,* 122 N.C.App. 356, 470 S.E.2d 59 (1996) (while defendant father could not be in civil contempt of an order that was not directed at him, the court noted that father's conduct could be the basis for criminal contempt).]

d) *Conduct alleged to be contemptuous is not specifically prohibited by the order or provision in order is impermissibly vague*.

(1) Provision that allowed defendant to purge his contempt by "fully complying" with prior orders did not clearly specify what defendant could or could not do to purge himself of contempt and did not establish a date after which contempt purged. Order for civil contempt reversed. [*Wellons v. White v. Wellons*, __ N.C.App. __, 748 S.E.2d 709 (2013), *citing Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003).]

(2) Father could not be in contempt of order that was so vague that court had to "strain" to identify the provisions pursuant to which defendant was held in contempt. Language that directed father not to "interfere" with mother's custody was impermissibly vague for it did not specify what father could or could not do to purge himself of contempt. [*Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003).] *Cf. Middleton v. Middleton*, 159 N.C.App. 224, 583 S.E.2d 48 (2003) (upholding contempt even though the conduct complained of was not specifically addressed in the agreement or order when it was clear that the party violated the intent and spirit of the agreement or order).

e) *The conduct allegedly contemptuous violated a contract, not a court order.*

(1) Provisions included in an unincorporated separation agreement may not be enforced through civil contempt. [*See Jones v. Jones*, 144 N.C.App. 595, 548 S.E.2d 565 (2001) (alimony case stating that "[w]here a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles").]

(2) However, an order requiring a party to specifically perform his or her obligations under an unincorporated separation agreement is enforceable by contempt. [*GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002), *citing McDowell v. McDowell*, 55 N.C.App. 261, 284 S.E.2d 695 (1981) (if a party to an unincorporated separation agreement does not perform his or her obligations under the agreement, the other party may obtain a decree of specific performance of the separation agreement, which is enforceable through contempt proceedings).]

(3) *See Spousal Agreements*, Bench Book, Vol. 1, Chapter 1, discussing specific performance as a remedy for breach of an unincorporated separation agreement.

f) *The person aggrieved agreed to the allegedly contemptuous conduct.*

(1) Father not in contempt for failing to make court-ordered child support payments for nearly ten years when father reasonably relied upon mother's oral agreement to waive the payments in exchange for father foregoing his visitation rights. The court noted the "just rule" that disobedience to a court order that results from the advice or agreement of the complainant should not be punished at the complainant's behest. [*Forte v. Forte*, 65 N.C.App. 615, 309 S.E.2d 729 (1983).]

g) *Alleged contemnor is immune from suit*.

(1) Clerk of superior court, acting in a judicial capacity in a partition suit, had judicial immunity from contempt charges. [*Bare v. Atwood,* 204 N.C.App. 310, 693 S.E.2d 746 (2010).]

(2) State of North Carolina and its administrative agencies, such as the DOT, enjoy sovereign immunity and cannot be held in contempt. [*North Carolina Dep't of Transportation v. Davenport,* 334 N.C. 428, 432 S.E.2d 303 (1993) (further noting that contempt statutes refer to persons, which does not include a sovereign).]

h) *Order to be enforced by contempt was made without, or in excess of, the court's jurisdiction.*

(1) Consent judgment requiring that a municipal election be held at a different time than that fixed by statute was void as court lacked jurisdiction to require that an invalid primary election be held. Defendants could not be in contempt for refusal to surrender their offices. [*Corey v. Hardison*, 236 N.C. 147, 72 S.E.2d 416 (1952); *Wilson v. Wilson*, 124 N.C.App. 371, 477 S.E.2d 254 (1996) (when the trial court lacked jurisdiction to issue a subpoena to a nonparty to appear for a deposition out of county, nonparty could not be held in civil contempt for his failure to appear).]

D. Matters that have not precluded a finding of civil contempt.

1. That the party erroneously interpreted a court order. [*McVicker v. McVicker,* __ N.C.App. __, 762 S.E.2d 533 (2014) (**unpublished**) (defendant mistakenly believed that language in an ED consent judgment, that authorized upon default a charging order on distributions to defendant from defendant's business, was sole remedy and precluded the remedy of contempt); *Rain Tree v. Bradford*, 206 N.C.App. 330, 698 S.E.2d 557 (2010) (**unpublished**) (plaintiff erroneously believed that a 2007 order prohibiting cohabitation but not overnight guests superseded a provision in a 2005 order that prohibited her from having overnight guests of the opposite sex).]

2. That the conduct complained of was not specifically addressed in the agreement or order when it was clear that the party violated the intent and spirit of

the agreement or order. [*Middleton v. Middleton,* 159 N.C.App. 224, 583 S.E.2d 48 (2003) (citation omitted) (husband violated the spirit and intent of a consent judgment providing for the sale of the marital home when he took willful and deliberate action to thwart the sale by making the house unattractive and undesirable to prospective purchasers; civil contempt finding upheld because a party "must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially").] *But cf. Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003) (defendant could not be held in contempt of order that was so vague that court had to "strain" to identify the provisions pursuant to which defendant was held in contempt; language that directed father not to "interfere" with mother's custody was impermissibly vague for it did not specify what father could or could not do to purge himself of contempt).

E. Procedure in a civil contempt proceeding.

1. Ways to initiate a civil contempt proceeding.

a) A person interested in enforcing a court order, including a judge, may file a motion accompanied by a sworn statement or affidavit. If a judicial official [*see* 2(a) below for definition] finds probable cause to believe there is civil contempt, the judicial official may issue either:

(1) A notice to show cause stating that the alleged contemnor will be held in contempt unless he or she appears and shows cause for not being held in contempt; or

(2) An order to show cause directing the alleged contemnor to appear and show cause why he or she should not be held in contempt. [G.S. § 5A-23(a)] This requires the defendant to personally appear at the hearing or risk being found in contempt for failure to appear. [*See Cox v. Cox,* 92 N.C.App. 702, 376 S.E.2d 13 (1989) (defendant found in indirect criminal contempt for failure to appear; appearance of defendant's counsel not sufficient to satisfy a show cause order that specifically ordered defendant to appear).]

b) An aggrieved party may serve a motion accompanied by a sworn statement or affidavit and notice of hearing on the alleged contemnor. [G.S. § 5A-23(a1)] There is no show cause order issued and no finding of probable cause. [*See Trivette v. Trivette,* 162 N.C.App. 55, 590 S.E.2d 298 (2004) (when contempt proceeding initiated by motion and notice of aggrieved party, there is no judicial finding of probable cause).] If initiated pursuant to G.S. § 5A-23(a1), the motion is limited to civil contempt and the court cannot consider criminal contempt. Due process requires that a proceeding for criminal contempt be initiated by the court, not by a private litigant. [*Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011).] For more on *Brandt, see* Michael Crowell, Contempt, School of Government, February 2013, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/015-Drennan%20-%20Crowell-Contempt,%202013.pdf.

2. Contempt proceedings initiated pursuant to G.S. § 5A-23(a).

a) The verified motion or motion accompanied by a sworn statement or affidavit requests a judicial official to issue an order or notice requiring an alleged contemnor to show cause why he or she should not be held in civil contempt. A judicial official is defined in G.S. § 5A-23(d) as "the trier of facts at the show cause hearing." Therefore, a clerk cannot issue a show cause order pursuant to G.S. § 5A-23(a) unless in a situation where a clerk is statutorily authorized to exercise contempt authority. [*Moss v. Moss*, __ N.C.App. __, 730 S.E.2d 203 (2012).] *See* G.S. § 50-13.9(a) specifically authorizing clerk to issue show cause orders in proceedings for income withholding or for contempt for failure to pay child support.

b) A judicial official must determine, based on the motion and sworn statement or affidavit, whether there is probable cause to believe there is civil contempt. [*See* G.S. § 5A-23(a)]

(1) Probable cause in G.S. § 5A-23(a) refers to those facts and circumstances, within a judicial official's knowledge and about which he has reasonably trustworthy information, that are sufficient to warrant a prudent person in believing that the alleged contemnor is in civil contempt. [*Young v. Mastrom, Inc*., 149 N.C.App. 483, 560 S.E.2d 596 (2002) (contempt action brought for failure to comply with order directing payment of money).]

(2) A trial court used the incorrect standard in denying a motion for a show cause order when it decided the motion under G.S. § 5A-21, which sets out the elements of civil contempt, instead of making a probable cause determination under G.S. § 5A-23(a). [*Young v. Mastrom, Inc*., 149 N.C.App. 483, 560 S.E.2d 596 (2002).]

(3) A judicial official's determination of probable cause under G.S. § 5A-23(a) is generally ex parte. The alleged contemnor is not entitled to prior notice or an opportunity to be heard before the judicial official issues an order or notice to show cause pursuant to G.S. § 5A-23(a).

c) If there is probable cause to believe that a person is in civil contempt, the judicial official must issue a notice or order to show cause directed to that person. [G.S. § 5A-23(a); *see Watkins v. Watkins,* 136 N.C.App. 844, 526 S.E.2d 485 (2000) (vacating an order finding a defendant in civil contempt of a consent order for custody based, in part, on the fact that no notice or order to show cause was ever issued to the defendant).]

(1) An **order** to show cause requires an alleged contemnor to appear before a district court judge at a specified reasonable time to show cause why he or she should not be held in civil contempt.

(2) A **notice** to show cause does not require the alleged contemnor's appearance but provides notice that he or she will be found in civil contempt unless he or she appears before a district court judge at a specified reasonable time and shows cause why he or she should not be held in civil contempt.

(3) Notice is not optional under G.S. § 5A-23 and contempt will be vacated when notice not provided unless objection waived. [*Carter v. Hill,* 186 N.C.App. 464, 650 S.E.2d 843 (2007) (when defendants were notified at the end of the trial that they would be held in contempt until the debt was paid, and they were taken immediately to jail, the hearing was clearly in violation of G.S. § 5A-23(a)); *Garrett v. Garrett,* 121 N.C.App. 192, 464 S.E.2d 716 (1995), *disapproved of on other grounds by Pulliam v. Smith,* 348 N.C. 616, 501 S.E.2d 898 (1998) (finding of civil contempt vacated when court's instantaneous determination of contempt made it obvious that the required statutory notice was not provided to plaintiff).]

(4) When defendant is served with a copy of the motion for an order to show cause, which states the grounds for the alleged civil contempt, as well as the show cause order referencing the motion, defendant had adequate notice of the nature of the contempt proceedings. [*Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008) (defendant had adequate notice that her failure to pay credit card debt as ordered was the basis of the proceeding).]

d) Service of the order or notice.

(1) Absent good cause, a show cause order or notice issued pursuant to G.S. § 5A-23(a) must be served on the alleged contemnor at least five days before the scheduled hearing. [G.S. § 5A-23(a)]

(2) G.S. § 5A-23(a) does not specify the manner in which a show cause order or notice must be served. Rule 5 of the Rules of Civil Procedure allows all orders to be served either pursuant to Rule 4 or pursuant to Rule 5. However, for income withholding or contempt for failure to pay child support, G.S. § 50-13.9(d) provides that an order to appear and show cause issued pursuant to that statute should be served in accordance with G.S. § 1A-1, Rule 4.

(3) The court is authorized to shorten the period of notice for good cause shown. [G.S. § 5A-23(a); *M.G. Newell Co. v. Wyrick,* 91 N.C.App. 98, 370 S.E.2d 431 (1988) (court authorized to shorten notice period when alleged contemnor had known of charges against him for several months and had had ample time to prepare, witnesses and parties were present, and defendant's

attorney acknowledged ample time to discuss charges with defendant).]

(4) There is no requirement that notice be served on other parties of interest in the underlying case. [*Anderson v. Lackey,* 166 N.C.App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (child did not have to be served with notice of contempt against his mother for her violation of an order providing for visitation by the father).]

e) Procedural requirements may be waived.

(1) When an alleged contemnor comes into court to answer the charges of the show cause order, he or she waives procedural requirements. [*Lowder v. All Star Mills, Inc.,* 301 N.C. 561, 273 S.E.2d 247 (1981) (contemnor waived defect of no sworn statement or affidavit); *see also Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008) (defendant's active participation in a contempt hearing, without objection and which included presenting evidence and exhibits relating to credit card debt that a court had ordered her to pay, defeated her contention that she did not have notice that her nonpayment of the credit card debt would be at issue); *Glesner v. Dembrosky,* 73 N.C.App. 594, 327 S.E.2d 60 (1985) (contemnor waived her objection to the lack of notice by appearing at hearing and presenting substantial evidence on the issues of which she claimed no notice); *Whitaker v. Whitaker,* 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied,* 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied,* 361 N.C. 370, 662 S.E.2d 552 (2008), *citing Lowder* (procedural objection to contempt hearing held only one day after defendant filed show cause motion was waived by plaintiff's attendance and participation at the hearing without objection).]

3. Contempt proceedings initiated by motion, affidavit and notice of an aggrieved party pursuant to G.S. § 5A-23(a1).

a) When contempt proceedings are initiated by motion pursuant to G.S. § 5A-23(a1), the aggrieved party must serve a copy of the motion, sworn statement or affidavit, and notice of hearing on the alleged contemnor pursuant to G.S. § 1A-1, Rule 5, at least five days before the scheduled hearing, absent good cause. [G.S. § 5A-23(a1)] Failure to provide a notice of hearing warrants reversal of a contempt order entered in a proceeding initiated pursuant to G.S. § 5A-23(a1). [*Ross v. Ross,* 215 N.C.App. 546, 715 S.E.2d 859 (2011).]

b) G.S. § 5A-23(a1) allows a contempt proceeding to be initiated upon motion and notice by an aggrieved party without a judicial finding of probable cause. [*Trivette v. Trivette,* 162 N.C.App. 55, 590 S.E.2d 298 (2004).]

4. Dismissal of a motion for contempt or order to show cause.

a) A person ordered to show cause may move to dismiss the order. [G.S. § 5A-23(c)]

b) Because when considering a motion to dismiss, the trial court must take the complaint's allegations as true, dismissal generally is appropriate only where the face of the complaint discloses some insurmountable bar to recovery. [*Westlake v. Westlake,* __ N.C.App. __, 753 S.E.2d 197 (2014), *citing Lea v. Grier,* 156 N.C.App. 503, 577 S.E.2d 411 (2003); *Brown v. Brown,* 188 N.C.App. 164, 654 S.E.2d 832 (2008) (**unpublished**) (since holding a party in contempt requires a determination by the trial court of willfulness, it is rarely appropriate for such a matter to be disposed of by a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6), or a motion for summary judgment under G.S. § 1A-1, Rule 56; only where it is absolutely clear that a party has not violated a provision of a court order should the trial court consider such a disposition).]

c) Dismissal of contempt motion in error.

(1) Trial court erred in dismissing father's motion for contempt for failure to state a claim when motion stated that custody order was still in effect and that mother had repeatedly obstructed father's visitation with his children. [*Westlake v. Westlake,* __ N.C.App. __, 753 S.E.2d 197 (2014) (construing father's motion liberally and treating the allegations as true).]

d) Dismissal of contempt motion upheld.

(1) Six of seven grounds for finding defendant in civil or criminal contempt properly dismissed because either i) defendant could not be in contempt of provisions not in the order; ii) conduct complained of did not violate order; iii) plaintiff did not allege that defendant's conduct was willfull; or iv) defendant had complied with order before motion filed or by hearing. [*Brown v. Brown,* 188 N.C.App. 164, 654 S.E.2d 832 (2008) (**unpublished**).]

5. A person with an interest in enforcing an order may present the case for a finding of civil contempt for failure to comply with an order. [G.S. § 5A-23(f)] A "person with an interest" includes the State, as represented by the district attorney, in a criminal case. [Official Commentary to G.S. § 5A-23(a)]

6. Mediation requirement for contempt issues in child custody and visitation matters.

a) In districts with a mediation program, any case with a contested issue of custody or visitation must be referred to mediation unless excused by order of a judge. Issues that arise in motions for contempt with respect to orders for custody and visitation shall be set for mediation unless waived by the court. [G.S. § 50-13.1(b); Rule 7.01 of the Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes Under the North Carolina Custody and Visitation Mediation Program (providing for

mediation of, among other things, actions to enforce custody and visitation orders).]

7. Contempt in context of a mediated settlement conference.

a) A person required to attend a mediated settlement conference or other settlement procedure under G.S. § 7A-38.4 who, without good cause, fails to attend or fails to pay any or all of a mediator or other neutral's fee, is subject to the contempt powers of the court. [G.S. § 7A-38.4A(c)]

F. Hearing.

1. Proceedings for civil contempt are always plenary proceedings. [*See* G.S. § 5A-23(a) and (a1) requiring notice and a hearing.] There is no summary procedure for civil contempt proceedings.

2. Because all proceedings are plenary, the distinction between direct and indirect contempt has little meaning in the civil contempt context. Notwithstanding, some cases refer to "indirect civil contempt." [*See State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992) (trial court found defendant in "indirect civil contempt" when he failed to have blood drawn for court-ordered paternity testing); *Piedmont Equipment Co. v. Weant*, 30 N.C.App. 191, 226 S.E.2d 688 (1976) (reviewing on appeal an order dismissing a charge of "indirect civil contempt").]

3. Venue is in the county where the order was issued. [G.S. § 5A-23(b)]

4. Recusal of judge if judge's objectivity may reasonably be questioned.

a) G.S. § 5A-15(a) provides that if a criminal contempt is based on acts before a judge that so involve the judge that the judge's objectivity may reasonably be questioned, the order must be returned before a different judge.

b) No statute addresses recusal in the context of civil contempt. However, recusal may be appropriate under Canon 3C(1) of the Code of Judicial Conduct, which provides that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned." For more on recusal, *see North Carolina Code of Judicial Conduct,* Bench Book, Vol. 2, Chapter 1.

c) That respondent father, in an unrelated criminal proceeding before the same judge had been held in contempt of court and jailed for calling the judge a bad name, did not require judge's recusal from a later TPR proceeding. [*In re A.R.S.*, 195 N.C.App. 459, 673 S.E.2d 168 (2009) (**unpublished**).]

5. Standard of proof.

a) G.S. Ch. 5A does not clearly specify the standard of proof in civil contempt proceedings.

b) In contempt proceedings pursuant to G.S. § 5A-23(a) (order or notice issued by a judicial official), and contempt proceedings pursuant to G.S. § 5A-23(a1) (motion and affidavit of an aggrieved party), a court should not find a person in civil contempt unless there is sufficient proof of contempt. Standard of proof is probably preponderance of the evidence.

6. Burden of proof.

a) Proceeding initiated by an order or notice issued by a judicial official pursuant to G.S. § 5A-23(a). A judicial official is defined in G.S. § 5A-23(d) as "the trier of facts at the show cause hearing." Therefore, a clerk cannot issue a show cause order pursuant to G.S. § 5A-23(a) unless in a situation where a clerk is statutorily authorized to exercise contempt authority. [*Moss v. Moss*, __ N.C.App. __, 730 S.E.2d 203 (2012).] *See* G.S. § 50-13.9(d) specifically authorizing clerk to issue show cause orders in proceedings for income withholding or for contempt for failure to pay child support.

(1) A show cause order in a civil contempt proceeding that is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show cause why he should not be held in contempt. [G.S. § 5A-23(a); *Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Tucker*; *Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009), *citing State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (in a civil contempt proceeding initiated by a show cause order, the defendant has the burden of presenting evidence to show that he was not in contempt and the defendant refuses to present such evidence at his own peril).]

(2) To meet a defendant's burden in the case of failure to pay money, such as child support, a party must establish a lack of means to pay support or an absence of willfulness in failing to pay. [*Belcher v. Averette*, 136 N.C.App. 803, 526 S.E.2d 663 (2000).]

(3) Despite fact that burden shifts to defendant, case law makes it clear that a defendant may not be held in contempt unless the trial court has sufficient evidence upon which to base findings of fact sufficient to support finding that defendant had the ability to pay as well as all other required findings to support contempt. [*See Carter v. Hill*, 186 N.C.App. 464, 650 S.E.2d 843 (2007) (where findings of fact were "conspicuously absent" from contempt order, and worse, instead of finding that defendant had the ability to pay, the court found to the contrary, that he was not able to pay the amount ordered, entry of contempt reversed); *Frank v. Glanville*, 45 N.C.App. 313, 262 S.E.2d 677 (1980) (when it was not clear that defendant had the ability to comply with the contempt order,

ever had the ability, or would ever be able to take reasonable measures that would enable him to comply, and because no finding detailing defendant's ability to comply with the contempt order was made, contempt order reversed); *State ex rel. Dunkle v. Utley*, 208 N.C.App. 568, 706 S.E.2d 841 (2010) (**unpublished**) (reversing contempt order when trial court "wholly failed" to make any findings of fact regarding defendant's willfulness or present ability to comply).]

b) Proceeding initiated by motion, affidavit and notice of an aggrieved party pursuant to G.S. § 5A-23(a1) (no prior review by a judicial official).

(1) In a proceeding initiated pursuant to G.S. § 5A-23(a1), the burden of proof is on the aggrieved party. [G.S. § 5A-23(a1); *Trivette v. Trivette*, 162 N.C.App. 55, 590 S.E.2d 298 (2004).]

(2) The burden does not shift to the alleged contemnor as it does in proceedings initiated by a notice or show cause order under G.S. § 5A-23(a). [*See Trivette v. Trivette*, 162 N.C.App. 55, 590 S.E.2d 298 (2004) (since contempt proceeding was initiated by motion and notice of hearing filed by former wife rather than order or notice issued by judicial officer, former wife, as movant, had burden of proof on motion seeking to find former husband in civil contempt; trial court erroneously placed burden on former husband to prove a lack of willful contempt).]

(3) Misapplication of the burden of proof is a procedural defect that is waived if not raised at trial. [*Moss v. Moss*, __ N.C.App. __, 730 S.E.2d 203 (2012) (defendant waived objection to misapplication of burden of proof in contempt proceeding by not objecting and acquiescing in the procedure employed by the trial court).]

7. Consideration of contempt orders in related proceedings.

a) A trial court did not err when it considered prior contempt orders entered in the same case in determining child custody. [*Raynor v. Odom*, 124 N.C.App. 724, 478 S.E.2d 655 (1996).]

8. No right to a jury trial in civil contempt proceedings. [*See* § G.S. 5A-23(d) (judicial official is the trier of facts at the show cause hearing).]

9. Right against self-incrimination.

a) The civil contempt statutes do not address a contemnor's right not be compelled to be a witness against himself at a contempt hearing. [*See* G.S. § 5A-15(e) so providing in criminal contempt proceedings.]

b) The North Carolina Supreme Court has noted that the Fifth Amendment privilege against compulsory testimonial self-incrimination extends to civil proceedings where a party may be subjected to

imprisonment. [*Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (considering whether a defendant's refusal to comply with an order to produce tax returns was protected, court determined that, under the facts of the case, the contents of the tax returns did not invoke protection of the Fifth Amendment, nor did the testimonial aspect involved in their production invoke its protection); *see also In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994) (stating that the privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments, applies to both civil and criminal proceedings "wherever the answer might tend to subject to criminal responsibility him who gives it") (citations omitted).]

c) An alleged civil contemnor may assert the right against self-incrimination and refuse to testify but the court may draw an adverse inference of fact from the failure to testify. [*McKillop v. Onslow County*, 139 N.C.App. 53, 532 S.E.2d 594 (2000) (stating rule that the finder of fact in a civil contempt case may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him; holding that plaintiff, by her refusal to present testimony, chose to abandon her claim that she was not in contempt of the trial court's order).]

d) With respect to the scope of review on appeal, an appellate court has found that where the relief granted is wholly civil in nature and defendant was not subject to criminal penalties, an appellate court is not required to examine whether a contemnor's right not to be a witness against himself was adequately protected during the contempt proceeding. [*Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

10. Right to confront witnesses.

a) In a civil contempt proceeding, the court is not obligated to provide the alleged contemnor with confrontation rights. [*Smith v. Barbour*, 170 N.C.App. 436, 613 S.E.2d 753 (**unpublished**), *review denied*, 359 N.C. 853, 619 S.E.2d 512 (2005) (mother's rights not violated when father not present at proceeding where she was held in civil contempt for violation of a custody and visitation order).]

11. Right to and appointment of counsel.

a) An alleged contemnor has the right to be represented by legal counsel in civil contempt proceedings.

(1) The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt hearing begins, that he or she may be incarcerated if found in civil contempt, that he or she has the right to be represented by retained counsel, and that he or she may be entitled to court-appointed counsel if unable to afford an attorney. [*See McBride v. McBride*,

334 N.C. 124, 431 S.E.2d 14 (1993) (at outset of a contempt proceeding for nonsupport, a trial court should (1) assess how likely it is that the defendant will be incarcerated; (2) if it is likely, the court should inquire into the defendant's desire for counsel, and determine his ability to pay for representation; and (3) if the defendant desires counsel but is indigent, the court is to appoint counsel to represent him).] In *D'Alessandro v. D'Alessandro*, __ N.C.App. __, 762 S.E.2d 329 (2014), the court of appeals specifically held that *McBride* applies in contempt proceedings for violation of a custody order.

(2) An alleged contemnor may waive his or her right to legal representation. [G.S. § 7A-457(a)]

(a) Any waiver must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must make a written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and the consequences of the waiver." [G.S. § 7A-457]

(b) Even though G.S. § 7A-457 speaks to waiver by an indigent, any waiver must be in accordance with G.S. § 7A-457, notwithstanding its limiting language. [*State v. Williams*, 65 N.C.App. 498, 309 S.E.2d 721 (1983).]

(3) If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the civil contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.

b) The North Carolina Supreme Court has held that an alleged contemnor is entitled to **court-appointed** counsel in a civil contempt proceeding arising out of the nonpayment of child support if (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she will actually be incarcerated as a result of the hearing. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (right based on Fourteenth Amendment due process clause); *King v. King*, 144 N.C.App. 391, 547 S.E.2d 846 (2001) (for appointment of counsel, a defendant must show that he is indigent and that his liberty interest is at stake); *Young v. Young*, __ N.C.App. __, 736 S.E.2d 538 (2012), *citing Turner* and *King* (father who failed to meet his burden of proving indigence not entitled to counsel at civil contempt hearing for failure to pay child support); *cf. Turner v. Rogers*, __ U.S. __, 131 S.Ct. 2507 (2011) (the Fourteenth Amendment due process clause does not automatically require the State to appoint counsel at civil contempt proceedings for an indigent individual who is subject to a child support order if the State provides "alternative or substitute procedural safeguards").] Prior to August 2014, it was not clear whether the holding in *McBride* was broad enough to require the

appointment of counsel for civil contempt proceedings arising in contexts other than child support enforcement. In *D'Alessandro v. D'Alessandro*, __ N.C.App. __, 762 S.E.2d 329 (2014), the court of appeals extended the right to court-appointed counsel to an indigent defendant subject to civil contempt for failure to comply with a child custody order. In separate proceedings, consolidated on appeal, a trial court found a pro se father in civil contempt of custody and child support orders. After finding an "obvious likelihood" that father might be incarcerated if found in contempt, that father had not been advised of his right to counsel and had not waived that right, and that it appeared from the record that father was indigent, both orders reversed "to the extent that they held defendant in contempt of the custody order and the child support order."

(1) Determinations of indigency and entitlement to counsel and appointment of counsel may be made by the district court judge or by the clerk of superior court. [*See* G.S. § 7A-452(c)]

(2) An alleged contemnor is indigent if he or she has insufficient income and resources, based on guidelines approved by the Office of Indigent Defense Services, to retain an attorney to represent him or her in the contempt hearing. [*See* G.S. § 7A-452; *see* G.S. § 7A-450(a) for definition of an indigent person.]

(3) In a proceeding for failure to pay a court-ordered sum of money, such as child support, a finding that a person is entitled to court-appointed counsel based on indigency may indicate that the person lacks the present financial ability to pay the sum ordered and therefore may preclude a finding of civil contempt for willfully failing to pay the amount ordered.

(4) Counsel for indigent persons in civil contempt proceedings are appointed pursuant to procedures approved by the Office of Indigent Defense Services. [*See* G.S. § 7A-452(a)]

c) An indigent obligor may not be incarcerated for civil contempt unless he or she has waived or forfeited the right to court-appointed counsel or has been represented by court-appointed counsel. [*McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (due process requires that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages).]

12. Failure to appear at initial hearing for civil contempt. There is no statute or case law authorizing the court to order the alleged contemnor's arrest if he or she fails to appear at the initial hearing for civil contempt. [*But see* G.S. § 15A-305(b)(8) (allowing arrest when defendant fails to appear as required by a show cause order issued in a criminal proceeding) and G.S. § 5A-16(b) (allowing arrest pursuant to G.S. § 15A-305 based on finding of probable cause that person ordered to appear for hearing to determine criminal contempt will not appear).] For more on this point, *see* Michael Crowell, Contempt, School of Government, February 2013, available at

http://www.sog.unc.edu/sites/www.sog.unc.edu/files/015-Drennan%20-%20Crowell-Contempt,%202013.pdf.

G. Orders for civil contempt.

1. Fundamentals of an order finding a person in civil contempt. The order should:

a) Indicate whether a person is being held in civil contempt or criminal contempt. [*See Watkins v. Watkins*, 136 N.C.App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

b) State how a party may purge the contempt. [G.S. §§ 5A-23(e) and 5A-22(a); *Bethea v. McDonald*, 70 N.C.App. 566, 320 S.E.2d 690 (1984) (purge provision is essential to the order).] *See* section 3 below.

c) Make findings as follows:

(1) On each of the elements in G.S. § 5A-21(a) [G.S. § 5A-23(e)];

(2) As to the facts constituting contempt [G.S. § 5A-23(e)];

(3) That the party had the ability to comply during the period when the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966)]; and

(4) That the party has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010).] *See* section II.G.3. below.

2. The following AOC forms are available.

a) SHOW CAUSE ORDER, FINDINGS AND JUDGMENT – CONTEMPT OR FAILURE TO APPEAR FOR JURY DUTY (AOC-CR-219) (criminal or civil contempt).

b) CONTEMPT ORDER DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-309) (criminal or civil contempt).

c) CONTEMPT ORDER NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT (AOC-CV-529) (criminal or civil contempt).

d) COMMITMENT ORDER FOR CIVIL CONTEMPT (AOC-CV-603).

e) ORDER OF CONTEMPT FOR NON-PAYMENT OF MEDIATOR'S FEES (AOC-CV-816).

3. Purge conditions.

a) The court's order must clearly specify the action that the contemnor must take to purge the contempt. [G.S. §§ 5A-23(e) and 5A-22(a)]

(1) If an order for civil contempt does not contain a purge provision, the contempt is criminal, not civil, and the order will be reversed. [*See In re S.J.R.*, 184 N.C.App. 188, 645 S.E.2d 900 (2007) (**unpublished**) (where the judge failed to state a purge condition that would allow the defendant to avoid incarceration, finding of civil contempt set aside).]

(2) If the order does not clearly specify what a person can do to purge the contempt, the order will be reversed. [*See Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003) (purge conditions that prevented father from "interfering" with mother's custody impermissibly vague; what father could or could not do to purge himself of contempt not specified); *Cox v. Cox*, 133 N.C.App. 221, 515 S.E.2d 61 (1999) (vague condition that mother shall not place children in a stressful situation or a situation detrimental to their welfare and not punish children in manner that is stressful, abusive, or detrimental, did not set out what mother could do to purge herself of contempt; contempt order reversed); *Nohejl v. First Homes*, 120 N.C.App. 188, 461 S.E.2d 10 (1995) (contempt order that failed to specify purge conditions remanded for entry of same).]

b) The conditions under which an obligor may purge himself or herself of contempt must be conditions that he or she has the present ability to meet, so that a defendant holds the keys to his own jail by virtue of his ability to comply with the court order. [*See Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *see also* Official Comment to G.S. § 5A-21.]

c) Upon a contemnor's "purging" himself of contempt, the contempt judgment is "lifted" or terminated. [*Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting).]

4. Findings.

a) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. § 5A-21(a). [G.S. § 5A-23(e)]

b) If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the actions that the contemnor must take to purge himself or herself of the contempt. [G.S. § 5A-23(e)]

c) Failure to make the required findings is sufficient by itself to reverse an order for contempt. [*Carter v. Hill*, 186 N.C.App. 464, 650 S.E.2d 843 (2007) (where findings of fact were "conspicuously absent" from the trial court's contempt order, and worse, instead of finding that

defendant had the ability to pay, the court found to the contrary, that he was not able to pay the amount ordered, entry of contempt reversed); *Frank v. Glanville*, 45 N.C.App. 313, 262 S.E.2d 677 (1980) (when it was not clear that defendant had the ability to comply with the contempt order, ever had the ability, or would ever be able to take reasonable measures that would enable him to comply, and because no finding detailing defendant's ability to comply with the contempt order was made, contempt order reversed); *Vaughn v. Vaughn*, 176 N.C.App. 409, 626 S.E.2d 876 (2006) (**unpublished**) (contempt order vacated when preprinted "fill-in-the-blank" form used by the trial court did not state how the purpose of its custody order could be served by compliance, did not contain a finding as to the alleged act of noncompliance by husband or that his action was willful, and made no finding as to his ability to comply with the custody order or what action he could take to purge himself of the contempt).]

d) The court must make findings as to a party's ability to comply (and willful conduct) during two periods of time: during the period when the party was in default and at the time of the hearing. *See* section II.B.3 at page 14.

H. Sanctions for civil contempt.

1. Incarceration.

a) Imprisonment is the only authorized sanction for civil contempt. [G.S. § 5A-21] [*Cf. Tyll v. Berry*, __ N.C.App. __, 758 S.E.2d 411, *review denied, appeal dismissed*, __N.C. _, _762 S.E.2d 207 (2014) (fine payable to the moving party for defendant's violation of a Chapter 50C order upheld; a fine is a "statutorily permitted" sanction for civil contempt proceedings).]

b) A person who is incarcerated for civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations in G.S. § 5A-21(b1) and (b2). [G.S. § 5A-21(b)]

c) Limitation on term of imprisonment.

(1) There is no limitation on the term of imprisonment when a person is held in civil contempt for failing to pay court-ordered child support or for failing to comply with a court order that does not involve the payment of money.

(2) A person found in civil contempt for failure to pay money other than child support may not be imprisoned for more than 90 days for the same act of disobedience or refusal to comply with a court order but may be recommitted for successive 90 day periods, with the total period of imprisonment not to exceed 12 months. [G.S. § 5A-21(b2)]

(3) When contempt is not purged within 90 days by a person imprisoned for civil contempt for the failure to pay money other than child support, the court must conduct a de novo hearing

before recommitting the person for a successive 90 day term. [G.S. § 5A-21(b2)]

(a) To qualify for a hearing de novo, defendant must show that he was being recommitted to an additional term of imprisonment and not merely serving the time remaining on an original sentence that had been suspended. [*Liberatore v. Liberatore*, __ N.C.App. __, 753 S.E.2d 397 (2013) (**unpublished**) (defendant's indefinite sentence for civil contempt temporarily suspended after defendant served 30 days; court did not strike the civil contempt charge and conditioned temporary suspension on defendant's compliance with original court order by a date certain, which defendant did not do; defendant sentenced to 60 days; defendant not entitled to a de novo hearing as there was only one sentence or in other words, defendant was sentenced to serve the time remaining from the first sentence and was not recommitted to a new sentence).]

(4) The 12 month maximum period of imprisonment includes the initial period of imprisonment and any additional period of imprisonment. [G.S. § 5A-21(b2)]

(5) Before a person can be recommitted, the court must:

(a) Conduct a hearing de novo; and

(b) Enter a finding for or against the alleged contemnor on each of the elements of G.S. § 5A-21(a); and

(c) Must find that all the elements of G.S. § 5A-21(a) continue to exist. [G.S. § 5A-21(b2)]

(6) A person's failure or refusal to purge himself of contempt shall not be deemed a separate or additional act of disobedience, failure, or refusal to comply with an order of the court. [G.S. § 5A-21(b2)]

2. Release from incarceration.

a) A person imprisoned for civil contempt must be released when the civil contempt no longer continues, in other words, when the contemnor has satisfied all purge conditions. [G.S. § 5A-22(a)]

b) Release by the judge upon motion of the contemnor.

(1) Upon contemnor's motion to the judge who found civil contempt, unless that judge is not available, the judge must order release if the judge affirmatively determines that the contemnor is subject to release. [G.S. § 5A-22(b)]

(2) If judge that found civil contempt is not available, the motion is made to a judge of the same division in the same judicial district. [G.S. § 5A-22(b)]

c) Release by the sheriff or other officer having custody without further order of the court.

(1) Upon finding that the contemnor has complied with the purge conditions specified in the contempt order, the sheriff or other officer having custody may release the person without further order of the court. [G.S. § 5A-22(a)]

(2) This is intended to apply mainly to situations in which compliance with the order calls for payment of money to the court. [Official Commentary to G.S. § 5A-22]

d) A contemnor may seek release under other procedure available under state law. [G.S. § 5A-22(b)]

I. Damages and costs.

1. Compensatory damages are not available in a contempt proceeding. [*Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C.App. 222, 689 S.E.2d 180, *review denied and dismissed*, 364 N.C. 242, 698 S.E.2d 402 (2010), *citing Glesner v. Dembrosky*, 73 N.C.App. 594, 327 S.E.2d 60 (1985) (recognizing general rule in North Carolina, that a court has no authority to award damages to a private party in a contempt proceeding because "[c]ontempt is a wrong against the state, and moneys collected ... go to the state alone"); *Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (error to award sums for repairs and cleanup of home and moving costs; recognizing that North Carolina's general rule is contrary to majority of states and to the federal position, but strong precedent supports rule); *Glesner v. Dembrosky*, 73 N.C.App. 594, 327 S.E.2d 60 (1985) (court erred in requiring contemnor to pay defendants' out-of-state travel expenses incurred in attending hearing on their motion to compel contemnor's compliance with an order allowing them visitation).]

2. Husband, in contempt of an ED order that required him to transfer certain property to wife, including stock certificates, ordered incarcerated until he came forward with a proposal to deliver the property, which husband did after nearly a year of incarceration. Release order required husband to transfer the then present value of the stock. Transfer of present value provision upheld, not as compensatory damages, but as recognition that wife would have been compensated for stock splits and dividends had husband made the stock transfer in a timely fashion. [*Conrad v. Conrad*, 82 N.C.App. 758, 348 S.E.2d 349 (1986).]

3. A court has no authority to award costs to a private party. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (order for wife to pay cost of husband's CPA expert witness reversed); *Green v. Crane*, 96 N.C.App. 654, 386 S.E.2d 757 (1990) (trial

court did not err in refusing to tax defendants with costs).] *See* below regarding award of attorney fees.

J. Attorney fees in civil contempt proceedings.

1. General rule.

a) Subject to exceptions in the area of family law, a court may award attorney fees in contempt matters only when specifically authorized by statute or pursuant to an express provision in an agreement between the parties.

(1) Outside of the family law field, statutory authority is required to award attorney fees in a contempt action. [*Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C.App. 222, 689 S.E.2d 180, *review denied and dismissed*, 364 N.C. 242, 698 S.E.2d 402 (2010); *see also Sea Ranch II Owner's Assoc. v. Sea Ranch II, Inc.*, 180 N.C.App. 230, 636 S.E.2d 307 (2006), *review denied*, 361 N.C. 357, 644 S.E.2d 233 (2007) (neither G.S §§ 6-18 or 6-20, allowing costs as a matter of course or as a matter of discretion, applies to a contempt proceeding as a basis for awarding attorney fees); *Baxley v. Jackson*, 179 N.C.App. 635, 634 S.E.2d 905, *review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006) (rejecting plaintiff's argument that court's inherent authority to sanction a party for willful failure to obey its orders includes an order for attorney fees); *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C.App. 183, 196 S.E.2d 598, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973) (without express statutory authorization, trial court lacked authority to award attorney fees to plaintiff after finding defendant in civil contempt of a TRO).]

(2) Award of attorney fees in a contempt action has been upheld when based on an express provision in a consent judgment. [*PCI Energy Serv., Inc. v. Wachs Technical Serv*., 122 N.C.App. 436, 470 S.E.2d 565 (1996) (court properly awarded attorney fees in a contempt proceeding to enforce a consent judgment when the judgment contained an express provision allowing for the recovery of "all costs and expenses" associated with enforcing the consent judgment).] [*But cf. Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980) (requiring statutory authority for an award of fees in addition to an express provision; stating in the context of a lease for personal property that "[e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor").]

(3) When there is no express contractual provision or statutory authority permitting a party to recover fees, they have not been

allowed. [*Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C.App. 222, 689 S.E.2d 180, *review denied and dismissed*, 364 N.C. 242, 698 S.E.2d 402 (2010) (reversing an award of attorney fees in a contempt proceeding for failure to pay fees and costs in prior orders when there was no statutory authorization for fees); *Baxley v. Jackson*, 179 N.C.App. 635, 634 S.E.2d 905, *review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006) (when there was no statutory authority allowing attorney fees as a sanction for defendants' failure to comply with the order of specific performance, the trial court was without authority to award attorney fees); *Nohejl v. First Homes*, 120 N.C.App. 188, 461 S.E.2d 10 (1995) (refusing to award attorney fees to the party seeking to enforce a consent judgment because there was no express contractual provision or statutory authority permitting plaintiffs to recover such fees).]

2. Family law exceptions.

a) Generally.

(1) Case law allows the award of attorney fees incurred in contempt actions enforcing some family law obligations when the underlying family law statutes authorize attorney fees in the underlying action. *See* discussions below regarding child support, child custody and alimony.

(2) However, case law also allows attorney fees to a party seeking to enforce an equitable distribution order by contempt even though the equitable distribution statute does not authorize the award of attorney fees. *See* discussion below.

b) Child support.

(1) The court may award attorney fees to an obligee pursuant to G.S. § 50-13.6 in connection with civil contempt proceedings to enforce a child support order. [*See Ugochukwu v. Ugochukwu*, 176 N.C.App. 741, 627 S.E.2d 625 (2006), *citing Blair v. Blair*, 8 N.C.App. 61, 173 S.E.2d 513 (1970) (award of fees to wife based on husband's willful contempt for failure to pay child support upheld; payment of fees does not appear to be a purge condition); *Belcher v. Averette*, 152 N.C.App. 452, 568 S.E.2d 630 (2002) (defendant in contempt of child support provisions in a consent decree ordered to pay plaintiff's attorney fees pursuant to G.S. § 50-13.6); *Smith v. Smith*, 121 N.C.App. 334, 465 S.E.2d 52 (1996) (agreement to pay college expenses is in nature of child support so that court authorized to award attorney fees when father failed to do so); *but cf. Powers v. Powers*, 103 N.C.App. 697, 407 S.E.2d 269 (1991) (court reversed an award of attorney fees to wife after finding husband in contempt of consent judgment requiring

husband to pay for child's college expenses, holding that order was not for "child support").]

(2) Contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order. [*See Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *quoting Eakes v. Eakes*, 194 N.C.App. 303, 669 S.E.2d 891 (2008) (order required payment of attorney fees as a condition of being purged of contempt for failure to comply with an order for child support and postseparation support; order vacated when it did not include the findings required when awarding attorney fees); *Eakes v. Eakes*, 194 N.C.App. 303, 669 S.E.2d 891 (2008), *citing Blair* (contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order).]

(3) For more on attorney fees in child support actions, both generally and in the context of contempt, *see Child Support*, Bench Book, Vol. 1, Chapter 3, Parts 1 and 4.

c) Equitable distribution.

(1) The court may award reasonable attorney fees to a party seeking to enforce an ED order by contempt proceedings, even though generally there can be no award for fees incurred in obtaining the ED order in the first instance. [*Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

(2) A contemnor can be required to pay an award of attorney fees as a condition of purging contempt arising from enforcement of an ED consent order. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (wife ordered to pay portion of husband's counsel fees as a condition of purging herself of contempt); *Middleton v. Middleton*, 159 N.C.App. 224, 583 S.E.2d 48 (2003) (district court authorized to award attorney fees as a condition of purging contempt for failure to comply with an ED order); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (upholding award of attorney fees as a condition of purging husband's contempt for failure to comply with an ED order).]

(3) A contemnor has been required to pay an award of attorney fees as a condition of purging contempt arising from enforcement of a provision in a separation agreement that was analogous to an ED award. [*GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (award of fees arising from an assignment in an

unincorporated separation agreement of car and related debt to wife, adopted in a consent judgment that ordered wife to specifically perform payment obligation to GMAC, was akin to a court awarding attorney fees through contempt proceedings for a spouse's failure to pay a marital debt arising out of an equitable distribution award, for which an award of attorney fees through the court's contempt power would be permitted); *see also Cox v. Cox*, 185 N.C.App. 158 (2007) (**unpublished**) (defendant ordered to pay attorney fees to wife who successfully brought contempt action for violation of a provision in a consent judgment that was "akin to one of equitable distribution").]

(4) For more on attorney fees in equitable distribution actions, both generally and in the context of contempt, *see Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.

d) Custody.

(1) Plaintiff properly ordered to pay attorney fees incurred by mother in defending frivolous proceeding for contempt of a custody order; award based on G.S. § 50-13.6 authorizing fees upon a finding that the supporting party had initiated a frivolous action or proceeding. [*Wiggins v. Bright*, 198 N.C.App. 692, 679 S.E.2d 874 (2009) (court noted fees also authorized under G.S. § 50–13.6 based on findings that defendant responded in good faith to the motion for contempt and did not have sufficient means to defray the costs and expenses of the matter).]

(2) Attorney fees allowed to father in a contempt proceeding for mother's violation of visitation provisions, even though mother not found in civil contempt because she had performed the required action, return of the children, by the time of the hearing. [*Ruth v. Ruth*, 158 N.C.App. 123, 579 S.E.2d 909 (2003) (fees recovered were those incurred by father in filing the motion to show cause and in the hearings related thereto); *Lafell v. Lafell*, 177 N.C.App. 811, 630 S.E.2d 257 (2006) (**unpublished**) (attorney fees allowed to father in part for mother's criminal contempt for failure to comply with order allowing visitation and telephone contact).]

(3) For more on attorney fees in custody actions, both generally and in the context of contempt, *see Child Custody*, Bench Book, Chapter 4.

e) Alimony.

(1) The following cases have awarded attorney fees in a contempt proceeding involving alimony. [*Shumaker v. Shumaker*, 137 N.C.App. 72, 527 S.E.2d 55 (2000) (upholding an award of

fees when a defendant in contempt for failing to comply with a temporary alimony order); *see also Martin v. Martin*, 202 N.C.App. 372, 690 S.E.2d 767 (2010) (**unpublished**) (upholding order finding defendant in civil contempt for failure to pay alimony as ordered and requiring defendant to pay plaintiff's attorney fees incident to the contempt proceeding); *Hudson v. Hudson*, 193 N.C.App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (defendant properly found in civil contempt for his failure to comply with an alimony order that required payment of attorney fees).] *But see Blackburn v. Bugg*, __ N.C.App. __, 723 S.E.2d 585 (2012) (**unpublished**) (reversing an award of attorney fees against a defendant found in civil contempt for failure to pay alimony as ordered in a prior proceeding enforcing the parties' premarital agreement; appellate court finding there was no express statutory authority to support the trial court's award, nor did the case arise from a recognized exception to the general rule, namely, orders for child support or ED).]

(2) For more on attorney fees in alimony actions, both generally and in the context of contempt, *see Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

f) Separation agreements.

(1) An unincorporated separation agreement is enforceable and modifiable only under traditional contract principles [*Long v. Long*, 160 N.C.App. 664, 588 S.E.2d 1 (2003)], so an unincorporated separation agreement is not properly the subject of a contempt proceeding. [*But see GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (if a party to an unincorporated separation agreement does not perform his or her obligations under the agreement, the other party may obtain a decree of specific performance of the separation agreement which is enforceable through contempt proceedings).]

(2) Attorney fees have been allowed in a contempt proceeding involving an incorporated separation agreement.

(a) Trial court correctly awarded plaintiff $2,200 in attorney fees after finding defendant in contempt for failure to comply with property settlement provisions in the parties' incorporated separation agreement. [*Michael v. Michael*, 198 N.C.App. 703, 681 S.E.2d 866 (2009) (**unpublished**) (separation agreement did not contain provision on attorney fees).]

(3) For more on attorney fees in spousal agreements, including unincorporated separation agreements that address attorney fees if enforcement of the agreement is required, *see Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

K. Appeal of a civil contempt order.

1. Appeal of a civil contempt order generally.

a) A person found in civil contempt may appeal the district court's order to the court of appeals by filing a notice of appeal within 30 days after the order is entered. [*See* G.S. § 5A-24 and G.S. § 7A-27(c); N.C. R. APP. P. 3(c)]

b) G.S. § 5A-24 allows an appeal only by a person found in civil contempt. It makes no provision for appeal when contempt is not found. However, at least one case has found an appeal by a plaintiff/appellant proper in a case finding defendant not in contempt. [*See Piedmont Equipment Co. v. Weant*, 30 N.C.App. 191, 226 S.E.2d 688 (1976) (prior contempt statute) (plaintiff/appellant entitled pursuant to G.S. § 1-277 to appeal the trial court's denial of civil contempt when the decision affected a substantial right of plaintiff/appellant and there was no other proceeding by which plaintiff could enforce its rights under the consent judgment other than the contempt proceeding for which review sought).]

c) Other cases have allowed the appeal of a person who unsuccessfully sought a civil contempt order without discussing the propriety of the appeal. [*See Campen (Featherstone) v. Featherstone*, 150 N.C.App. 692, 564 S.E.2d 616, *review denied, appeal dismissed*, 356 N.C. 297, 570 S.E.2d 504 (2002) (father appealed order that denied his motion to find mother in contempt of a custody order); *Forte v. Forte*, 65 N.C.App. 615, 309 S.E.2d 729 (1983) (ex-wife appealed an order declining to hold ex-husband in contempt for failure to make court-ordered child support payments).]

2. Standard of review.

a) In reviewing contempt proceedings, the appellate court is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law or judgment. [*Wellons v. White v. Wellons*, __ N.C.App. __, 748_S.E.2d 709_(2013), *citing Shumaker v. Shumaker*, 137 N.C.App. 72, 527 S.E.2d 55 (2000) (civil contempt); *Ugochukwu v. Ugochukwu*, 176 N.C.App. 741, 627 S.E.2d 625 (2006) (citation omitted); *Campen (Featherstone) v. Featherstone*, 150 N.C.App. 692, 564 S.E.2d 616, *review denied, appeal dismissed*, 356 N.C. 297, 570 S.E.2d 504 (2002).]

b) Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. [*File v. File*, 195 N.C.App. 562, 673 S.E.2d 405 (2009), *citing State v. Simon,* 185 N.C.App. 247, 648 S.E.2d 853 (2007) (in reviewing a nonjury proceeding such as contempt, findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary); *Eakes v. Eakes,* 194 N.C.App. 303, 669

S.E.2d 891 (2008), *citing Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990).]

c) On appeal from order of civil contempt, conclusions of law are reviewed de novo. [*Wellons v. White v. Wellons*, __ N.C.App. __, 748 S.E.2d 709 (2013), *citing Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009).]

3. Motion or application to stay a contempt order during appeal of contempt order.

a) The general rule of appellate procedure is that a motion to stay any civil order is directed initially to the district court. [*See* N.C. R. App. P. 8(a)]

b) If the stay is denied by the trial court, a party may apply to the appellate court for a writ of supersedeas staying enforcement of the order.

4. Contempt order affects a substantial right.

a) Ordinarily an appeal lies only from a final judgment. [*See* G.S. § 7A-27(c) allowing appeal of a final judgment in district court to the court of appeals.] Appeal of a nonfinal, or interlocutory order, that affects a substantial right is allowed. [G.S. § 7A-27(d)(1)]

b) Even though the order may be interlocutory, appeal of a civil contempt affects a substantial right and is immediately appealable. [*Guerrier v. Guerrier*, 155 N.C.App. 154, 574 S.E.2d 69 (2002) (citations omitted) (appeal of any contempt order affects a substantial right and is immediately appealable); *Thompson v. Thompson*, __ N.C.App. __, 735 S.E.2d 214 (2012), *citing Guerrier* (appeal allowed of order finding defendant in civil contempt for failing to pay postseparation support even though PSS order itself was interlocutory and not appealable, even after defendant found in contempt of it); *Hamilton v. Johnson*, __ N.C.App. __, 747 S.E.2d 158 (2013), *citing Willis v. Duke Power*, 291 N.C. 19, 229 S.E.2d 191 (1976) (appeal of contempt order for failure to comply with a temporary child support order affected a substantial right); *Ross v. Ross*, 215 N.C.App. 546, 715 S.E.2d 859 (2011), *citing Guerrier*; *see also Whitaker v. Whitaker*, 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied*, 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied*, 361 N.C. 370, 662 S.E.2d 552 (2008) (finding that court of appeals could consider plaintiff's appeal of a contempt order, regardless of the fact that it provided for further proceedings, based on *Guerrier* statement that "any contempt order" is immediately appealable); *but see Anderson v. Lackey*, 166 N.C.App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (a contempt order does not affect a substantial right when the party is not at imminent risk of punishment, distinguishing *Guerrier* on the basis that the court in *Anderson* took under advisement the sanctions to be imposed for the mother's contempt).]

c) In *State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992), the court addressed whether an interlocutory appeal of a contempt order affected a substantial right. It found that defendant's appeal from a civil contempt order entered in a criminal nonsupport action, based on his refusal to undergo a court-ordered blood test in a paternity action, was immediately appealable because, if defendant refused to comply, he risked a fine or imprisonment, and if he complied, his challenge to the blood test would have been moot.

d) For a case addressing whether an order dismissing a motion for contempt affects a substantial right, *see Moore v. Moore*, __ N.C.App. __, 741 S.E.2d 513 (2013) (**unpublished) (**citations omitted) (appeal of an order dismissing a motion for criminal contempt does not affect a substantial right; appeal of an order dismissing defendant's motion for civil contempt did not affect a substantial right when defendant failed to show the possibility of inconsistent verdicts absent the appellate court's consideration of the appeal).]

e) G.S. § 50-19.1, *added by* 2013 N.C. Sess. Laws 411, § 2, effective August 23, 2013, providing for immediate appeal of certain actions when other claims are pending in the same action, does not appear to apply to contempt orders. Thus, the appealability of a contempt order is not affected by G.S. § 50-19.1.

5. An appeal of a contempt order generally precludes further action by the trial court in the contempt matter.

a) Generally an appeal of a contempt order precludes further action in the contempt matter. [G.S. § 1-294; *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (when defendant gave notice of appeal in open court of an order finding him in contempt for failing to produce income tax returns and a list of assets, the court lost jurisdiction to take further action on the contempt matter; order entered for defendant's imprisonment for failure to satisfy purge condition and imposing sanctions on defendant was void); *Guerrier v. Guerrier*, 155 N.C.App. 154, 159, n.4, 574 S.E.2d 69 (2002) (appeal of an order finding father in contempt of an ED judgment for removing funds from childrens' investment accounts precluded the trial court from entering further orders on the matter, such as entering judgment for the amount of the funds removed or removing the father from acting as custodian of the accounts; enforcement order vacated on other grounds but court noted that unlike child support, child custody, and alimony, no statute provided that an equitable distribution order remains enforceable pending appeal).]

b) A trial court lacks jurisdiction to consider contempt of a contempt order from which an appeal has been taken. [*See Marshall v. Marshall*, __ N.C.App. __, 757 S.E.2d 319 (2014), *citing Webb v. Webb*, 50 N.C.App. 677, 274 S.E.2d 888 (1981) and G.S. § 1-294 (trial court lacked jurisdiction to enter contempt order #2 in October 2012, finding defendant

in contempt of contempt order #1 entered in August 2012, when defendant had taken an appeal of contempt order #1 in September 2012).]

L. Enforcement of an order by contempt after appeal of the order is filed.

1. Generally a perfected appeal stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein. [G.S. § 1-294; *see Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (noting as "well settled" that an appeal, even of an appealable interlocutory order, operates as a stay of all proceedings relating to issues included therein until the matters are determined on appeal; further noting jurisdiction of the trial court is divested from the date that notice of appeal was given).]

2. Thus, a party generally may not be found in civil contempt of an order while an appeal of the order is pending, subject to exceptions set out below in section L.3.

a) A party generally may not be held in contempt for "violating the very order then being questioned on appeal." [*Whitaker v. Whitaker*, 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied*, 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied*, 361 N.C. 370, 662 S.E.2d 552 (2008) (citation omitted); *see also Wilson v. Wilson*, 124 N.C.App. 371, 477 S.E.2d 254 (1996) (appeal of an order ordering nonparty to appear at a deposition divested the trial court of jurisdiction, pending the appeal, to find the nonparty in contempt of that order); *McKyer v. McKyer*, 184 N.C.App. 188, 645 S.E.2d 902 (2007) (**unpublished**) (husband's notice of appeal, from an order denying his motion to vacate an award of attorney fees to former wife, divested the trial court of jurisdiction to hold a contempt hearing and to find husband in contempt for failing to pay wife's attorney fees).]

b) Even though a party generally cannot be held in contempt of an order pending appeal of the order, the Supreme Court has cautioned parties that there may be consequences for violation of an order pending appeal. In *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962), the court noted that while an appeal stays contempt proceedings until the validity of the judgment is determined, taking an appeal "does not authorize a violation of the order" and further, that a party "who wilfully violates an order does so at his peril" because, if the order is upheld, a violation "may be inquired into" upon remand.

3. However, by statute, certain orders are enforceable by contempt pending appeal.

a) Order for child support.

(1) Notwithstanding G.S. § 1-294, a child support order is enforceable in the trial court by civil contempt pending an appeal of the child support order. [G.S. § 50-13.4(f)(9)] The original order, and the finding of contempt based on a violation of that

order, may be enforced pending appeal. [*See Guerrier v. Guerrier*, 155 N.C.App. 154, 574 S.E.2d 69 (2002) (G.S. § 50-13.4(f)(9) is an exception to G.S. § 1-294 and allows enforcement of orders for the payment of child support pending appeal including any sanctions entered pursuant to an order of civil contempt; appeal of an order finding defendant in contempt for failure to pay child support did not divest the court of jurisdiction to enter an enforcement order sanctioning defendant $100 for failure to comply with purge condition that required payment of past child support and medical expenses).]

(2) When the trial court enters an order of contempt while the child support order is on appeal, the appellate court in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires. [G.S. § 50-13.4(f)(9); N.C. R. App. P. 23]

b) Order for alimony.

(1) Notwithstanding G.S. § 1-294 and G.S. § 1-289, an order for the periodic payment of alimony is enforceable in the trial court by civil contempt pending an appeal of the order. [G.S. § 50-16.7(j); *see Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (reading G.S. § 1-294 and G.S. § 50-16.7(j) together, the trial court had jurisdiction to issue a show cause order and subsequent criminal contempt order for defendant's failure to appear at the hearing on the show cause order).]

(2) G.S. § 50-16.7(j) does not appear to apply to an award of postseparation support, at least not after entry of an award for alimony. [*See Harris v. Harris*, 173 N.C.App. 232, 617 S.E.2d 723 (2005) (**unpublished**) (without considering application of G.S. § 50-16.7(j), appeal from an order awarding wife alimony divested the trial court of jurisdiction to consider wife's motion for civil contempt for failure to pay postseparation support while the alimony order was on appeal because alimony award affected postseparation support; also holding that the PSS order did not continue in force during appeal of alimony award).]

(3) When the trial court enters an order of contempt while the alimony order is on appeal, the appellate court in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided, if justice requires. [G.S. § 50-16.7(j); N.C. R. App. P. 23]

c) Custody order.

(1) Notwithstanding G.S. § 1-294, an order for custody or visitation is enforceable by civil contempt pending an appeal of the order. [G.S. § 50-13.3(a)]

(2) When the trial court enters an order of contempt while the custody order is on appeal, the appellate court in which the appeal is pending may stay any order for civil contempt entered for child custody until the appeal is decided, if justice requires. [G.S. § 50-13.3(a); N.C. R. App. P. 23]

d) ED order. There is no statutory provision allowing enforcement of an order for equitable distribution by civil contempt pending an appeal of the ED order. [*See Guerrier v. Guerrier*, 155 N.C.App. 154, 159 n.4, 574 S.E.2d 69 (2002) (trial court would have been without jurisdiction to enforce an ED judgment by civil contempt pending appeal because, unlike child support, child custody, and alimony, no statute provides that an equitable distribution order remains enforceable pending appeal).]

4. Also, matters not affected by the judgment appealed from are not stayed by an appeal.

a) The general rule is that appeal of any matter only divests the court of jurisdiction in matters "affected by the judgment appealed." [G.S. § 1-294]

b) Therefore a trial court may consider contempt, or enforce an order for contempt, if the matter appealed is unrelated to the contempt. [*See Johns v. Johns*, 195 N.C.App. 325, 672 S.E.2d 782 (2009) (**unpublished**) (appeal of order dismissing husband's various motions in a domestic case, did not divest the trial court of jurisdiction to issue order for arrest after the appeal to enforce contempt order for husband's failure to pay wife's attorney fees, because contempt order/purge condition not affected by appeal of the order dismissing husband's motions).]

5. Appeal of a nonappealable interlocutory order does not deprive the trial court of jurisdiction over the proceeding.

a) When the order being appealed from is interlocutory but does not affect a substantial right or is otherwise not appealable, the trial court has jurisdiction to, and can properly, hold a party in contempt for violating the order. [*Onslow County v. Moore*, 129 N.C.App. 376, 499 S.E.2d 780, *review denied*, 349 N.C. 361, 525 S.E.2d 543 (1998) (when order issuing a preliminary injunction was interlocutory and did not affect a substantial right, trial court could find defendant in contempt for violating the injunction after appeal of the order issuing the injunction); *see also Whitaker v. Whitaker*, 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied*, 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied*, 361 N.C. 370, 662 S.E.2d 552 (2008) (when plaintiff's appeal of an order was interlocutory and the order was neither certified as a final judgment for appeal nor affected a substantial right, the trial court could properly hold plaintiff in contempt for violations of that order).]

III. Criminal Contempt

A. When used.

1. The nature of the proceeding does not determine whether contempt is civil or criminal. Both civil and criminal contempt are available in both civil and criminal proceedings.

a) A defendant may be charged criminally but be in civil contempt. [*See State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992) (defendant charged with criminal nonsupport found in civil contempt for failing to comply with an order for blood testing).]

b) A person may be held in criminal contempt for willfully failing to comply with an order entered in a civil proceeding. [*See* G.S. § 50-13.4(f)(9) (child support); G.S. § 50-13.3(a) (custody); G.S. § 50-16.7(j) (alimony).]

B. Not a criminal conviction.

1. For a case holding that a 1994 criminal contempt adjudication, assumed to be punishable by a 30-day maximum term, was not a "prior conviction" under a strict construction of the Structured Sentencing Act then applicable, based in significant part on the fact that there is no right to a trial by jury, *see State v. Reaves*, 142 N.C.App. 629, 544 S.E.2d 253 (2001) (decided before 2009 amendment to G.S. § 5A-12(a)(3) providing, under certain circumstances, for imprisonment up to 120 days for failure to pay child support).

C. Grounds for criminal contempt. [G.S. § 5A-11]

1. G.S. § 5A-11 sets out the following exclusive grounds for criminal contempt:

a) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings. [G.S. § 5A-11(a)(1)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Lawyer's conduct in failing to turn off cell phone upon entering courtroom, which phone later audibly rang and interrupted proceedings, was irresponsible but not willful. [*State v. Phair,* 193 N.C.App. 591, 668 S.E.2d 110 (2008) (contempt order reversed; lawyer's conduct was "certainly irresponsible" but not willful; G.S. § 5A-11(a)(2) also cited as basis for contempt).]

(3) Lawyer's conduct in soliciting a third person to disrupt the criminal trial of his client, by standing up and protesting the judge's rulings, was willful and interrupted court proceedings. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C.

673, 356 S.E.2d 779 (1987), *cert. denied,* 484 U.S. 1004 (1988) (contempt order affirmed).]

b) Willful behavior committed during the sitting of a court in its immediate view and presence and tending to impair the respect due its authority. [G.S. § 5A-11(a)(2)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) A spectator's refusal to rise while court was adjourning, after being asked to rise and when capable of doing so, is sufficient grounds for contempt under this section or G.S. § 5A-11(a)(1). [*State v. Randell,* 152 N.C.App. 469, 567 S.E.2d 814 (2002) (per curiam) (reversing order of contempt when defendant was not accorded a summary hearing before being found guilty of contempt).]

(3) Attorney, who was not attorney of record but rather was an interloper, correctly found in direct criminal contempt for refusing to sit down after direct order to do so, refusing to be quiet after direct order to do so, repeatedly interrupting the judge by speaking over his voice, disputing court proceedings and encouraging the criminal defendant to do the same, and pandering to the audience. [*In re Nakell*, 104 N.C.App. 638, 411 S.E.2d 159 (1991), *appeal dismissed, disc. review denied,* 330 N.C. 851, 413 S.E.2d 556 (1992) (attorney's conduct precipitated a violent outburst from the criminal defendant, applause from his supporters in the courtroom, and resulted in removal of the criminal defendant from the courtroom).]

(4) Attorney's refusal to sit down and be quiet when repeatedly told to do so by the trial court, attorney's repeated attempts to address the trial court concerning his client although a different matter had been called for hearing, and attorney's "basically shouting" at the court after being warned, constituted direct contempt. Attorney held in contempt a second time for continuing to address the trial court even after being taken into custody. [*In re Brown,* 181 N.C.App. 148, 639 S.E.2d 454 (2007) (**unpublished**) (noting that attorney's refusal to sit down when ordered to do so, standing alone, constituted contempt of court).]

(5) Pro se defendant, who disobeyed a direct order not to make statements about the prosecutor's veracity, properly found in contempt under G.S. § 5A-11(a)(2) and (3). [*State v. Williams,* 188 N.C.App. 848, 656 S.E.2d 736 (2008) (**unpublished**).]

(6) Lawyer's response, after being advised that the court could not hear lawyer's motion and ordering lawyer to appear the following morning, "[i]f you wanted to hear my case, you should have heard my case today," was, along with other conduct, disrespectful and contemptuous. [*State v. Lambert,* 152 N.C.App. 719, 568 S.E.2d 337 (2002) (**unpublished**) (contempt reversed when court did not give lawyer a summary opportunity to respond).]

(7) Defendant found in contempt for violating the spirit of a court order when defendant nonlawyer attempted to represent a corporation's owner in court proceedings after being ordered not to act in a representative capacity for the corporation. [*State v. Gell,* 151 N.C.App. 599 (2002) (**unpublished**).]

c) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution. [G.S. § 5A-11(a)(3)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Plaintiff's failure to appear at two court hearings, if contempt at all, constituted criminal contempt. [*O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985) (without deciding whether failure to appear constituted direct or indirect contempt, the court noted that it was clear that the purpose of the contempt judgments was to punish plaintiff's disobedience of the court's orders rather than to provide a remedy for defendant).]

(3) A person can be in contempt pursuant to G.S. § 5A-11(a)(3) even though a formal written order was never entered and filed with the clerk of court. [*See State v. Simon,* 185 N.C.App. 247, 648 S.E.2d 853, *review denied,* 361 N.C. 702, 653 S.E.2d 158 (2007) (defendant in indirect criminal contempt of court for visiting the office of the trial court administrator in violation of the trial court's oral directives to stay out of the judges' office area; the relevant "process, order, directive, or instruction" does not have to be a formal written order; noting, however, that the better practice is to put an instruction or directive in writing, especially if the order is to remain effective after the completion of the proceeding or matter then before the court).]

(4) An exchange between a judge and an attorney, occurring at the conclusion of a voir dire hearing, constituted a directive or instruction of the court, which the attorney disobeyed at a later criminal trial, by asking a question that was clearly impermissible

under the Rape Shield Statute. [*State v. Okwara* __ N.C.App. __, 733 S.E.2d 576 (2012) (criminal contempt and censure affirmed).]

(5) Mother in criminal contempt under this section for interfering with a court order allowing father temporary visitation with their child. [*File v. File,* 195 N.C.App. 562, 673 S.E.2d 405 (2009).]

(6) Defendant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox,* 92 N.C.App. 702, 376 S.E.2d 13 (1989) (appearance of defendant's counsel was not sufficient to satisfy the order as defendant was personally ordered to appear; contempt order reversed because due process required that defendant be given a hearing and required that facts be established by a reasonable doubt).] Failure to appear pursuant to a show cause order may also constitute contempt under G.S. § 5A-11(a)(7).

(7) Defendant in indirect criminal contempt for calling a witness and encouraging her not to obey a subpoena issued by the court. [*State v. Wall,* 49 N.C.App. 678, 272 S.E.2d 152 (1980).]

(8) Defendant in indirect criminal contempt when he filed suit in South Carolina to accomplish an action, payment to him of a commission, that a North Carolina court had by order denied. [*Osmar v. Crosland-Osmar, Inc.,* 43 N.C.App. 721, 259 S.E.2d 771 (1979), *cert denied,* 299 N.C. 331, 265 S.E.2d 397 (1980).]

d) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified. [G.S. § 5A-11(a)(4)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Testimony that is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of criminal and civil contempt statutes. [*Galyon v. Stutts,* 241 N.C. 120, 84 S.E.2d 822 (1954) (earlier version of G.S. § 5A-11(a)(4)).]

(3) Reporter's refusal to answer a prosecutor's questions, when she had notice that the trial court had rejected another reporter's claim of privilege and after being warned that her failure to answer would subject her to contempt sanctions, was a willful and deliberate act constituting direct contempt. [*In re Owens,* 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam,* 350 N.C. 656, 517 S.E.2d 605 (1999).] NOTE: case decided before G.S. § 8-

53.11 was passed, codifying a qualified privilege of journalists against disclosure of confidential or nonconfidential information obtained while acting as a journalist. [*See* 1999 N.C. Sess. Laws 267, § 1, effective October 1, 1999.]

(4) A minister duly subpoenaed and called to the stand, who willfully and unlawfully refused to be sworn and to testify on religious grounds, was properly found in direct contempt and punished summarily, even though he sincerely believed it was his moral duty as a Christian minister to refuse to testify. [*In re Williams*, 269 N.C. 68, 152 S.E.2d 317, *cert. denied*, 388 U.S. 918 (1967) (statute then in effect on communications between clergymen and communicants, G.S. § 8-53.1, did not justify minister's refusal to testify because the communicant did not object to the testimony, which was required at the time to evoke the privilege).] NOTE: case decided before G.S. § 8-53.1 (now G.S. § 8-53.2) was amended, removing the requirement that the communicant object to the testimony of the clergyman to evoke the privilege. [*See* 1967 N.C. Sess. Laws 794, effective June 15, 1967.]

e) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court. [G.S. § 5A-11(a)(5)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may be imposed without finding that the act or omission was willfully contemptuous and without clearly warning the individual that the conduct is improper. [G.S. § 5A-12(b)]

(2) No person may be held in contempt under G.S. § 5A-11 on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice. [G.S. § 5A-11(b)]

(3) A court shall not issue any rule or order prohibiting or restricting the publication or broadcast of matters occurring in open court in any hearing, trial, or other proceeding, civil or criminal. [G.S. § 5A-11(c); G.S. § 7A-276.1]

(4) A court may not seal or restrict the publication or broadcast of the contents of any public record required to be open to public inspection. [G.S. § 5A-11(c); G.S. § 7A-276.1]

f) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction. [G.S. § 5A-11(a)(6)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Gross negligence implies "recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others." [*State v. Okwara*, __ N.C.App. __, 733 S.E.2d 576 (2012), *quoting State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987) (determination that defense attorney's violation of the Rape Shield Statute was willful and grossly negligent affirmed; gross negligence was based on attorney's "failure to perform her duties as an officer of the court in an official transaction" arising from impermissible questioning of the alleged victim).]

g) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court. [G.S. § 5A-11(a)(7)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) "Grossly negligent," for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. [*State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987).]

(3) "Substantial interference" means that degree of interference with the court's business that is real, and not momentary or illusory. It also has been described as "wilful disobedience, resistance to, or interference with the court's lawful process, order, direction or instructions or its execution." [*State v. Key,* 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007) (citation omitted) (rejecting argument that there was no interference because the court was able to transact other business).]

(4) Both willfulness or gross negligence and evidence of substantial interference with court business must be established. [*See State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987) (reversing contempt for lack of evidence on both elements; no

evidence that wife's arrival one hour after criminal proceedings against her husband began was willful or negligent but rather was related to transportation failure; nor was there any evidence that wife's tardiness resulted in substantial interference with the business of the court when trial had just started and wife was expected to testify for the defense).]

(5) Attorney properly held in contempt for failure to appear at his client's hearing on an absconder violation and for abandonment of his client by leaving the courthouse. Attorney's actions unnecessarily resulted in the court, its staff and its officers expending significant time and effort in an attempt to resolve the case over a two day period. These actions substantially interfered with the court's business. [*State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007).]

(6) Defendant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (appearance of defendant's counsel was not sufficient to satisfy the order as defendant was personally ordered to appear; contempt order reversed because due process required that defendant be given a hearing and required that facts be established by a reasonable doubt); *State v. Nwanguma*, __ N.C.App. __, 754 S.E.2d 257 (2014) (**unpublished**), *citing Cox* (a party's failure to appear for trial as ordered was indirect criminal contempt); *cf. State v. Verbal*, 41 N.C.App. 306, 254 S.E.2d 794 (1979) (expressly declining to rule on the question but assuming that attorney was in direct criminal contempt after returning to the courtroom eighteen minutes late from a lunch break).] Failure to appear pursuant to a show cause order may also constitute contempt under G.S. § 5A-11(a)(3).

(7) A trial court was authorized to find contempt under G.S. § 5A-11(a)(7), but instead struck defendant's answer as a sanction, when parties advised the court of a settlement but defendants failed to execute settlement documents. Defendants' failure to complete settlement violated court-wide rule regarding calendaring and settlement of cases. [*Lomax v. Shaw*, 101 N.C.App. 560, 400 S.E.2d 97 (1991).]

h) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses. [G.S. § 5A-11(a)(8)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission

was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

i) Willful communication with a juror in an improper attempt to influence his deliberations. [G.S. § 5A-11(a)(9)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may be imposed **without** finding that the act or omission was willfully contemptuous and **without** clearly warning the individual that the conduct is improper. [G.S. § 5A-12(b)]

(2) A person held in criminal contempt under this section may, for the same conduct, be found guilty of a violation of G.S. § 14.225.1 [picketing or parading with intent to influence, among others, a juror], but the person must be given credit for any imprisonment resulting from the contempt. [G.S. § 5A-12(e)]

j) Willful refusal by a defendant to comply with a condition of probation. [G.S. § 5A-11(a)(9a); *see also* G.S. § 15A-534 (a willful violation of a condition of probation is punishable by criminal contempt).]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

k) Any other act or omission specified elsewhere in the General Statutes as grounds for criminal contempt. [G.S. § 5A-11(a)(10)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) A partial listing of general statutes or rules providing for criminal contempt includes the following:

(a) A person served with criminal summons who willfully fails to appear may be punished for criminal contempt. [G.S. § 15A-303(e)(3)]

(b) Contempt authorized for violation of a TRO issued by a district court judge to prevent or enjoin criminal activity on or in the immediate vicinity of leased premises. [G.S. § 42-74]

(c) Civil or criminal contempt is authorized for violation of a civil no-contact order issued by a district court judge under the Workplace Violence Prevention Act. [G.S. § 95-269]

(d) An order for child custody or visitation is enforceable by civil contempt, and its disobedience may be punished by proceedings for criminal contempt. [G.S. § 50-13.3(a)] This language has been interpreted as giving the trial court a choice as to whether it would treat the party's alleged disobedience as civil or criminal contempt. [*Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984).] For a case finding a parent in criminal contempt for willful violation of a custody order, *see Sloan v. Sloan*, 164 N.C.App. 190, 595 S.E.2d 228 (2004) (mother in criminal contempt for refusing to comply, on six occasions, with orders providing for telephonic visitation with child's grandparents).]

(e) An order for the periodic payment of child support or a child support judgment that provides for periodic payments is enforceable by proceedings for civil contempt, and disobedience may be punished by proceedings for criminal contempt. [G.S. § 50-13.4(f)(9)]

(f) Any order for the payment of alimony or postseparation support is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt. [G.S. § 50-16.7(j)]

(g) UIFSA orders may be enforced by civil or criminal contempt. [G.S. § 52C-3-305(b)(5)]

(h) A violation of a 50B order is punishable by contempt. [G.S. § 50B-4(a)]

(i) A knowing violation of a civil no-contact order is punishable as contempt of court. [G.S. § 50C-10; *see Tyll v. Berry*, __ N.C.App. __, 758 S.E.2d 411, *review denied, appeal dismissed*, __ N.C. __, 762 S.E.2d 207 (2014) (interpreting G.S. § 50C-10 as authorizing civil contempt for violation of a 50C order).]

(j) A presiding judge may maintain courtroom order through use of his civil or criminal contempt powers. [G.S. § 15A-1035]

(k) General Rule of Practice 6 for Superior and District Courts provides that conduct of counsel during arguments on motions heard by telephone conference may be subject to punishment as direct criminal contempt of court.

2. Willfulness required by G.S. § 5A-11.

a) "Willfulness" in G.S. § 5A-11 means an act "done deliberately and purposefully in violation of law, and without authority, justification, or excuse." The term has also been defined as "more than deliberation or

conscious choice; it also imports a bad faith disregard for authority and the law." [*State v. Okwara*, __ N.C.App. __, 733 S.E.2d 576, 582 n.4 (2012), *citing Phair* (standard of review is not abuse of discretion or plain error); *State v. Phair*, 193 N.C.App. 591, 668 S.E.2d 110 (2008) (citations omitted).]

b) The word willful when used in a criminal statute means that the act was "done purposely and deliberately in violation of law and without authority, justification, or excuse." [*State v. Chriscoe*, 85 N.C.App. 155, 354 S.E.2d 289 (1987); *State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**), *citing Chriscoe*).]

c) A failure to pay may be willful under G.S. § 5A-11 if a spouse voluntarily takes on additional financial obligations or divests self of assets or income after entry of a support order. [*Faught v. Faught*, 67 N.C.App. 37, 312 S.E.2d 504, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984) (citations to "well-established line of authority" omitted) (defendant's failure to pay alimony was willfull within the meaning of G.S. § 5A-11(a)(3) when, after the original alimony award, defendant obligated himself to pay for automobiles for himself, his adult daughter and his new wife, as well as other obligations for his new family).]

3. Gross negligence required by G.S. § 5A-11(a) (6) and (7).

a) Gross negligence implies "recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others." [*State v. Okwara*, __ N.C.App. __, 733 S.E.2d 576 (2012), *quoting State v. Chriscoe*, 85 N.C.App. 155, 354 S.E.2d 289 (1987) (determination that defense attorney's violation of the Rape Shield Statute was willful and grossly negligent affirmed; gross negligence was based on attorney's "failure to perform her duties as an officer of the court in an official transaction" as set out in G.S. § 5A-11(a) (6), arising from attorney's impermissible questioning of the alleged victim).]

D. When criminal contempt is not available.

1. Acts that, by statute, may not be the basis for criminal contempt.

a) No person may be held in contempt under G.S. § 5A-11 on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice. [G.S. § 5A-11(b)]

(1) Trial judge did not find attorney in contempt based on attorney's statements at a public rally that attorney believed that the prosecution of his client was racially motivated. Where the trial court considered the attorney's rally statements as relevant only to the issue of the attorney's motive or intent to solicit the third party, the trial court did not base its finding of contempt on evidence in violation of G.S. § 5A-11(b) or the attorney's constitutional rights. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319

N.C. 673, 356 S.E.2d 779 (1987), *cert. denied,* 484 U.S. 1004 (1988) (record showed attorney found in contempt for soliciting a third person to disrupt his client's trial).]

b) Inability, failure, or refusal to pay the appointment fee for appointed counsel shall not be grounds for contempt. [G.S. § 7A-455.1(d)]

c) Citation issued by a law enforcement officer may not be enforced by contempt. [Official Commentary to G.S. § 15A-302]

2. Circumstances that, pursuant to case law, may not be the basis for criminal contempt.

a) *When the order to be enforced by contempt was made without, or in excess of, the court's jurisdiction.*

(1) Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt. [*In re Smith,* 301 N.C. 621, 272 S.E.2d 834 (1981) (order requiring out-of-state attorney, who was never admitted to limited practice in North Carolina and was never attorney in the case, to appear was a nullity; attorney could not be held in criminal contempt for failure to appear); *cf. State v. Jordan,* __ N.C.App. __, 748 S.E.2d 775 (**unpublished**), *review denied,* __ N.C. __, 748 S.E.2d 325 (2013), *citing* 17 Am.Jur.2d Contempt § 127 (even though order requiring defendant to submit to competency examination may have been voidable for failing to comply with applicable statute, when order was issued by court having subject matter and personal jurisdiction, defendant required to obey order, regardless of the order's "ultimate validity"; defendant properly found in criminal contempt for failing to appear).]

b) *When the order to be enforced by contempt does not compel or prohibit the act complained of.*

(1) When defendant witness was not under any legal process, order or personal instruction by the judge to appear in court, defendant could not be held in criminal contempt for failure to appear. [*State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987) (in the absence of an order to be present, defendant may not be held in contempt for violation of same).]

c) *When the order to be enforced lacks clarity as to what is intended.*

(1) Language in a temporary injunction prohibiting any person who was "not fully licensed" from, among other things, taking off or landing from an airport, was not sufficiently clear to provide the trial court with a basis for holding defendants in criminal contempt. [*Broadbent v. Allison,* 193 N.C.App. 454, 667 S.E.2d 342 (2008) (**unpublished**) (phrase "fully licensed" was ambiguous because pilots are issued "certificates" and not "licenses" and FAA

regs provided no fewer than six different levels of pilot certification).]

d) *When conduct complained of occurred solely after issuance of the show cause order.*

(1) Criminal contempt reversed when the findings supporting contempt were based solely on acts that occurred after issuance of the show cause orders. Reversal warranted even though the record contained evidence that defendant violated the order at issue, a TRO, before the show cause order was issued because the trial court failed to make the necessary findings beyond a reasonable doubt as to those facts. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008).]

E. Matters that have not precluded a finding of criminal contempt.

1. That the defendant sincerely believed that his contemptuous statements were truthful. [*State v. Williams*, 188 N.C.App. 848, 656 S.E.2d 736 (2008) (**unpublished**) (that defendant sincerely believed that his statements about the prosecutor being a liar were true was beside the point; regardless of their truth, the trial court repeatedly directed defendant not to make the statements, and defendant disobeyed that order).]

2. That the statements may be protected under the First Amendment. [*State v. Lambert*, 152 N.C.App. 719, 568 S.E.2d 337 (2002) (**unpublished**) (freedom of speech under the First Amendment is not absolute and yields to the compelling state interest of maintaining order, decorum and respect in the operations of its courts; lawyer's conduct and statements that court should have heard his matter that day was disrespectful and contemptuous and not protected speech).]

3. That a reporter believed that, in a criminal matter, she had a qualified privilege to refuse to testify under the First and Fourteenth Amendments. [*In re Owens*, 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999) (reporter's belief that refusal to testify was privileged was irrelevant).]

4. That court proceedings may not have actually begun for the day. [*State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**) (irrelevant when the court was still in session for the week and moreover, the court was in the process of beginning the day's business when prospective jurors were waiting in two rooms for the start of voir dire).]

5. That defendant was not" technically" in violation of a court order. [*State v. Gell*, 151 N.C.App. 599 (2002) (**unpublished**) (defendant nonlawyer, who had been ordered not to act as the legal representative of a corporation, violated the spirit of the order when he filed documents and appeared in a representative capacity on behalf of the corporation's owners in other court proceedings).]

6. That the court's directive was oral and not written. [*State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007) (defendant in indirect criminal contempt of court for visiting the office of

the trial court administrator in violation of the trial court's oral directives to stay out of the judges' office area).]

7. That the position espoused by the attorney was correct when the attorney was not the defendant's attorney of record. [*Nakell v. Attorney General of North Carolina,* 15 F.3d 319 (4th Cir.), *cert. denied,* 513 U.S. 866 (1994) (it was inappropriate for attorney to present arguments to the court, regardless of correctness, when attorney clearly understood that the court did not recognize him as defendant's counsel).]

8. That the alleged contemnor is in compliance on the date of the hearing. [*See Ruth v. Ruth,* 158 N.C.App. 123, 579 S.E.2d 909 (2003) (error for trial court to find mother in civil contempt for failing to return children after visitation when she had returned children to father before the contempt hearing); *Reynolds v. Reynolds,* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd per curiam on other grounds for reasons stated in dissenting opinion,* 356 N.C. 287, 569 S.E.2d 645 (2002) (father's payment of arrearages after contempt motion filed eliminated option of civil, but not criminal, contempt).]

F. Distinction between direct and indirect criminal contempt.

1. The distinction between direct and indirect criminal contempt is important because summary proceedings are available only for direct criminal contempt.

a) Because G.S. §5A-13(b) requires plenary proceedings for indirect criminal contempt, it would be reversible error to proceed summarily in the case of indirect criminal contempt.

b) Because proceedings for direct criminal contempt may be plenary or summary, direct contempt mislabeled as indirect has been found not to warrant reversal. [*See Adams Creek Associates v. Davis,* 186 N.C.App. 512, 652 S.E.2d 677 (2007), *review denied, appeal dismissed, stay dissolved,* 362 N.C. 354, 662 S.E.2d 900, 901 (2008) (incorrectly identifying contempt as indirect when it was direct not reversible error).]

2. Direct criminal contempt.

a) Criminal contempt is direct when the act:

(1) Is committed within the sight or hearing of the presiding judicial official; and

(2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

(3) Is likely to interrupt or interfere with matters then before the court. [G.S. § 5A-13(a)]

b) G.S. § 5A-13(a) does not require that the presiding judicial official actually see or hear a defendant's act, only that it be committed "within the sight or hearing" of the official. [*State v. Jackson,* __ N.C.App. __, 752 S.E.2d 257 (2013) (**unpublished**) (even though the judge did not hear defendant use a racial epithet when she spoke to a deputy/bailiff,

defendant uttered the racial slur in the presence of the judge when defendant made the statement in open court during court proceedings).]

c) A judge may punish direct criminal contempt immediately in a summary proceeding, discussed in section III.G at page 67, or may defer punishment for a plenary proceeding, discussed in section III.H at page 72.

3. Indirect criminal contempt.

a) Indirect criminal contempt is any other criminal contempt. [G.S. §5A-13(b)] *See* section III.C at page 51 for list of conduct that is criminal contempt.

b) Indirect criminal contempt is punishable only after plenary proceedings. [G.S. §5A-13(b)] *See* section III.H at page 72.

4. Examples of direct criminal contempt.

a) Refusal to obey order of the court.

(1) A spectator's refusal to rise while court was adjourning, after being asked to rise and when capable of doing so, is sufficient grounds for direct criminal contempt. [*State v. Randell,* 152 N.C.App. 469, 567 S.E.2d 814 (2002) (per curiam) (reversing order of contempt when defendant was not accorded a summary hearing before being found guilty of contempt).]

b) Disrespectful attitude or demeanor toward the court.

(1) Testimony by defendants that they would not comply with existing court orders requiring them to stay off certain real property, and that they would not follow future court orders directing them to vacate the property, constituted direct criminal contempt pursuant to G.S. § 5A-13(a)(1). Testimony was within sight and hearing of the presiding judge and was "disrespectful and disparaged the respect due to the court and its orders." [*Adams Creek Associates v. Davis*, 186 N.C.App. 512, 652 S.E.2d 677 (2007), *review denied, appeal dismissed, stay dissolved*, 362 N.C. 354, 662 S.E.2d 900, 901 (2008).]

(2) Attorney's response, after being advised that the court could not hear his motion and ordering attorney to appear the following morning, that "[i]f you wanted to hear my case, you should have heard my case today," along with other conduct, was disrespectful and constituted direct contempt. [*State v. Lambert,* 152 N.C.App. 719, 568 S.E.2d 337 (2002) (**unpublished**) (contempt reversed when court did not give attorney a summary opportunity to respond).]

(3) Attorney's refusal to sit down and be quiet when repeatedly told to do so by the trial court, attorney's repeated attempts to address the trial court concerning his client although a different matter had been called for hearing, and attorney's "basically

shouting" at the court after being warned, constituted direct contempt. Attorney in direct contempt a second time for continuing to address the trial court even after being taken into custody. [*In re Brown*, 181 N.C.App. 148, 639 S.E.2d 454 (2007) (**unpublished**) (noting that attorney's refusal to sit down when ordered to do so, standing alone, constituted contempt of court).]

c) Untruthful testimony before the court.

(1) Defendant's untruthful testimony after taking an oath at a probation revocation hearing, that a mandatory Saturday class prevented her from reporting for weekend detention, constituted direct criminal contempt. [*State v. Terry*, 149 N.C.App. 434, 562 S.E.2d 537 (2002).]

d) Interruption or interference with court proceedings.

(1) Defendant's use of a racial epithet when she spoke to a deputy/bailiff was disruptive when the judge, upon becoming aware of the statement, "immediately stopped the proceedings to address defendant's behavior." Judge also stated that basis for contempt was "disruption to the operation of court." [*State v. Jackson*, __ N.C.App. __, 752 S.E.2d 257 (2013) (**unpublished**).]

(2) Defendant's conduct, while engaged in a verbal dispute with his former probation officer, created a commotion in front of the courthouse during jury selection for a controversial trial. His conduct, which included the use of profanity, and yelling loudly immediately outside a window in the judge's chambers, constituted direct criminal contempt, even though court proceedings had not begun for the day. [*State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**).]

(3) Defendant did not willfully interrupt or interfere with court proceedings when defendant had no knowledge that court proceedings were taking place. [*In re Hennis*, 276 N.C. 571, 173 S.E.2d 785 (1970) (per curiam) (defendant was silently picketing sixty-one feet from the windows of the courtroom and had no knowledge that court was in session or that his conduct was interfering with the court's regular conduct of business, nor had he been told to discontinue walking along sidewalks adjacent to courthouse wearing a placard; error to find him in direct contempt when his conduct could not be considered willful).]

(4) A defendant's willful intent to interfere with court proceedings can be inferred. [*State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**), *citing State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985).]

5. Examples of indirect criminal contempt.

a) Defendant was in indirect criminal contempt for visiting the office of the trial court administrator in violation of the trial court's oral directives to stay out of the judges' office area. [*State v. Simon,* 185 N.C.App. 247, 648 S.E.2d 853, *review denied,* 361 N.C. 702, 653 S.E.2d 158 (2007).]

b) Defendant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (contempt order reversed because due process required that defendant be given a hearing and that facts be established by a reasonable doubt); *State v. Nwanguma,* __ N.C.App. __,754 S.E.2d 257 (2014) (**unpublished**), *citing Cox* (failure to appear for trial as ordered was indirect criminal contempt).]

c) Defendant in indirect criminal contempt for calling a witness and encouraging her not to obey a subpoena issued by the court. [*State v. Wall,* 49 N.C.App. 678, 272 S.E.2d 152 (1980).]

d) Defendant in indirect criminal contempt under G.S. § 5A-11(a)(3) when he filed suit in South Carolina to accomplish an action, payment to him of a commission, that a North Carolina court had by order denied. [*Osmar v. Crosland-Osmar, Inc.,* 43 N.C.App. 721, 259 S.E.2d 771 (1979), *cert denied,* 299 N.C. 331, 265 S.E.2d 397 (1980).]

e) Defendant in indirect criminal contempt for willfully violating the court's order to comply with all inmate rules and regulations while in jail for direct criminal contempt. [*State v. Williams*, 200 N.C.App. 322, 683 S.E.2d 467 (2009) (**unpublished**) (defendant called the officer in charge of the jail an obscene name and used other profanity when referring to her after being denied certain personal items he had requested).]

6. The classification of tardiness or failure to appear in court as direct or indirect is not entirely clear. In light of the lack of clarity on the issue, it is the better practice to conduct a plenary hearing if faced with a tardy or absent contemnor.

a) The court of appeals has noted that the "willful absence of an attorney from a scheduled trial constitutes contempt of court, although disputes arise over whether it is direct or indirect contempt." [*In re Smith*, 45 N.C.App. 123, 263 S.E.2d 23 (1980), *rev'd on other grounds*, 301 N.C. 621, 272 S.E.2d 834 (1981) (citations omitted).]

b) One case has found that a litigant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (classification of contempt as indirect was based on judge's lack of direct knowledge of facts that would establish that defendant's failure to appear was willful); *State v. Nwanguma*, __ N.C.App. __, 754 S.E.2d 257 (2014) (**unpublished**), *citing Cox* (failure to appear for trial as ordered was not an overt act that occurred in the trial court's presence).]

c) Other cases have decided the contempt issue in tardy or failure to appear cases on other grounds, such as notice or opportunity to respond, without classifying the conduct as direct or indirect contempt. [*See O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985) (court elected not to decide whether plaintiff's repeated failure to appear at custody hearings constituted direct or indirect contempt); *State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007) (attorney's failure to appear as counsel at his client's hearing constituted criminal contempt but court did not classify the failure to appear as direct or indirect); *Pierce v. Pierce*, 58 N.C.App. 815, 295 S.E.2d 247 (1982) (defendant punished summarily for being 25 minutes late for court; contempt order reversed for lack of notice/opportunity to respond; neither court addressed whether tardiness constituted direct or indirect criminal contempt).]

G. Summary proceedings for criminal contempt.

1. Generally.

a) Summary proceedings are available only for direct criminal contempt. [G.S. § 5A-13(a)] Summary proceedings may not be used for civil or indirect criminal contempt.

b) The Rules of Evidence, other than those with respect to privileges, do not apply to contempt proceedings in which the court is authorized by law to act summarily. [G.S. § 8C-1, Rule 1101(b)(4)]

c) A judicial official may chose not to proceed summarily against a person charged with direct criminal contempt but may instead proceed under G.S. § 5A-15 for plenary proceedings. [G.S. § 5A-13(a)]

d) If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of the official's intention to institute contempt proceedings. [G.S. § 5A-13(a)] The Official Commentary states that this sentence establishes the rule that a person be cited for contempt at the time the contempt occurs even if the proceedings are to be held later.

2. If conduct qualifies as direct criminal contempt under G.S. §§ 5A-11 and 5A-13(a), the trial judge may punish summarily when:

a) Necessary to restore order or maintain the dignity and authority of the court; **and**

b) Measures are imposed substantially contemporaneously with the contempt; **and**

c) The person charged with contempt is given summary notice of the charges **and** a summary opportunity to respond. [G.S. § 5A-14(a) and (b)]

3. Whether measures imposed are substantially contemporaneously with the contempt.

a) The term “substantially contemporaneously with the contempt” clearly does not require that the contempt proceeding immediately follow the misconduct. [*State v. Johnson*, 52 N.C.App. 592, 279 S.E.2d 77, *review denied*, 303 N.C. 549, 281 S.E.2d 390 (1981).]

b) Factors bearing on whether the punishment imposed is substantially contemporaneous with the contempt include:

(1) Defendant's notice or knowledge of the misconduct;

(2) The nature of the misconduct; and

(3) Other circumstances that may have some bearing on the right of the defendant to a fair and timely hearing. [*State v. Johnson*, 52 N.C.App. 592, 279 S.E.2d 77, *review denied*, 303 N.C. 549, 281 S.E.2d 390 (1981).]

c) A hearing on 16 November was a continuation and was "substantially contemporaneous" with events in court on 14 November that gave rise to the contempt charge. On the 14th, the judge gave the defendant attorney "specification of the contempt" and set a hearing on the 16th to further consider the matter and to afford attorney/contemnor adequate opportunity to respond to the direct criminal contempt charge. [*In re Nakell*, 104 N.C.App. 638, 411 S.E.2d 159 (1991), *appeal dismissed, disc. review denied*, 330 N.C. 851, 413 S.E.2d 556 (1992); *see also Nakell v. Attorney General of North Carolina*, 15 F.3d 319 (4th Cir.), *cert. denied*, 513 U.S. 866 (1994) (addressing the same hearing in the context of attorney/contemnor’s habeas petition, the 4th Circuit found no violation of due process arising from the delay of two days).]

d) Under the “particular circumstances” of the case, punishment imposed at a hearing held a day after the direct contempt occurred was substantially contemporaneous. The circumstances included that defendant was in court for a brief period for a bond hearing, not a trial; defendant was put on notice that his conduct was so disruptive that he lost his right to be present and was removed; defendant’s removal “infuriated” defendant, giving rise to a conclusion that further punishment that day could have further antagonized defendant and further delayed proceedings. [*State v. Johnson*, 52 N.C.App. 592, 279 S.E.2d 77, *review denied*, 303 N.C. 549, 281 S.E.2d 390 (1981).]

4. Summary notice of charge.

a) Before summarily imposing measures in response to direct criminal contempt, the judicial official must give the person charged with contempt summary notice of the charges. [G.S. § 5A-14(b); *see* Official Commentary to G.S. § 50-14 (following ABA recommendation that a person charged with contempt be given notice of what the contemptuous action was).]

b) Formal notice and a hearing are not required in summary proceedings. [*In re Owens,* 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam,* 350 N.C. 656, 517 S.E.2d 605 (1999).]

c) Written notice is not required when the trial court imposes measures substantially contemporaneously with the contempt as provided by G.S. § 5A-14(a). [*State v. Johnson,* 52 N.C.App. 592, 279 S.E.2d 77, *review denied,* 303 N.C. 549, 281 S.E.2d 390 (1981).]

d) Attorney given adequate notice of impending contempt charge, even though judge never specifically used the word "contempt," when the trial court repeatedly told attorney that he was "out of order" and asked him whether he wished to join his client in custody, directly warned contemnor that he was out of order and would be detained if he said one more word, and told contemnor to sit down and be quiet three times. [*In re Brown,* 181 N.C.App. 148, 639 S.E.2d 454 (2007) (**unpublished**).]

5. Summary opportunity to respond.

a) G.S. § 5A-14(b) requires the judicial official to provide a person summary notice of the charges and a summary opportunity to respond before imposing measures.

(1) A summary verbal notice that a person is charged with criminal contempt, and a description of the acts considered contemptuous, meet the requirements of the statute.

(2) A written order to appear and show cause is not required in a summary proceeding for direct contempt when the trial court imposes measures substantially contemporaneously with the contempt as provided by G.S. § 5A-14(a). [*State v. Johnson,* 52 N.C.App. 592, 279 S.E.2d 77, *review denied,* 303 N.C. 549, 281 S.E.2d 390 (1981).]

b) Since the statute guarantees a potential contemnor a chance to respond to the charge, a contempt order entered in a summary proceeding will be reversed if a contemnor was not given notice and an opportunity to respond. [*Peaches v. Payne,* 139 N.C.App. 580, 533 S.E.2d 851 (2000) (when court was immediately recessed after the judge advised an attorney that he was in the bailiff's custody for contempt, contempt finding reversed; attorney not given summary opportunity to respond); *Pierce v. Pierce,* 58 N.C.App. 815, 295 S.E.2d 247 (1982) (order for contempt reversed when defendant father, who had been punished summarily for being 25 minutes late for court without offering any excuse, was not given notice or an opportunity to respond as required in a summary proceeding); *In re Discipline of Sutton,* 205 N.C.App. 321, 697 S.E.2d 525 (2010) (**unpublished**) (error to find attorney in criminal contempt when attorney not afforded a real "opportunity to present reasons not to impose a sanction"; attorney had already been held in contempt before being taken into custody); *State v. Scott,* 178 N.C.App. 563, 631 S.E.2d 892 (2006)

(**unpublished**) (criminal contempt reversed when defendant not given summary notice and an opportunity to respond before being found in contempt for filing a frivolous motion for appropriate relief and/or for making false statements under oath at the evidentiary hearing on the motion).]

c) G.S. § 5A-14 does not require a hearing, or anything approaching a hearing, in summary contempt proceedings. Instead, the requirements of the statute are meant to ensure that the individual has an opportunity to point out instances of gross mistake. [*See* Official Comment to G.S. § 5A-14; *In re Owens*, 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999) (statutory requirements met if individual has an opportunity to present reasons not to impose a sanction).]

d) While trial judges must have the ability to control their courts, judges must also be punctilious about following the statutory requirements because a finding of contempt against a practitioner may have significant repercussions for that lawyer. [*Peaches v. Payne*, 139 N.C.App. 580, 533 S.E.2d 851 (2000).]

e) The summary hearing must be held before the defendant is found guilty of contempt. An opportunity to explain, given after finding contempt, does not correct a failure to provide a summary opportunity to be heard. [*State v. Randell*, 152 N.C.App. 469, 567 S.E.2d 814 (2002) (per curiam) (reversing the contempt order even though defendant given "ample" opportunity afterwards to explain his actions); *In re Foster*, __ N.C.App. __, 744 S.E.2d 496 (2013) (**unpublished**) (criminal contempt, based on defendant attorney's repeated cursing in magistrate court reversed when defendant not given summary notice and a summary opportunity to respond; while magistrate twice warned defendant not to curse, magistrate did not warn defendant that she would be held in contempt if she continued to curse, did not specifically inform defendant about a possible contempt charge before holding defendant in direct criminal contempt, and did not give defendant an opportunity to provide reasons why contempt should not be imposed prior to being held in contempt).]

f) For sample summary notice language, *see* Appendix on page 90.

6. Custody of person charged with direct criminal contempt to be heard at a summary proceeding.

a) A judicial official may orally order that a person being charged with direct criminal contempt be taken into custody and restrained to the extent necessary to assure the person's presence for summary proceedings. [G.S. § 5A-16(a)]

7. No right to a jury trial. [*See* G.S. § 5A-14(a) authorizing judicial official to summarily impose measures in response to direct criminal contempt); *Int'l Union,*

United Mine Workers v. Bagwell, 512 U.S. 821, 827 n.2, 114 S.Ct. 2552 (1994) (direct contempts that occur in the court's presence may be immediately adjudged and sanctioned summarily).]

8. Standard of proof.

a) The facts in a summary proceeding for contempt must be established beyond a reasonable doubt. [G.S. § 5A-14(b)] *See* section 9.c below for case law regarding standard of proof.

9. Findings.

a) Before imposing punishment under G.S. § 5A-14, the judicial official must find facts supporting the summary imposition of punishment in response to contempt. [G.S. § 5A-14(b)]

b) The findings in a summary contempt proceeding should clearly reflect or include:

(1) That the contemnor was given an opportunity to be heard;

(2) A summary of whatever response was made;

(3) A finding that the excuse or explanation proffered was inadequate or disbelieved; and

(4) That the judicial official applied the reasonable doubt standard to the findings of fact. [*State v. Verbal,* 41 N.C.App. 306, 254 S.E.2d 794 (1979).]

c) Case law on requirement of a finding as to the court's application of the reasonable doubt standard.

(1) Without a finding as to application of the reasonable doubt standard, the order will be reversed. [*In re Contempt Proceedings against Cogdell,* 183 N.C.App. 286, 644 S.E.2d 261 (2007) (order that failed to indicate that judge applied the "beyond a reasonable doubt" standard to judge's findings was fatally deficient); *State v. Verbal,* 41 N.C.App. 306, 254 S.E.2d 794 (1979) (implicit in G.S. § 5A-14(b) is the requirement in a summary proceeding that the judicial official's findings should indicate that the reasonable doubt standard was applied to the findings of fact).]

(2) However, an order without a reasonable doubt finding has been upheld when there was no factual determination for the court to make. [*See In re Owens,* 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam,* 350 N.C. 656, 517 S.E.2d 605 (1999) (when it was clear that the court had considered the contemnor's excuse, the privilege of a reporter to refuse to testify, and had found it inadequate, an order lacking a reasonable doubt finding was upheld).]

(3) The implicit requirement in G.S. § 5A-14(b), that in a summary proceeding the findings must indicate that the reasonable

doubt standard was applied, has been required in an order for criminal contempt issued in a plenary hearing. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004) (the import and consequences of the two hearings is substantially equivalent; holding an order of superior court, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, deficient for not indicating that the reasonable doubt standard had been applied); *see also State v. Phillips*, __ N.C.App. __, 750 S.E.2d 43, *temporary stay allowed*, __ N.C. __, 751 S.E.2d 212 (2013), *review allowed, writ allowed*, __ N.C __, 755 S.E.2d 629 (2014), *citing Ford* and *State v. Verbal*, 41 N.C.App. 306, 254 S.E.2d 794 (1979) (order for indirect criminal contempt reversed for failure to indicate application of "beyond a reasonable doubt" standard).] *See* section III.H.10 at page 78.

10. There is no right to counsel in a summary proceeding for direct contempt. [*In re Williams*, 269 N.C. 68, 152 S.E.2d 317, *cert. denied*, 388 U.S. 918 (1967) (summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel).]

H. Plenary proceedings for criminal contempt.

1. Plenary criminal proceedings are used for all indirect contempts and can be used for direct contempt. [*See* G.S. § 5A-15(a) (when a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when a judicial official may not proceed summarily, the judicial official proceeds with a plenary proceeding).]

2. Procedure.

a) A judicial official initiates a plenary proceeding by issuing a show cause order directing a person to appear and show cause why he or she should not be held in criminal contempt. [G.S. § 5A-15(a); *Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011) (criminal contempt proceedings are initiated at the sole discretion of the court; only the court can provide "real notice of the true nature of the charge" against the alleged contemnor).]

(1) Issuance of a show cause order requires the defendant to personally appear at the hearing or risk being found in contempt for failure to appear. [*See Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (defendant found in indirect criminal contempt for failure to appear; appearance of defendant's counsel not sufficient to satisfy a show cause order that specifically ordered defendant to appear).]

b) There is no requirement in Chapter 5A for application or motion by a party or other person nor is a finding of probable cause required.

(1) Although a party is not required to file a verified petition or affidavit as a prerequisite to the issuance of a show cause order for

criminal contempt, a verified motion or affidavit filed pursuant to a civil contempt proceeding under G.S. § 5A-23 may provide a proper basis for the issuance of a show cause order by a judicial official for criminal contempt under G.S. § 5A-15(a). [*See Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984) (husband's motion alleged sufficient facts to show wife's willful disobedience of order setting out husband's visitation rights).]

c) Venue lies throughout the judicial district where the show cause order was issued. [G.S. § 5A-15(b)]

d) A person ordered to show cause may move to dismiss the order. [G.S. § 5A-15(c)]

3. Right to notice and a hearing.

a) A copy of the show cause order must be furnished to the person charged and must direct the person to appear before a judge at a reasonable time specified in the order and show cause why the person should not be held in contempt. [G.S. § 5A-15(a)]

(1) Service under G.S. § 1A-1, Rule 4, is sufficient.

(2) When the show cause order is issued in a pending civil case, where Rule 4 service of process has been accomplished on the defendant, Rule 5 of the Rules of Civil Procedure appears to allow the show cause order to be served on a party pursuant to Rule 5. Rule 5 allows service by regular mail.

b) For notice to be constitutionally sufficient, it must afford a defendant the opportunity to prepare an adequate defense. [*O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985) (noting that under U.S. Supreme Court precedent, even in instances of direct contempt where the trial court postpones announcing punishment for contemptuous behavior that occurred during a trial, the contemnor "should have reasonable notice of the *specific charges* and opportunity to be heard in his own behalf"); *State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008), *citing O'Briant* (for indirect criminal contempt proceedings in which a trial court is not allowed to proceed summarily, a show cause order is akin to a criminal indictment and is the process by which a defendant is afforded notice).]

c) The show cause order must provide adequate notice of the grounds for the alleged contempt. In *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985), the court vacated a 1983 adjudication of criminal contempt when plaintiff not given sufficient notice that she should be prepared to defend herself on contempt charges arising from failure to attend custody hearings in early to mid-1982.

(1) Evidence did not establish that plaintiff received an order to appear and show cause at a hearing in 1983 why she should not be held in contempt for failing to appear at hearings in 1982. Even if

received, order did not provide adequate notice of contempt charges arising from failure to appear at the 1982 hearings when notice stated only that the hearing would be "a trial on the merits upon all outstanding issues" and "all outstanding motions pending."

(2) The 1982 show cause orders were not specific about which of plaintiff's acts were alleged to be contemptuous, i.e., her failure to appear or her failure to comply with an order allowing visitation and telephone contact. Even if 1982 show cause orders gave notice of contempt charges based on failure to appear, they did not provide adequate notice of the contempt charges to be heard in 1983. [*O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985).]

d) Reasonable time requirement in G.S. § 5A-15(a).

(1) Eighteen hours was sufficient notice for defendant to appear and answer a charge of indirect criminal contempt when defendant had an opportunity to seek counsel but voluntarily waived his right to do so, the charges against defendant were neither complex nor lengthy, and the show cause order described defendant's contemptuous acts. [*State v. Williams,* 200 N.C.App. 322, 683 S.E.2d 467 (2009) (**unpublished**).]

e) A defendant, given notice of the charges and the assistance of appointed counsel, who elected not to present evidence on his own behalf, did not take advantage of his opportunity to be heard and cannot complain of improper notice and inadequate opportunity to be heard. [*State v. Gell,* 151 N.C.App. 599 (2002) (**unpublished**).]

4. Special provisions involving direct contempt to be heard at a plenary proceeding.

a) If a judicial official defers a proceeding for direct contempt, he or she must, immediately following the alleged contemptuous act, inform the person of the judicial official's intent to institute a plenary proceeding for direct contempt. [G.S. § 5A-13(a)]

b) A judicial official may orally order that a person being charged with direct criminal contempt be taken into custody and restrained to the extent necessary to assure the person's presence for notice of plenary proceedings. [G.S. § 5A-16(a)]

5. Order for arrest of a person charged with criminal contempt to be heard at a plenary proceeding.

a) In a proceeding for criminal contempt, the court may order a person's arrest if the court finds, based on a sworn statement or affidavit, probable cause to believe that the person will not appear in response to the show cause order. [G.S. § 5A-16(b); G.S. § 15A-305(b)(9); *see also Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984) (court had

power to have plaintiff wife arrested and held until she posted bail to assure her appearance).] An order for arrest has been reversed when the court failed to make a probable cause finding that plaintiff would not appear. [*See Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984).]

b) If a court issues an order for arrest and the person is not brought before a judge for hearing in the contempt proceeding immediately following arrest, he or she must be released from jail pending the contempt hearing upon posting an appearance bond or satisfying other pre-trial release requirements pursuant to G.S. § 15A-534. [*See* G.S. § 5A-16(b)]

c) An order for arrest may be issued when a defendant fails to appear as required by a show cause order issued in a criminal proceeding. [G.S. § 15A-305(b)(9)]

d) If a person fails to appear at a contempt hearing after being released from custody following arrest, the person's appearance bond may be forfeited for the benefit of the public schools but may not be applied to satisfy amounts the person owes. [*See Mussallam v. Mussallam,* 321 N.C. 504, 364 S.E.2d 364 (1988) (discussing distinction between appearance bond and compliance bond in contempt proceeding relating to civil action for child custody); N.C. CONST. art. IX, § 7; G.S. § 115C-452 (codification of constitutional provision); G.S. § 15A-544.7(c)(1) (providing for clear proceeds to go to county finance officer for benefit of the public schools).]

6. No right to a jury trial.

a) There is no constitutional right to a jury trial of criminal contempt. [*Blue Jeans Corp. v. Amalgamated Clothing Workers,* 275 N.C. 503, 169 S.E.2d 867 (1969) (no constitutional right to a jury trial when the prescribed punishment is imprisonment for less than six months or a fine of less than $500; punishment for criminal contempt at the time was a fine of $250 or imprisonment for thirty days, or both); *see also Bloom v. Illinois,* 391 U.S. 194, 20 L.Ed.2d 522 (1968) (criminal contempt conviction in a nonjury trial could not be sustained when a twenty-four month prison sentence imposed).] [*But cf. Int'l Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 114 S.Ct. 2552 (1994) (serious noncompensatory contempt fines were criminal and constitutionally could not be imposed absent a jury trial).]

b) The judge is the trier of facts at the criminal contempt hearing. [G.S. § 5A-15(d)]

c) When a trial judge sits as "both judge and juror" in a non-jury proceeding, the judge has the duty to weigh and consider all competent evidence, and pass upon the credibility of witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.

[*In re Paul,* 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied,* 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied,* 484 U.S. 1004 (1988).]

d) For a paper raising questions about a right to a jury trial based on amendments to G.S. § 5A-12 allowing imprisonment for up to six months, *see* Michael Crowell, Civil Contempt, presented at the Superior Court Judges Summer 2008 Conference and available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/CivilContempt.pdf.

e) For a case holding that a 1994 criminal contempt adjudication, assumed to be punishable by a 30-day maximum term, was not a "prior conviction" under a strict construction of the Structured Sentencing Act then applicable, based in significant part on the fact that there is no right to a trial by jury, *see State v. Reaves*, 142 N.C.App. 629, 544 S.E.2d 253 (2001) (decided before 2009 amendment to G.S. §5A-12(a)(3) providing, under certain circumstances, for imprisonment up to 120 days for failure to pay child support).

7. Right against self-incrimination.

a) The person charged with contempt may not be compelled to be a witness against himself at the hearing. [G.S. § 5A-15(e)] Thus, a person who asserts the privilege upon a reasonable belief that his answer could be used against him in a criminal prosecution cannot be held in criminal contempt for the refusal to answer. [*See In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994).]

b) An order holding a defense witness in a murder case in criminal contempt for refusal to answer two questions on cross examination, when the witness had a charge of first degree murder pending against him in a related case, infringed on the witness' privilege against self-incrimination. Criminal contempt order reversed. [*In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994) (applying a liberal interpretation to the privilege and concluding that it was reasonable for witness to believe that his answers to both questions could be used against him in a criminal prosecution).]

c) Although a witness is entitled to assert the privilege, the trial court may, in its discretion, strike the witness' direct testimony "in whole or in part" when the witness invokes the privilege on cross-examination in response to questions relating to the details of the witness' direct examination. [*In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994).]

8. Appointment of a prosecutor or member of the bar to represent the court.

a) The judge conducting the plenary proceeding may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar, to represent the court in hearings for criminal contempt. [G.S. § 5A-15(g)]

9. Recusal of judge if judge's objectivity may reasonably be questioned.

a) If the criminal contempt is based on acts before a judge that so involve the judge that the judge's objectivity may reasonably be questioned, the order must be returned before a different judge. [G.S. § 5A-15(a); *In re Marshall,* 191 N.C.App. 53, 662 S.E.2d 5 (2008) (citation omitted) (in connection with a criminal contempt hearing, stating that since one purpose behind the statute is to maintain public confidence in the courts, even the appearance of a lack of objectivity must be avoided); *see also Caperton v. A.T. Massey Coal Co., Inc,* 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (identifying criminal contempt proceedings as one of the situations that may require recusal under the Due Process Clause).]

b) It can be error not to have criminal contempt heard before a different judge even when the respondent fails to make such a motion. [*See In re Marshall,* 191 N.C.App. 53, 662 S.E.2d 5 (2008) (vacating a judgment holding attorney in contempt because show cause order was not returned before a different judge, even though attorney had not made such a request).]

c) G.S. § 5A-15 neither expressly nor impliedly places any responsibility on a respondent to file a motion for recusal. Rather G.S. § 5A-15(a) imposes a duty on the judge to acknowledge that the judge's involvement in the acts allegedly constituting the contempt could reasonably cause others to question the judge's objectivity and, in such circumstance, to return the show cause order before a different judge *ex mero motu*. [*In re Marshall,* 191 N.C.App. 53, 662 S.E.2d 5 (2008).]

d) Fact that judge presiding at a summary proceeding requested affidavits from court personnel who witnessed conduct of the attorney charged with direct criminal contempt, and that judge gave an interview to a newspaper reporter regarding the contempt charges, did not constitute personal bias that would require the judge's recusal nor did it render the contempt proceeding unfair. [*Nakell v. Attorney General of North Carolina,* 15 F.3d 319 (4th Cir.), *cert. denied,* 513 U.S. 866 (1994) (agreeing, however, with the district court that the trial judge's actions were "not a wise judicial activity"); *accord In re Nakell,* 104 N.C.App. 638, 411 S.E.2d 159 (1991), *appeal dismissed, disc. review denied, stay dissolved,* 330 N.C. 851, 413 S.E.2d 556 (1992) (record showed no bias, prejudice, or proof that would require judge before whom the contempt was committed to recuse himself from conducting the hearing).]

e) The recusal language speaks to direct criminal contempt. No statute addresses recusal in the context of an indirect criminal contempt or civil contempt. While G.S. § 5A-15(a) does not address the return of the show cause order before a different judge in those contexts, other authority may make it appropriate to do so. [*See* Code of Judicial Conduct Canon 3C(1), which provides that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned."

f) For more on disqualification, *see North Carolina Code of Judicial Conduct*, Bench Book, Vol. 2, Chapter 1.

10. Standard of proof.

a) Facts supporting a finding that a person is guilty of criminal contempt must be established beyond a reasonable doubt. [G.S. § 5A-15(f)]

b) The implicit requirement in G.S. § 5A-14(b), that in a summary proceeding the findings must indicate that the reasonable doubt standard was applied, has been required in an order for criminal contempt issued in a plenary hearing. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004), *citing State v. Verbal*, 41 N.C.App. 306, 254 S.E.2d 794 (1979) (the import and consequences of the two hearings is substantially equivalent; holding an order of superior court, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, deficient for not indicating that the reasonable doubt standard had been applied).]

c) An appellate court is not at liberty to make findings for the trial court. There is no precedent or legal authority permitting the appellate court to remand for additional findings of fact by the trial court in an indirect criminal contempt matter. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008), *citing In re Estate of Lunsford*, 160 N.C.App. 125, 585 S.E.2d 245 (2003) (criminal contempt vacated even though the record contained evidence that defendant violated the order at issue, a TRO, before the show cause order was issued because the trial court failed to make the necessary findings beyond a reasonable doubt as to those facts).]

11. Burden of proof.

a) A show cause order in a criminal contempt proceeding is akin to an indictment and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008) (plenary proceeding) (noting that burden does not shift to the defendant as in a proceeding for civil contempt under G.S. § 5A-23(a)).]

b) In a criminal contempt proceeding, as in any other criminal proceeding, the State has the ultimate burden of proof beyond a reasonable doubt on all elements of the offense. The State must prove all of the requisite elements under the applicable statute, beyond a reasonable doubt. [*State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007), *citing State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007).]

c) While the State must prove the facts that form the basis of the contempt charge, when defendant admits to the underlying facts, leaving no issue of fact to be decided, there was no improper burden on defendant. [*State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361

N.C. 702, 653 S.E.2d 158 (2007) (defendant admitted entering judges' office area after judge had told him not to).]

12. Right to and appointment of counsel.

a) An alleged contemnor has the right to be represented by legal counsel in criminal contempt proceedings.

(1) The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt proceeding is heard, that he or she may be incarcerated if found in criminal contempt, that he or she has the right to be represented by retained counsel, and that he or she may be entitled to court-appointed counsel if he or she is unable to afford to retain an attorney.

(2) An alleged contemnor may waive his or her right to legal representation. An alleged contemnor's waiver of legal representation must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must a make written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and the consequences of the waiver." [G.S. § 7A-457]

(3) If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the criminal contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.

b) An alleged contemnor is entitled to court-appointed counsel in a criminal contempt proceeding if (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she will actually be incarcerated as a result of the hearing. [G.S. § 7A-451(a) (an indigent person is entitled to court-appointed counsel in any case in which imprisonment, or a fine of $500, or more, is likely to be adjudged); *State v. Wall*, 49 N.C.App. 678, 272 S.E.2d 152 (1980) (failure to advise defendant charged with criminal contempt of his right to counsel if he was indigent not prejudicial error when no evidence that defendant was indigent and he voluntarily waived right to counsel); *Hammock v. Bencini*, 98 N.C.App. 510, 391 S.E.2d 210 (1990) (noting that G.S. § 7A-451(a)(1) requires appointment of counsel in any case in which imprisonment likely to be adjudged and includes citations for criminal contempt for failure to comply with civil child support orders); *Tyll v. Berry*, __ N.C.App. __, 758 S.E.2d 411, *review denied, appeal dismissed*, __ N.C. __, 762 S.E.2d 207 (2014), *citing Turner v. Rogers*, __ U.S. __, 131 S.Ct. 2507 (2011) and *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158 (1979) (in criminal contempt proceedings, the Sixth and Fourteenth Amendments to the U.S. Constitution generally "require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense").]

(1) Determinations of indigency and entitlement to counsel and appointment of counsel may be made by the district court judge or by the clerk of superior court. [*See* G.S. 7A-452(c)]

(2) An alleged contemnor is indigent if he or she has insufficient income and resources, based on guidelines approved by the Office of Indigent Defense Services, to retain an attorney to represent him or her in the contempt hearing. [*See* G.S. 7A-452; *see also* G.S. § 7A-450(a) for definition of an indigent person.]

c) Child support proceedings.

(1) Counsel for indigent obligors in criminal contempt proceedings in child support cases are appointed pursuant to procedures approved by the Office of Indigent Defense Services. [*See* G.S. § 7A-452]

(2) For more on the right to and appointment of counsel in criminal contempt proceedings in the context of child support enforcement, *see Enforcement of Child Support Orders,* Bench Book, Vol. 1, Chapter 3, Part 4.

I. Orders for criminal contempt.

1. Fundamentals of an order finding a person in criminal contempt. The order should:

a) Include a finding of guilty or not guilty. [G.S. § 5A-15(f)]

b) Indicate whether it is civil contempt or criminal contempt. [*See Watkins v. Watkins,* 136 N.C.App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

c) If imprisonment ordered, the judge should specify the beginning and end dates of the sentence. [Note that a sentence of imprisonment for criminal contempt is served day for day with no credit for good time, gain time or earned time. *See* State of North Carolina Department of Corrections Division of Prisons Policy and Procedure, Chapter B, sections .0111(d)(2) (good time); .0112(c)(2)(gain time); .0113(f)(1) (earned time).]

d) Indicate that the court applied the reasonable doubt standard. [G.S. § 5A-15(f); *State v. Ford,* 164 N.C.App. 566, 596 S.E.2d 846 (2004), *citing State v. Verbal,* 41 N.C.App. 306, 254 S.E.2d 794 (1979) (superior court order of contempt, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, must indicate that the reasonable doubt standard of proof was applied).]

e) Make findings of fact and enter judgment. [G.S. § 5A-15(f)]

2. The following AOC forms are available.

a) SHOW CAUSE ORDER, FINDINGS AND JUDGMENT – CONTEMPT OR FAILURE TO APPEAR FOR JURY DUTY (AOC-CR-219) (criminal or civil contempt).

b) DIRECT CRIMINAL CONTEMPT/SUMMARY PROCEEDINGS/FINDINGS AND ORDER (AOC-CR-390).

c) CONTEMPT ORDER DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-309) (criminal or civil contempt).

d) CONTEMPT ORDER NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT (AOC-CV-529) (criminal or civil contempt).

J. Punishment for criminal contempt.

1. Censure, imprisonment, or a fine under G.S § 5A-12(a).

a) G.S. § 5A-12(a) provides generally that a person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three, subject to the following exceptions:

(1) A person who commits a contempt described in G.S. § 5A-11(a)(8) (willful refusal of witness given immunity to testify) is subject to imprisonment not to exceed six months, in addition to censure and a fine. [G.S. § 5A-12(a)(1)]

b) A judicial official who finds a person in criminal contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment if warranted by the contemnor's conduct and the ends of justice. [G.S. § 5A-12(c)]

c) The court may suspend a contemnor's incarceration and impose conditions of probation. [*See* G.S. § 15A-1343] The contemnor's probation may be revoked and the sentence activated if the contemnor violates or fails to fulfill the conditions of probation. [*See* G.S. §§ 15A-1344 and 15A-1345] *See* sections 2(d) and 3 below discussing suspension and conditions of probation in context of child support.

d) Criminal contempt may not be purged so provisions that can be avoided or terminated by compliance should not be included. However, a sentence in criminal contempt may be suspended upon conditions. [*See Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting).]

e) A fine imposed in a criminal contempt proceeding is payable to the state and may not be ordered to be paid to the aggrieved party or to applied to satisfy support arrearages owed by the contemnor. [*See In re Rhodes*, 65 N.C. 518 (1871) (per curiam) (stating that a fine for contempt is a punishment for a wrong to the state and payment goes to the state).]

f) Provision in a criminal contempt adjudication requiring defendant to pay $3,150 in damages to plaintiff was invalid. Amount exceeded that allowed by statute. [*M.G. Newell Co. v. Wyrick,* 91 N.C.App. 98, 370 S.E.2d 431 (1988).]

g) *See* chart, Overview of Criminal Contempt, at page 91.

2. Punishment for criminal contempt of a child support order.

a) An obligor who is found in criminal contempt is subject to censure, imprisonment for a definite and fixed term not to exceed 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)(3)]

b) However, a sentence of imprisonment up to 120 days may be imposed for criminal contempt resulting from the failure to pay child support, provided the sentence is suspended upon conditions reasonably related to the contemnor's payment of child support. [G.S. § 5A-12(a)(3), *amended by* 2009 N.C. Sess. Laws 335, § 1, effective December 1, 2009, and applicable to offenses committed on or after that date.]

c) An obligor who is found in criminal contempt for willfully failing to pay court-ordered child support may not be sentenced to jail under an order that allows him or her to be released from jail upon **purging** the contempt (usually by paying all or part of the child support arrearages he or she owes) as in the case of civil contempt. Purge conditions are imposed in civil, not criminal, contempt proceedings.

d) A court, however, may find an obligor in criminal contempt for willfully failing to pay court-ordered child support; sentence him or her to a definite period of incarceration, **suspend** the sentence for criminal contempt; and require the obligor to pay all or part of the child support arrearages or to continue to pay his or her court-ordered child support obligation as it becomes due as one of the conditions of the obligor's probation. [G.S. § 15A-1343(b)(4); *see Bishop v. Bishop*, 90 N.C.App. 499, 369 S.E.2d 106 (1988); *Reynolds v. Reynolds,* 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (defendant also required to post a cash bond or security to guarantee timely payment of future cash child support as well as other conditions).] These conditions are conditions of probation and are not purge conditions.

e) **Important note**: If a judge finds an obligor in criminal contempt, sentences the obligor, suspends the obligor's sentence, and the only conditions of probation require compliance with the underlying child support order, the order constitutes an order of civil, rather than criminal, contempt. [*See Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (where court imposed a determinate thirty-day term, suspended upon certain conditions, i.e., that obligor pay counsel fees and interest upon delinquent child support

payments, and that defendant post a cash bond as well as make each child support payment when due, order was for criminal contempt); *Hicks obo Feiock v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423 (1988) (remand to determine whether father's payment of arrearages would purge his determinate jail sentence; if so, proceeding was civil in nature).]

3. Special conditions of probation.

a) As a special condition of probation, a defendant may be required to satisfy any conditions determined by the court to be reasonably related to his rehabilitation. [G.S. § 15A-1343(b1)(10)]

b) After finding an attorney guilty of criminal contempt and suspending his sentence, the court placed the attorney on probation on the condition that he not violate any state law, not speak profanely to any court official, and not appear as an attorney in any matter in the Wake County district or superior courts for one year. These conditions of probation did not constitute an abuse of discretion. [*State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007) (noting that the attorney did not challenge the conditions of probation as not reasonably related to his rehabilitation under G.S. § 15A-1343(b1)(10)); *Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (active thirty day jail sentence suspended upon defendant's posting of a cash bond or security to secure timely payment of future child support, defendant's immediate payment of interest on delinquent child support payments and immediate payment of attorney fees, and defendant's timely payment of future child support).]

4. Disbarment.

a) Disbarment of attorney guilty of criminal contempt for willfully interrupting trial court proceedings upheld. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004 (1988).]

5. Criminal contempt and the Structured Sentencing Act.

a) Criminal contempt adjudication, assumed to be punishable by a 30-day maximum term, was not a "prior conviction" under a strict construction of the Structured Sentencing Act then applicable, based in significant part on the fact that there is no right to a trial by jury. [*State v. Reaves*, 142 N.C.App. 629, 544 S.E.2d 253 (2001) (not specifically addressing whether an adjudication of criminal contempt based upon failure to comply with a nontestimonial identification order for which the sentence was not to exceed 90 days, or a violation of G.S. § 5A-11(8), might constitute a "prior conviction" under the Act; case decided before 2009 amendment to G.S. §5A-12(a)(3) providing, under certain circumstances, for imprisonment up to 120 days for failure to pay child support).]

K. Attorney fees in criminal contempt proceedings.

1. A court may require a contemnor to pay an aggrieved party's attorney fees if there is statutory or case law authority to do so. [*M.G. Newell Co. v. Wyrick*, 91 N.C.App. 98, 370 S.E.2d 431 (1988) (condition of suspended sentence in criminal contempt adjudication that required defendant to pay plaintiff's attorney fees was invalid when award of fees not authorized by statute or case law); *see also Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (affirming an order requiring a defendant held in criminal contempt to pay $55,000 in attorney fees in the underlying custody and support action as a condition of a suspended sentence); *Lafell v. Lafell*, 177 N.C.App. 811, 630 S.E.2d 257 (2006) (**unpublished**) (attorney fees allowed to father for mother's criminal contempt of custody order; attorney fees authorized by G.S. § 50-13.6).]

2. *See* section II.J at page 40 discussing when an award of attorney fees is authorized by statute, case law or agreement in contempt proceedings generally and in contempt proceedings in the family law area.

3. Attorney fees allowed as a sanction under Rule 11 in a criminal contempt case.

a) A trial court was within its discretion to award defendant mother attorney's fees as a sanction under Rule 11 for having to defend allegations by child's father that were not legally sufficient to constitute criminal contempt of a custody order. [*Jackson v. Jackson*, 192 N.C.App. 455, 665 S.E.2d 545 (2008) (mother not guilty of criminal contempt with respect to most of the custody violations alleged by father and was entitled to attorney fees for having to defend those claims; mother found in criminal contempt for failing to allow father reasonable telephone access with the child).]

L. Appeal of an order of criminal contempt.

1. Appeal by a person found in criminal contempt in either a civil or a criminal proceeding.

a) A person found in criminal contempt in district court may appeal to superior court for a trial de novo. [G.S. § 5A-17(a); G.S. § 15A-1431]

b) Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than 24 hours from the time of imposition of confinement without a bail determination being made by :

(1) A district court judge if the confinement is imposed by a clerk or a magistrate.

(2) A superior court judge if the confinement is imposed by a district court judge.

(3) A superior court judge other than the superior court judge that imposed the confinement.

(4) If a superior court judge has not acted within 24 hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. § 5A-17(b), (c), *added by* 2013 N.C. Sess. Laws 303, § 1, effective December 1, 2013, and applicable to confinement imposed on or after that date.]

c) The court of appeals lacks jurisdiction to hear an appeal of a district court order adjudicating a defendant in criminal contempt. [*See Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion* in 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting); *Roberts v. Roberts*, __ N.C.App. __, 763 S.E.2d 926 (2014) (**unpublished**) (court of appeals lacked authority to review appeal of a district court order finding defendant in criminal contempt for violation of consent custody order).] *But cf. Jackson v. Jackson,* 192 N.C.App. 455, 665 S.E.2d 545 (2008) (a criminal contempt order that plaintiff alleged impermissibly modified child custody was properly appealed to the court of appeals; as to those aspects of the criminal contempt order that plaintiff argues impermissibly modify custody or exceed the trial court's authority, plaintiff has a right to appeal to the court of appeals); *see also File v. File,* 195 N.C.App. 562, 673 S.E.2d 405 (2009) (without addressing appropriateness of the appeal, court of appeals affirmed an order finding mother in criminal contempt of an order allowing father visitation with their child).

d) The de novo hearings in superior court are plenary proceedings that must be conducted in accordance with G.S. § 5A-15. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004).]

e) When reviewing a contempt order de novo, the superior court reviews the facts and law, and additional testimony can be heard. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004).]

f) G.S. § 5A-17 addresses an appeal only by a person found in criminal contempt. It makes no provision for appeal when no contempt is found. The court of appeals has found no right to appeal a defendant's acquittal of criminal contempt charges. [*Patterson v. Phillips*, 56 N.C.App. 454, 289 S.E.2d 48 (1982) (noting that courts in other jurisdictions generally agree that no appeal lies to review an acquittal from criminal contempt charges; finding that the individual plaintiff, child's mother, could not appeal defendant attorney's acquittal of criminal contempt charges based on his alleged interference with a custody order).]

2. Standard of review.

a) After the de novo hearing in superior court, a criminal contempt order can be appealed to the court of appeals. The standard of review for contempt cases is "whether there is competent evidence to support the trial

court's findings of fact and whether the findings support the conclusions of law and ensuing judgment," not whether the trial court abused its discretion. [*State v. Phair*, 193 N.C.App. 591, 668 S.E.2d 110 (2008), *citing State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).]

b) While conclusions of law are reviewable de novo, the findings of fact are not. On appellant review of a contempt order, "the trial judge's findings of fact are conclusive ... when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency." [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008), *citing O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985); *File v. File*, 195 N.C.App. 562, 673 S.E.2d 405 (2009), *quoting State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).]

c) When a defendant alleges that the order giving rise to a finding of criminal contempt lacks sufficient clarity, the appellate court may review the order de novo. [*See Broadbent v. Allison*, 193 N.C.App. 454, 667 S.E.2d 342 (2008) (**unpublished**).]

d) There is no precedent or legal authority permitting the appellate court to remand for additional findings of fact by the trial court in an indirect criminal contempt matter. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008).]

3. Release of defendant pending appeal.

a) Upon appeal to superior court, the district court judge must review the case and fix conditions of pretrial release as appropriate. [G.S. § 15A-1431(d)]

b) Terms of a defendant's release are within the trial court's discretion. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004 (1988) (citation omitted) (trial court did not abuse its discretion when it ordered the respondent attorney not to practice law during the appeal of his conviction for criminal contempt; release in this case was pursuant to G.S. § 15A-536, release after conviction in superior court).]

c) A pretrial release order remains in effect pending appeal unless the judge modifies the order. [G.S. § 15A-1431(e)]

4. Stay pending appeal of a criminal contempt order.

a) Appeal of a criminal contempt order to superior court stays execution of all portions of the judgment, including payment of a fine, probation or special probation, and active punishment. [G.S. § 15A-1431(f1)]

IV. Enforcement of a Nontestimonial Identification Order

A. Either civil or criminal contempt available.

1. A person who resists compliance with authorized nontestimonial identification procedures, by failing to appear or refusing to submit to the designated procedures, may be held in criminal contempt pursuant to G.S. § 5A-12(a)(2) or civil contempt pursuant to G.S. § 5A-5A-21(b). [G.S. § 15A-279(e)]

B. If found in criminal contempt.

1. A person found in criminal contempt, but not arrested, for failure to comply with a nontestimonial identification order is subject to censure, imprisonment not to exceed 90 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)(2)]

C. If found in civil contempt.

1. A person found in civil contempt, but not arrested, for failure to comply with a nontestimonial identification order pursuant to G.S. § 15A-271 et seq., may not be imprisoned for more than 90 days unless the person is arrested on probable cause. [G.S. § 5A-21(b1)]

2. After imprisonment for 90 days, the person must be released or arrested for the offense to which the order is related.

3. If the person is arrested, he or she may be imprisoned for as long as he or she continues to refuse to comply with the nontestimonial identification order. [*See* Official Commentary to G.S. § 5A-21 stating that after arrest for probable cause, the 90 day limitation no longer applies.]

V. Other Resources on Contempt

A. Generally.

1. For an ONLINE MODULE on the law of contempt, see https://unc.ncgovconnect.com/p30019876/.

2. Note, *Distinction between Civil and Criminal Contempt in North Carolina*, 67 N.C.L.Rev. 1281 (1989).

B. Child support.

1. John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series No. 17, School of Government, February 2004.

C. News media.

1. Contempt: Special Issues When Dealing with the Media (Or What I Learned About Rule 15 and How I Learned It), Senior Resident Judge Jesse B. Caldwell, III, Superior Court Judges Conference Fall 2007, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Caldwell.pdf.

	CRIMINAL CONTEMPT	CIVIL CONTEMPT
	5A-11 through 5A-17	5A-21 through 5A-25
Purpose:	To punish.	To force compliance with a court order.
Grounds:	Committing one of the willful acts specified in 5A-11(a). See chart, page 91.	Failure to comply with a court order, if the person is able to comply, or to take reasonable measures that would enable person to comply [5A-21(a)].
When The Grounds Must Exist:	During the court proceedings, or at any time since the entry of the original order (if an order is involved in the case).	At the time of the hearing; the alleged contemnor is no longer in civil contempt if he or she has complied with the court's order by the time of the hearing.
Procedure:	Plenary proceeding. (5A-14); Summary proceeding. (5A-15).	Plenary proceeding. (5A-23).
Order and Findings	A finding of criminal contempt must be based on evidence that supports findings of fact beyond a reasonable doubt. [5A-14(b); 5A-15(f)].	The order finding a person in civil contempt must include the facts constituting civil contempt and must specify the actions by which the person may purge himself or herself. [5A-23(e)].
Punishment:	[5A-12]. Under 5A-12(c) a judge may reduce the sentence or fine at any time based on the defendant's actions and on the ends of justice.	[5A-21(b)]. Imprisonment for as long as civil contempt continues; defendant must be released when civil contempt ceases.
Appeal:	To superior court. [5A-17; 15A-1431 et seq.]. See section III.L.	To the court of appeals. [5A-24; 1-268 et seq].

APPENDIX
Sample Summary Notice Language

[Mr./Mrs. Defendant or Party], you are hereby notified, as required by G.S. 5A-14, that you are charged with direct criminal contempt of court, in that when the court overruled an objection by your attorney to certain testimony by the witness Mr. X., you pounded the table with your fist and called the witness a "liar" and the court a "kangaroo court" [describe other conduct as appropriate]. When warned by the court, as the record will show, you repeated the "liar" and "kangaroo court" language and further threatened to "take care of" the witness after the trial. You are advised that you may now respond to this charge before the court takes further action. You may respond through your counsel or directly or both.

OVERVIEW OF CRIMINAL CONTEMPT

Grounds [5A-11]	**Showing of willfulness or prior warning required to impose fine or imprisonment** [5A-12(b)]	**Type of contempt** [5A-13, -14(a), -15(a)]	**Punishment** [any combination of the following, 5A-12]:
1. Willful behavior committed during sitting of a court and directly tending to interrupt its proceedings [5A-11(a)(1)]	Yes.	Direct or indirect.	Censure; 30 days; $500.
2. Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority [5A-11(a)(2)]	Yes.	Direct.	Censure; 30 days; $500.
3. Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, instruction, or its execution [5A-11(a)(3)]	Yes.	Direct or indirect.	Censure; 30 days (except if not arrested and fail to comply with nontestimonial identification order, 90 days; except if failure to pay child support, 120 days if sentence suspended upon conditions reasonably related to payment of support, 120 days); $500.
4. Willful refusal to be sworn or affirmed as witness, or when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified [5A-11(a)(4)]	Yes.	Direct.	Censure; 30 days; $500.
5. Willful publication of report of court proceedings as specified in 5A-11(a)(5)	No.	Indirect.	Censure; 30 days; $500.
6. Willful or grossly negligent failure by court officer to perform duties in an official transaction [5A-11(a)(6)]	Yes.	Direct or indirect.	Censure; 30 days; $500.

OVERVIEW OF CRIMINAL CONTEMPT (continued)

Grounds [5A-11]	**Showing of willfulness or prior warnings required to impose fine or imprisonment** [5A-12(b)]	**Type of contempt** [5A-13, -14(a), -15(a)]	**Punishment** [any combination of the following, 5A-12]:
7. Willful or grossly negligent failure to comply with court schedules or practices that substantially interfere with court's business [5A-11(a)(7)]	Yes.	Direct or indirect.	Censure; 30 days; $500.
8. Willful refusal to testify or produce other information on judge's order under Art. 61, G.S. Chapter 15A [5A-11(a)(8)]	Yes.	Direct.	Censure; 6 months; $500.
9. Willful communication with a juror in an improper attempt to influence juror's deliberations [5A-11(a)(9)]	No.	Direct or indirect.	Censure; 30 days; $500. Conduct also punishable under 14-225.2, but see limitation on punishment in 5A-12(e).
9(a) Willful refusal by a defendant to comply with a condition of probation [5A-11(a)(9a)]	Yes.	Indirect.	Censure; 30 days; $500.
10. Any other act or omission specified elsewhere as grounds for criminal contempt [5A-11(a)(10)]	Yes.	Direct or indirect.	Censure; 30 days; $500.

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Tab 10
Structured Sentencing

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Probation Violations

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Central Prison Tour

Tab 13 Criminal Court: Judge Pomeroy

Criminal Court

NORTH CAROLINA Judicial COLLEGE

SCHOOL FOR NEW SUPERIOR COURT JUDGES

Todd Pomeroy
Senior Resident Superior Court Judge
Judicial District 27B
Lincoln & Cleveland Counties
Office: 704-742-7877
Cell: 704-740-6519

UNC SCHOOL OF GOVERNMENT

1

Objectives

1. To identify & understand common issues to expect in criminal court
2. To learn & practice the application of language used in presiding over criminal cases

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2

Your First Day on the Bench

- What issues will I encounter?
- How do I recognize & determine these issues?
- What do I say?
- Where do I start?

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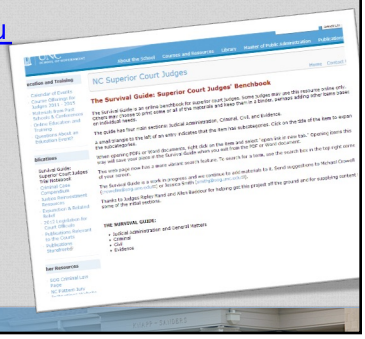
3

An Essential Resource

The Survival Guide: Superior Court Judges' Bench Book

www.judges.unc.edu

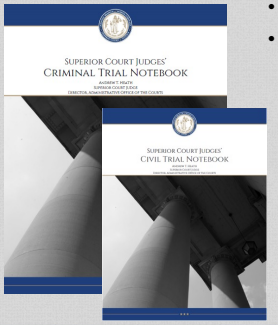


UNC SCHOOL OF GOVERNMENT

4

An Essential Resource

- Superior Court Judges' Trial Notebooks
  - CRIMINAL
  - CIVIL



For a bound and printed copy:

Kinsley M. Craig, TCA
Judicial District 27B
kinsley.m.craig@nccourts.org
Phone: 704-742-7878

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5

When Court Opens

- Arrive and open court on time
- Remain standing until Bailiff finishes with the court opening
- Smile and greet the court personnel and attorneys
- Be pleasant and courteous
- Learn the names of your court personnel

UNC SCHOOL OF GOVERNMENT

6

A Dog's Purpose, Teacher's Lounge & The Grand Jury

UNC School of Government

7

Exercise 1: Seating a New Grand Jury

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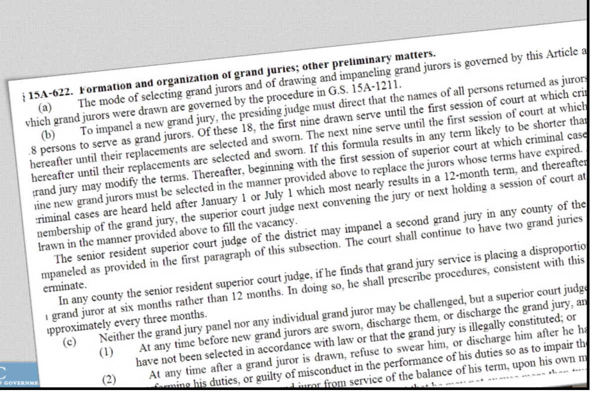
8

Grand Jury



§ 15A-622. Formation and organization of grand juries; other preliminary matters.

(a) The mode of selecting grand jurors and of drawing and impaneling grand jurors is governed by this Article a
which grand jurors were drawn are governed by the procedure in G.S. 15A-1211.

(b) To impanel a new grand jury, the presiding judge must direct that the names of all persons returned as jurors
18 persons to serve as grand jurors. Of these 18, the first nine drawn serve until the first session of court at which cri
hereafter until their replacements are selected and sworn. The next nine serve until the first session of court at which
hereafter until their replacements are selected and sworn. If this formula results in any term likely to be shorter tha
grand jury may modify the terms. Thereafter, beginning with the first session of superior court at which criminal case
nine new grand jurors must be selected in the manner provided above to replace the jurors whose terms have expired.
criminal cases are heard held after January 1 or July 1 which most nearly results in a 12-month term, and thereafter
membership of the grand jury, the superior court judge next convening the jury or next holding a session of court at
drawn in the manner provided above to fill the vacancy.

The senior resident superior court judge of the district may impanel a second grand jury in any county of the
impaneled as provided in the first paragraph of this subsection. The court shall continue to have two grand juries
terminate.

In any county the senior resident superior court judge, if he finds that grand jury service is placing a disproportio
a grand juror at six months rather than 12 months. In doing so, he shall prescribe procedures, consistent with this
approximately every three months.

(c) Neither the grand jury panel nor any individual grand juror may be challenged, but a superior court judge

(1) At any time before new grand jurors are sworn, discharge them, or discharge the grand jury, an
have not been selected in accordance with law or that the grand jury is illegally constituted; or

(2) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he ha
performing his duties, or guilty of misconduct in the performance of his duties so as to impair th
juror from service of the balance of his term, upon his own m

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9

Grand Jury

- Selection of Foreperson
  - Selection process must be racially neutral
  - Criteria:
    - Leadership ability
    - Fairness
    - Prior Grand Jury Experience
    - Ability to Follow Instructions
    - Education

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Grand Jury

- Removing/replacing grand jurors

11

In General: Practical Suggestions

- Be aware of the record
- Call for Clerk's file in every case
- Review charging document; index it so you can return to it
- Read the applicable statute
- Review the file for other pertinent history
- Proceed at your pace
- Provide equal opportunity to both sides
- Ask questions whenever necessary
- Listen!

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Exercise 4: Arraignments

- Prosecutor asks to arraign Defendant: simple request, right?
- What are the potential problems here?

13

To Arraign or Not to Arraign?

- An arraignment may not be necessary:
  - An arraignment only is required if the defendant files a written request with the clerk. G.S. 15A-941(d). Failure to request an arraignment is a waiver of the right to arraignment.
  - A failure to conduct an arraignment is not reversible error absent a showing of prejudice. State v. Smith, 300 N.C. 71 (1980).

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To Arraign or Not to Arraign?

- Arraignment during a trial week may create problems:
  - In counties with 20 weeks of Criminal Superior Court, arraignments must be on arraignment day;
  - No jury case may be scheduled during an arraignment day;
  - No Defendant may be arraigned and tried during the same week without consent
- *"Why do you need to arraign this Defendant at this time?"*

15

Mandatory Arraignments GS 15A-928(c)

- When a prior conviction makes an offense one of a higher grade, a special indictment is required;
- Judge must arraign Defendant on the special indictment prior to the close of the State's evidence.

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Exercise 4: Bill of Information?

- What is the issue here?
- How do you resolve this issue? Why is this issue important?

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Charging Documents

- For cases originating in Superior Court
  - Bills of Indictment
  - Bills of Information

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Charging Documents

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  - Citations
  - Warrants
  - Misdemeanor Statements of Charges

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Guilty Pleas: Practical Suggestions

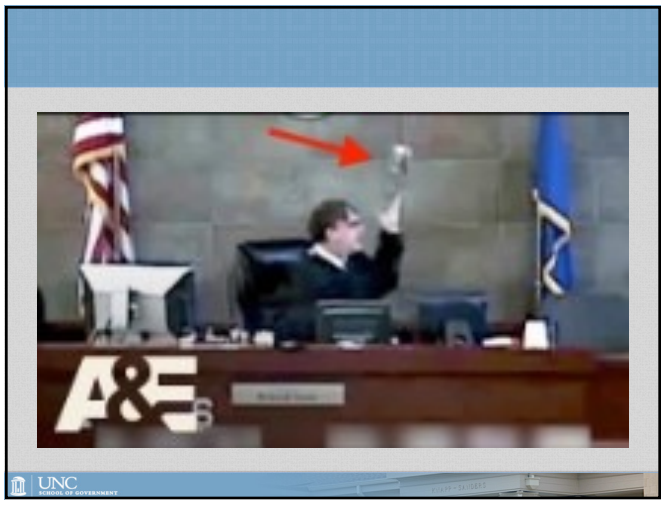
- Indictment
- Determine if it was previously rejected
- Take your time
- Remember your role

20

Exercise 5: Motion for Recordation (*not on your list*)

- What is the issue presented by this Motion?
- How do you determine the issue?

21



22

Jury Orientation

23

Jury Orientation

Make sure you understand local practice

- Orientation
- Roll Call
- Requests for excusal/deferral
- Administration of juror oaths

24

Jury Orientation

Handling deferrals

- Illness
- Business and family travel
- Work conflicts
- Age

25

Jury Orientation

- Explain Call Back System
- Explain the role of the jury

26

Exercise 5: Starting a Jury Trial

- How do you get the ball rolling?

27

Informing Jurors of Case

Judge must:

- Identify the parties & counsel
- Inform the jurors of:
  - charge
  - date of offense
  - victim's name
  - defendant's plea
  - affirmative defenses
- Use of witness list

28

Informing Jurors of Case

Judge may not read the pleadings (or indictment) to the jury.

29

Jury Orientation

Members of the Jury, the case that is being called for trial at this time is State vs. _____, who may be referred to as the Defendant. The Defendant is accused of the crime of _____. These events are alleged to have occurred on (date) at (location). The alleged victim is _____. To these charges the Defendant has entered a plea of not guilty. Under our system, a Defendant is not required to prove innocence, but is presumed innocent. The State must prove guilt beyond a reasonable doubt.

30

Trial Jury Selection

Procedure

- State's challenges replaced immediately; defendant's are not
- State always examines jurors first, passes a full panel to Defendant
- Distinct differences in how challenges are exercised and how replacement jurors are called
- Re-opening questions to a juror previously accepted

Jury Selection

- Challenges for Cause

Jury Selection

- Peremptory Challenges

  Non-capital: 6 per side for each Defendant

  Capital: 14 per side for each Defendant
- Be prepared to deal with *Batson* issues

Exercise 6: Jury Selection

- "Questionable" questions to the jury

34

Jury Selection Hints

- Make jurors comfortable
- Preliminary instructions
  - Be careful about saying "too much"
- Overview of trial
- Empaneling the jury - timing

35

Exercise 7

- The Defendant Bolts

36

A Common Question

- Note taking by Jurors
  - May come from jurors, or more commonly from a bailiff:
  - "Your Honor, one of the jurors has just asked if the jurors can take notes?" Or
  - "Judge, some of the jurors are taking notes. What do you want to do about that?"

37

Exercise 8: Taking a Recess

- What do you say?

38

Admonitions to Jury

Ladies and Gentlemen, during the time that you are serving on this jury, it is very important that you follow a number of rules:

39

Admonitions to Jury

First, you must not talk about the case amongst yourselves. The only place this case may be discussed is in the jury room and then only after you begin your deliberations.

40

Admonitions to Jury

Second, you must not talk about this case with anyone else (including members of your families) or allow anyone else to talk with you or say anything in your presence about this case. If anyone communicates or attempts to communicate with you or in your presence about this case, you must notify the bailiff of that fact immediately.

41

Admonitions to Jury

In this age of instant electronic communication and research, I want to emphasize that in addition to not speaking face-to-face with anyone about the case, you should not engage in any form of electronic communication about the trial, including but not limited to: Twitter, blogging, Facebook, text messaging, instant messaging, and any other such means of electronic communication.

42

Admonitions to Jury

Third, you must keep all cell phones turned off when you are in the courtroom or the jury room.

43

Admonitions to Jury

Fourth, while you sit as a juror in this case, you are not to form an opinion about the guilt or innocence of the defendant, nor are you to express to anyone any opinion about the case until I tell you to begin your deliberations.

44

Admonitions to Jury

Fifth, you must not talk or communicate in any way with any of the parties, attorneys, or witnesses involved in the case. This rule applies inside as well as outside the courtroom, and it prohibits any type of conversation, whether about the evidence in this case or about the weather, or just to pass the time of day.

45

Admonitions to Jury

Sixth, you must not read or listen to any news media coverage of this case or trial, including television, newspaper, radio, or Internet accounts. Newspaper, radio, television, and Internet accounts may be inaccurate, or they may contain references to matters which are not proper for your consideration. Your verdict must be based solely on the evidence presented during this trial and no other source.

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Admonitions to Jury

Seventh, you must not visit the scene or place that is the subject matter of this trial or make any independent inquiry or investigation about this matter. You may not conduct any research, including Internet research, to look for any information regarding the case.

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Admonitions to Jury

Each of you must obey each of these rules to the letter. Unless you do so, there is no way the parties can be assured of absolute fairness and impartiality. It is your duty, while the trial is in progress, or while it is in recess, or while you are in the jury room, to see that you remain a fair and impartial trier of the facts. If you violate these rules, you violate an order of the court and this is contempt of court and could subject you to punishment as provided by law.

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Practical Suggestions

- Anticipate problems
  - Family members of jurors
  - Family members of litigants
  - Cell phones and internet access
  - Juror curiosity about facts and law
- Address these matters up front

49

Sequestration of Witnesses

- The "norm"
  - Make order apply to both sides
  - Any exceptions from sequestration
- Specify what is ordered
  - Witnesses excluded
  - Communication between witnesses
- Consider (but not announce?) possible remedies for violation
  - Exclude evidence/strike testimony
  - Contempt and instruction

50

Presentation of Evidence

- Be sure jury can see & hear evidence
- Objections
- Reading back testimony
  - Exercise of *discretion*
- Taking notes
- Jury instructions during trial

51

Exhibits

Keep Your Own List

- Number
- Brief description
- Admitted or excluded
- Purpose
- Biological evidence

Clerk has a form for Exhibit List- AOCG-150

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Exhibit List

Ex #	Desc	Desc	Purp	Auth	Offer	Recd	Bio?
S-1							
S-2							
S-3							

53

At Close of State's Evidence

- Motion to Dismiss

54

At Close of State's Evidence

- Examine Defendant on Right to Testify
  - *State v. Harbison*, 315 N.C. 175 (1985)
  - *State v. Ali*, 329 N.C. 394 (1991)

55

Exercise 9: Charge Conference

- What do you say?

56

Jury Instructions

- See G.S. 15A-1231(b): must have charge conference before jury arguments and must:
  - Be on the record, outside presence of the jury
  - inform the parties of the offenses, lesser included offenses, and affirmative defenses on which judge will charge the jury and
  - inform them of what, if any, parts of tendered instructions will be given…

57

Charge Conference

Pursuant to G.S. 15A-1231, I am now convening a conference outside the presence of the jury for purposes of receiving input from counsel on the instructions that will be given to the jury in this case.

58

Charge Conference

What does the State contend are the possible verdicts in this case?

What, if any special instructions are requested on behalf of the State?

What does the Defendant contend are the possible verdicts in this case?

What, if any special instructions are requested on behalf of the Defendant?

59

Charge Conference

Having considered all requests and arguments, I plan to instruct the jury substantially as follows:

NC Pattern Instructions numbered: ___, ___, ____, etc

Special Instructions as follows:

The possible verdicts in the case will be:

60

Jury Arguments

- Order of arguments
- Waiver of final argument

61

Jury Arguments

- Limitations on number 7A-97
  - Two per side in non-capital cases

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Jury Arguments

- Be careful about imposing time restrictions
- Limitations on time 7A-97
  - One hour/side in misdemeanors
  - Two hours/side in civil & felony
  - No limit in capital

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Jury Argument

G.S. 15A-1230(a):

- Not become abusive
- Not inject "personal experiences"
- Not express personal belief re: truth/falsity of evidence or guilt/innocence
- Not make argument on basis of matters outside record

See also *State v. Jones*, 355 N.C. 117 (2002)

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Jury Instructions

- Instruct in accord with Charge Conference
- Possible Verdicts
- Written Instructions?

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Jury Instructions

- Excuse the jury to begin selection of their foreperson
- Remind them not to deliberate until they receive the verdict sheet
- Request from each party any objections to or claimed omissions from the charge
- Then send the verdict sheet to the jury room

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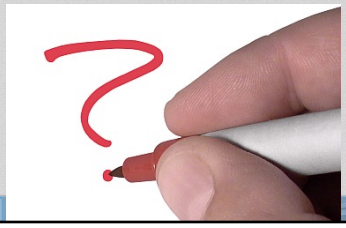
Exercise 10: The Jury Knocks

- Questions from the Jury
- Viewing Exhibits 15A-1233
  - Be aware of difference between criminal and civil rule of viewing exhibits and testimony (*See* G.S. 1-181.2)



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The Verdict

- Preparation of verdict sheet
  - Are any special findings needed?
- Receiving the verdict
- Polling the jury 15A-1238
- Recording the verdict
- No comment on verdict
  - G.S. 15A-1239
  - Canon 3(A)(6) of Code of Judicial Conduct
- Talking with jury after discharge

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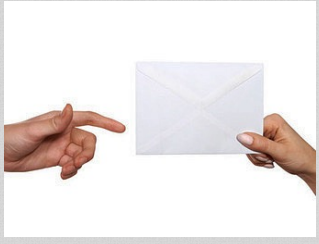
Exercise 11: Taking the Verdict



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Taking the Verdict

Would the foreperson of the jury please stand and state your name for the record?

Has the jury reached a unanimous verdict in this case?

Please hand the verdict sheet to the bailiff.

(Review the verdict sheet for marking of verdict, dating and signature of foreperson)

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Taking the Verdict

You have indicated that the jury has returned as its verdict that you find the Defendant guilty of the offense of 1st Degree Murder. Was that the unanimous verdict of the jury?

Members of the jury, your foreperson has announced that you have found as your verdict that the Defendant is guilty of 1st Degree Murder. If that was your verdict, please raise your right hand.

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Polling the Jury

- Begin with the foreperson, then proceed individually from Jurors 1 through 12, asking the following questions:
- Your foreperson has announced that you have returned as your unanimous verdict that you find the Defendant guilty of the 1st Degree Murder.
  - Was that your verdict?
  - Is that still your verdict?

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Exercise 12: Sentencing

73

Entering Sentence

The Defendant, having (pled guilty to) (been found by a jury to be guilty of) the offense of _____, a Class ___ felony. Based upon evidence presented (and stipulation of the Defendant), I find that the Defendant has ___ prior record points and is a Prior Record Level ___.

Madam Clerk, the sentence will be entered in (a single judgment) (a total of ___ judgments).

74

Entering Sentence

The Judgment is that the Defendant is sentenced to a minimum of __ and a maximum of ___ months in the N.C. Department of Correction. Commitment is to issue this day. Mr. Sheriff, he is in your custody; or

This sentence is to commence at the expiration of the sentence imposed in Case Number ____; or

This sentence is suspended and the Defendant is placed on supervised probation for a period of ___ months upon the following conditions:

75

General Advice

- Start on time and end on time (including breaks and lunch recess).
- Treat everyone with respect.
- Consider the robe– it changes everything
  - The robe does not make you smarter
  - But it does make your words more important.
- Take the time necessary on each matter.
- Never say more when less will suffice.
- Never lose your temper on the bench, unless you have planned it well in advance.

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In Closing

- A plug for professionalism: needed both in the bar and on the bench
- Encourage professionalism in all that you do
- By what you say and do, you set the tone for the proceedings

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TRYING A NON-CAPITAL CRIMINAL CASE: AN OUTLINE FOR THE SUPERIOR COURT JUDGE

Jessica Smith, UNC School of Government (Mar. 2015)

1. Read the case file.

2. Arraignment. Unless the defendant has filed a written request for an arraignment, the court must enter a not guilty plea on the defendant's behalf in accordance with G.S. 15A-941. G.S. 15A-1221(a)(1a). See Arraignment in Superior Court in this Benchbook for more information.

3. Confirm jurisdiction.

- Make sure that the superior court has jurisdiction over the case.
  - The superior court has original jurisdiction over all felonies and over misdemeanors joined with felonies.
  - The superior court has original jurisdiction over misdemeanors initiated by presentment. G.S. 7A-271(a)(2).
  - The superior court has jurisdiction over misdemeanors appealed from the district court for trial de novo. G.S. 7A-271(b).

- Make sure that the type of charging instrument is appropriate for trial in superior court.
  - For cases initiated in superior court, the charging document must be an information or a bill of indictment. G.S. 15A-923(a).
  - A presentment from the grand jury may not serve as a pleading. G.S. 15A-923(a).
  - An indictment is required unless waived. However, an indictment may not be waived in a capital case or in a case in which the defendant is unrepresented. G.S. 15A-942(b). Waiver of the indictment must be in writing, signed by the defendant and his attorney, and attached to or executed on the bill of information. G.S. 15A-942(c). Note that the AOC form information—AOC-CR-123—includes a waiver of an indictment at the bottom of the form.
  - If the case is an appeal for trial de novo from district court, the charging document may be a citation, criminal summons, warrant for arrest, or magistrate's order. If the defendant objects to the sufficiency of a summons, warrant, or magistrate's order, the prosecution may file a statement of charges, in certain circumstances. G.S. 15A-922(e). An objection to trial on a citation is untimely if raised for the first time in superior court. State v. Monroe, 57 N.C. App. 597 (1982).

- Check the charging instrument for fatal defects e.g., failure to charge an element; fatal defects create jurisdictional issues. See Indictments in this Benchbook for more information.

4. Competency. Address any unresolved competency issues.

- Specifically, check for any unopened envelopes that might contain mental health evaluations.

- You may require counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves at trial. *See* Indiana v. Edwards, 554 U.S. 164 (2008).

5. Waiver of counsel. If the defendant appears pro se, make sure a waiver of counsel was done in superior court. If not, make inquiry and proceed accordingly. See Counsel Issues in this Benchbook.

- If defendant is proceeding pro se, consider appointing standby counsel. *See* 15A-1243.

6. Recordation. The judge must require the court reporter to make a record of all proceedings, except jury selection in non-capital cases, opening statements and final arguments to the jury, and the lawyers' arguments on questions of law. G.S. 15A-1241.

- Jury selection and/or opening and closing statements must be recorded if a motion to do so is made. *Id.*

7. Jurors – Preliminary Issues

- Determine that the jurors are qualified to serve. See Jury Selection in this Benchbook for information about juror qualifications.
- Decide you how you are going to deal with excuses from jurors and act accordingly. *See* G.S. 9-6.
  - One practice is to have the clerk screen excuses and then deal with any excuses that come up during jury selection, on the record. Some judges report that handling these matters off the record encourages excuses to be presented.
- Hear requests for deferral from those over 72 years old, as appropriate under G.S. 9-6.1.
- Give additional introductory remarks to prospective jurors in accordance with G.S. 15A-1213. G.S. 15A-1221(a)(2).
  - G.S. 15A-1213 provides: "[p]rior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required."
  - Note that the trial judge may *not* read the pleadings to the jury. *Id.*

8. Selecting and impaneling the jury. The jury (including alternates(s)) is sworn, selected and impaneled in accordance with G.S. 15A-1211 through -1217. *See* G.S. 15A-1221(a)(3). For more detailed information on all aspects of jury selection, see Jury Selection in this Benchbook.

- Note that the procedure for jury selection in criminal trials may be somewhat different from what you have experienced in civil trials. However, the statutory procedure for jury selection is mandatory for criminal trials.

- The indictment may not be read to the jurors during jury selection or trial. G.S. 15A-1221(b).
- Have the clerk impanel the jury in accordance with G.S. 15A-1216.
  - If the trial will not begin until the following day and you are in a jurisdiction where you will have potential jurors in court the next day, you may want to delay impaneling until then. In places where there the panel will not return until later in the week, it may be best to select an alternate and have the jury impaneled before you recess for the evening.

9. Admonitions to jurors. Give appropriate admonitions to the jurors before every break and overnight recess. G.S. 15A-1236(a) provides that "at appropriate times must admonish the jurors that it is their duty":

- Not to talk among themselves about the case except in the jury room after deliberations have begun.
- Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case.
- Not to form an opinion about the defendant's guilt or innocence, or express any opinion about the case until they begin deliberations.
- To avoid reading, watching, or listening to accounts of the trial.
- Not to talk during trial to parties, witnesses, or counsel.

The statute further provides that "[t]he judge may also admonish them with respect to other matters which he considers appropriate." G.S. 15A-1236(a).

10. Note taking by jurors. Unless the judge on his or her own motion or on motion of any party directs otherwise, jurors may take notes during trial. *See* G.S. 15A-1228; see also Note Taking by the Jury in this Benchbook.

11. Trial in absentia. For trial in the defendant's absence, see Trial in the Defendant's Absence in this Benchbook.

12. Restraining the defendant during trial. For a discussion of this issue, see Restraining the Defendant during Trial in this Benchbook.

13. Sequestration of witnesses. For a discussion of this issue, see Sequestration of Witnesses in this Benchbook.

14. Limiting instructions. Be prepared to give standard limiting instructions during trial. Common scenarios requiring such an instruction include:

- 404(b) prior bad acts evidence.
- Out of court statements being offered for corroboration or impeachment.
- Expert testimony about syndromes.

For sample instructions, see Routine Limiting Instructions in Criminal Cases in this Benchbook.

15. Exhibits. It is advisable to create your own exhibit list during the trial.

- It is recommended that your exhibit list track the following information: exhibit number; description of exhibit; who authenticated the exhibit; whether the exhibit was offered in evidence; whether the exhibit was admitted in evidence; and the information discussed below regarding items that might contain biological evidence.
- Check regularly with the clerk regarding which exhibits have been admitted etc., to make sure that everyone is on the same page.
- When physical evidence is offered or admitted into evidence in a criminal proceeding, you must ask the parties (a) to identify the collecting agency and (b) whether the evidence in question is reasonably likely to contain biological evidence and if that biological evidence is relevant to establishing the identity of the perpetrator. G.S. 15A-268(a3). If either party asserts that the evidence may have biological evidentiary value, and you so find, you must instruct that the evidence be so designated in the court's records and that the evidence be preserved pursuant to the G.S. 15A-268. *Id.* The Exhibits/Evidence Log Form (AOC-G-150) has fields for the courtroom clerk to record this information and the your finding.

16. Jury instructions — thinking ahead

- Before the trial begins, consider asking the parties if they know which jury instructions they will be tendering. Doing this will give you a jump start on compiling the charge and will save time later. Also, reviewing the instructions for the crime(s) charged may help you deal with objections as to relevancy.

17. Opening statements. Each party must be given the opportunity to make a brief opening statement. *See* G.S. 15A-1221(a)(4); Rules 9 & 10 of the General Rules of Practice for the Superior and District Courts.

- Defense may reserve opening statement until it presents evidence. G.S. 15A-1221(a)(4), (a)(6).
- Consider discussing with counsel issues pertaining to opening and closing statements e.g., improper arguments, etc.
- Consider asking whether counsel will be making any admissions of guilt. See the section on *Harbison* claims on Ineffective Assistance of Counsel in this Benchbook.

18. The State's case. The State must present evidence. G.S. 15A-1221(a)(5).

- Before the close of the State's case, be sure to arraign the defendant on any prior convictions that elevate the offense as required by G.S. 15A-928(c). See Arraignment in this Benchbook for more information.

19. Defense motion to dismiss. At the conclusion of the State's case, rule on any motions to dismiss made under G.S. 15A-1227(a)(1).

20. The defense case. G.S. 15A-1221(a)(6).

- The defense is not required to put on evidence. *Id.*

- Consider informing the defendant, out of the presence of the jury, of his or her right to testify/not to testify.
  - Sample colloquy regarding the right to testify/not to testify: "You have the right to testify or not to testify. The decision about whether or not to testify should not be made by your lawyer, the district attorney, me, your family members, or anyone else. That decision is yours and yours alone. If you choose not to testify, I will give an instruction to the jury saying that they are not to hold that against you. Do you have any questions about your right to testify or not to testify, or anything related to that right? What is your decision about whether you will testify in this case? Let the record reflect that I have had this conversation with the defendant in open court with [his/her] lawyer present, outside the presence of the jury, and that the defendant has decided that [he/she] [will/will not] testify in this case."
  - Alternate colloquy, for judges who do not wish to require a represented defendant to answer questions by the court: "You do not have to talk to me and you have the right to remain silent. Your lawyer tells me that you have decided [not to testify][to testify]. If this is correct, you do not need to say anything. However, this is not correct, now is the time to tell me."
- If the defense has reserved opening statement, it may be given before the defense presents its case. *Id.*

21. Rebuttal and additional evidence.

- Each party may introduce rebuttal evidence in accordance with G.S. 15A-1226(a). *See* G.S. 15A-1221(a)(7).
- The judge, in his or her discretion, may permit any party to introduce additional evidence at any time before the verdict. G.S. 15A-1226(b).

22. Absolute impasse. As a general rule, some decisions in the course of a criminal trial are made by the defendant and others are made by defense counsel. A defendant decides, for example, whether to testify and whether to plead guilty. Counsel typically decides strategy issues, such as which jurors to strike, which witnesses to call, and whether and how to conduct cross-examination. However, in North Carolina, there is a doctrine of absolute impasse. Under this doctrine, when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control. State v. Ali, 329 N.C. 394, 404 (1991). Reversible error occurs if an absolute impasse is brought to the trial judge's attention and the judge fails to require defense counsel to abide by the defendant's wishes. *See, e.g.*, State v. Freeman, 202 N.C. App. 740 (2010). For more information on this issue, see Absolute Impasse in this Benchbook.

23. Defense motion to dismiss. At the close of all evidence, rule on any motions to dismiss made under G.S. 15A-1227(a)(2).

24. Offers of proof. Deal with offers of proof as they arise during the trial. *See generally* N.C.R. Evid. 103(a)(2).

- You may hear these at lunch, at the end of the day, etc.

25. Charge Conference. *See generally* G.S. 15A-1231; Rule 21 of the General Rules of Practice for the Superior and District Courts.

- The charge conference is mandatory. G.S. 15A-1231(b).
- It must be held out of the jury's presence. *Id.*
- It must be recorded. *Id.*
- Any party may tender written instructions. G.S. 15A-1231(a). Any party tendering written instructions to the judge must provide copies to the other parties. *Id.*
- Inform the parties of:
  - The offenses (and lesser included offenses) on which you will charge;
  - The affirmative defenses on which you will charge;
  - What, if any parts of the tendered instructions you will give; and
  - Any other instructions that you will give, if a party asks.

  G.S. 15A-1231(b).
- Be sure to include a final mandate in your instructions.
- Review the charging instrument to make sure that it supports the crimes charged and the State's theory of the case (there is a problem e.g., if the indictment charges kidnapping for the purpose of committing a felony but the evidence shows a purpose of facilitating flight).
- Every charge conference should include discussion of the possible verdicts.
  - Always articulate how the verdict sheet should read.
  - Make sure that a verdict sheet is being prepared (usually by the clerk, although in some counties by the court reporter, lawyers, or judge).

26. Closing arguments. Closing arguments are done after all evidence has been presented. G.S. 15A-1221(a)(8); Rule 10 of the General Rules of Practice for the Superior and District Courts.

- For the order of closing arguments, see "Closing Arguments" in this Benchbook.
- Consider asking whether counsel will be making any admissions of guilt. See the section on *Harbison* claims in Ineffective Assistance of Counsel in this Benchbook.
- Consider reviewing with counsel the limits on closing arguments prescribed by G.S. 15A-1230.
- For the court's control over argument, see G.S. 7A-97.

27. Charge the jury.

- The judge must charge the jury. G.S. 15A-1221(a)(9); 15A-1231(c); 15A-1232.
- It is recommended that you follow the North Carolina Pattern Jury Instructions whenever possible. You can put together the jury instructions electronically by using the Pattern Jury Instruction software that was loaded onto your AOC computer.
- You must give an instruction informing the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty. G.S. 15A-1235(a).
- A trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing. State v. McAvoy, 331 N.C. 583, 591 (1992).

28. Discharging alternates.

- Before sending the jury to deliberate, excuse any alternate jurors. G.S. 15A-1221(a)(10); 15A-1215.
  - Exception: where there is a bifurcated proceeding (e.g., habitual felon, or jury sentencing hearing under G.S. 15A-1340.16(a1)), retain the alternates somewhere outside of courtroom pending return of the jury with a verdict.
- When you get to the portion of the pattern jury instruction stating that a verdict requires agreement of all 12 jurors, deal with the issue of alternates.
  - Ask jurors 1 thru 12: "Is anyone feeling the onset of any illness or does anyone know of any reason whatsoever why you cannot fully participate in the deliberations, working with your fellow jurors toward a unanimous verdict? If so, raise your hand."
  - Assuming no juror needs to be relieved of his or her duties, discharge the alternate(s), saying: "This will conclude the duties of our alternate juror, [Mr./Ms._____]. From this point forward, please do not communicate with any of the jurors about the case and do not re-enter the jury room. You may have a seat in the audience and I will speak with you further in a moment."
    - Think about what the alternate juror(s) will do once excused (e.g., talk with lawyers/parties about impressions of the evidence and arguments, remain the courtroom to view the outcome of the case, etc.) and address these issues later with the discharged alternates.
  - If a juror needs to be relieved, use an alternate juror.

29. Jury deliberations. G.S. 15A-1221(a)(10).

- During your concluding instructions, instruct the jury: "Your first order of business when you retire to the jury room will be to select one of your members as foreperson to lead you in your deliberations, but do not begin your discussions of the case until you receive the verdict sheet from the bailiff. When you receive the verdict sheet, that will be your signal to begin your deliberations. Once you have agreed unanimously upon a verdict, your foreperson should mark that verdict, date and sign the verdict sheet, and then knock on the door of the jury room as a signal to us that you have arrived at a verdict. You will then be returned to the courtroom to announce your verdict."
- After the jury leaves the courtroom, check with counsel about whether any additional instructions or corrections are needed.
- If issues are raised, announce your decision and return the jury to the courtroom for further instruction, if necessary.
- If no issues are raised send the verdict sheet to the jury, stating: "Please take the verdict sheet to the jurors. It is now _____ o'clock am/pm."
- Unless the judge on his or her own motion or on motion of any party directs otherwise, jurors may take their notes into the jury room during deliberations. *See* G.S. 15A-1228; *see also* Note Taking by the Jury in this Benchbook.
- An alternate may not be substituted for an original juror once deliberations have begun, except in a bifurcated proceeding as noted above.
- Recess court during the jury deliberations.
  - You may wish to take pleas, handle probation violations, or handle other non-jury matters while the jury is deliberating. You even may wish to start jury selection in another case.

- At least one attorney representing the defendant must remain in the immediate area of the courtroom so as to be available at all times during deliberations. Rule 13 of the General Rules of Practice for the Superior and District Courts.
  - Suggested colloquy: "Court is at ease while the jury deliberates [or, if you are going to handle other matters—e.g., pleas in other cases—while the jury deliberates: Court is at ease in this case while the jury deliberates] but counsel should remain in the courtroom or right outside the door in case the jury has questions or if your presence is required for some other reason."
- Address the jury's requests for evidence and/or exhibits and/or questions as they arise. *See generally* G.S. 15A-1233 (review of testimony; use of evidence by the jury); Jury Review of Evidence under Jury Deliberations in this Benchbook. Always address the entire jury on these issues, not just the jury foreperson.
  - Suggested procedure for dealing with questions from the jury:
    - Make sure any questions from the jury are presented in writing and are made part of the court file as "court exhibits."
    - Present all questions on the record in open court, outside of the presence of the jury.
    - Get input from counsel and/or an unrepresented defendant about how to address the question.
    - Announce your decision before proceeding, allowing time for objections.
    - Bring the jury into the courtroom, addressing all questions on the record, in open court.
    - Never send messages back and forth to the jury room.
  - If exhibits are sent back to the jury room, ensure safekeeping during breaks and/or overnight recesses.
  - If the jury asks for a transcript of testimony, rule on that request "in your discretion."
  - See G.S. 15A-1234 regarding additional instructions that may be given to a deliberating jury.
- If the jury fails to arrive at a verdict before the conclusion of the first day, instruct the jury as to conduct and set a time for their return.

30. Extending the session. If the trial or deliberations require you to extend the session, see Extending the Session in this Benchbook for more information about entry of an extension order.

31. Verdict/deadlocked jury.

- For guidance on how to handle a potential or actual jury deadlock, see Jury Deadlock in this Benchbook.
- For guidance on the form of the verdict, taking a verdict and polling the jury, see Jury Verdict in this Benchbook.

32. Discharge the jury. Thank and discharge the jury.

33. Discharge or sentence the defendant.

- If the verdict is not guilty, discharge the defendant.
- If defendant has been found guilty:
  - Rule on any motions to dismiss made under G.S. 15A-1227(a)(3).

- Move to any additional proceeding (e.g., habitual felon, or jury sentencing hearing under G.S. 15A-1340.16(a1)).
- Sentence the defendant in open court
  - If the defendant is not present, enter a Prayer for Judgment Continued. See Trial in the Defendant's Absence and Prayer for Judgment Continued in this Benchbook
- Determine whether defendant should be committed to custody or released on bail pending appeal.

34. Judgment.

- Check (and double check) the judgment.
- Sign the judgment.

35. Fee Applications. For indigent defendants who have not waived the right to appointed counsel, ask the lawyer for his or her fee application (AOC-CR-225) and complete both sides of the form. The front side includes an order for payment to counsel. The back side includes a judgment requiring the defendant to repay the state for counsel expenses if convicted. Be sure to inform the defendant of the amount requested and awarded. *See generally* G.S. 7A-458; Rule 1.9, Part 1 N.C. Office of Indigent Defense Services Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level (available online at: http://www.aoc.state.nc.us/www/ids/). If counsel has not completed the application, ask counsel for an oral statement of the number of hours for which counsel will seek compensation. Following these steps ensures that notice is given to the defendant of the amount to be entered against him or her (AOC-CR-225 requires "due notice to the defendant").

36. Adjourn or recess court.

GRAND JURY QUESTIONNAIRE

The presiding judge is required to select a foreperson for the Grand Jury. Please complete this Questionnaire. Your answers will be sealed and can only be opened by order of the Court.

1. Name (please print) _____; Age _____

2. Number of years completed in school. _____

3. Have you ever served on a Grand Jury before (including the past six months)? _____

4. Have you ever served as foreperson of a Grand Jury?
If so, when? _____

5. Have you ever been convicted of a criminal offense (other than minor traffic convictions)? _____

6. Where are you employed? _____

7. How long have you worked there? _____

8. What position do you hold and/or what are your work duties?
_____

9. Do you supervise other employees at work? _____

10. List any professional, religious, or civic organizations to which you belong. _____

11. List any offices or positions of leadership you have held in the above organizations. _____

12. Whom do you recommend (including yourself) to be the foreperson of this Grand Jury? _____

13. If chosen, would you be willing to serve as foreperson for the next six months? _____

_____
Signature

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That ____ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, and that in order to assist the court in making this selection, each grand juror would be required to complete a written questionnaire, such questionnaires being used for purposes of gaining information as to the qualities and characteristics of each grand juror. Upon completion of the questionnaires, each questionnaire was reviewed by the court, paying particular attention to qualities of leadership ability, fairness, education, prior grand jury experience and ability to follow instructions. In selecting a grand jury foreperson, all members of the grand jury were considered as possible candidates and the court specifically made the selection of the foreperson and assistant foreperson in a racially neutral manner.

Considering information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, _____ is a fit and proper person to serve as foreperson of this grand jury and _____ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints _____ as foreperson of the grand jury of this county, and _____ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

It is further ORDERED that the Clerk place the eighteen completed questionnaires in a sealed envelope, not to be opened except by court order, and that it be kept with the permanent minutes of this court.

This the _____ day of _____, 19___.

_____
Forrest Donald Bridges
Superior Court Judge

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That ____ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, but that the court would entertain recommendations from the grand jury for the positions of foreperson and assistant foreperson. The grand jury also was informed by the court that, in making such recommendations, all members of the grand jury should be considered as possible candidates, that any recommendations should be based upon the leadership ability, fairness, education, prior grand jury experience and ability to follow instructions and that the persons recommended must be selected in a racially neutral manner. After receiving the recommendations of the grand jurors, the Court again inquired and was assured that the recommendations had been made in a racially neutral manner.

Considering the recommendations and other information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, _____ is a fit and proper person to serve as foreperson of this grand jury and _____ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints _____ as foreperson of the grand jury of this county, and _____ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

This the _____ day of _____, 19___.

_____

Forrest Donald Bridges
Superior Court Judge

NOTICE TO ATTORNEYS CONCERNING JURY SELECTION

Counsel are expected to familiarize themselves prior to trial with the provisions of G.S. 15A-1214 and related case law pertaining to jury selection. During the course of jury selection, counsel should anticipate that those provisions will be enforced, including, but not limited to the following:

1. **The purpose of the jury selection process is to provide reasonable opportunity for counsel to satisfy themselves and the people they represent that prospective jurors meet the qualifications required by law, can and will serve as fair and impartial jurors throughout the trial of the matter, decide the case based upon the evidence presented in the courtroom and follow the law as instructed by the court.**
2. **Counsel should not attempt to use the jury selection process for purposes of:**
   - **(a) Visiting with or seeking to establish rapport with the jurors;**
   - **(b) Indoctrinating the jurors to a particular view;**
   - **(c) Arguing the case during questioning; or**
   - **(d) Asking what kind of verdict they would render under certain circumstances.**
3. **General questions should be addressed to the jury panel as a whole and counsel should seek to avoid undue repetition arising from asking the same questions to each individual juror. Counsel may address jurors individually when asking questions that apply only to that person, questions prompted by affirmative answers to general questions, or questions relating to unique personal experiences of that juror. *State v. Phillips,* 300 N.C. 678, 268 S.E.2d 452 (1980).**
4. **Examples of *improper* questions from counsel during jury *selection that will not be permitted* include:**
   - **(a) Hypothetical questions tending to "stake out" the juror or elicit in advance what a juror's decision will be, given certain facts. *State v. Vinson,* 287 N.C. 326, 215 S.E.2d 60 (1975); *State v. Hunt,* 37 N.C. App. 315, 246 S.E.2d 159 (1978). Examples of improper hypotheticals include:**
     - **(1) Asking a juror how he would weight a particular mitigating or aggravating circumstance. *State v. Walls,* 342 N.C. 1, 463 S.E.2d 738 (1995);**
     - **(2) "If you were to find that the defendant had previously been convicted of a murder, could you still follow the judge's instructions..." *State v. Robinson,* 339 N.C. 263, 451 S.E.2d 196 (1994);**
     - **(3) "If I choose not to put on a defense, would you hold that against me..." *State v. Blankenship,* 337 N.C. 543, 447 S.E. 727 (1994) *as distinguished from* "If the defendant chooses not to testify..."**

(b) Questions that include an incorrect statement of law. *State v. Hedgepeth,* 66 N.C. App. 390, ___ S.E.2d ___ (1984)

(c) Questions of law posed to a juror (the jurors are not expected to know the law until receiving instructions from the court).

(d) Questions about parole eligibility. *State v. Payne,* 337 N.C. 505, 448 S.E.2d 93 (1994); *State v. Smith,* 347 N.C. App. 453, 496 S.E.2d 841 (1995)

(e) Questions about capital punishment as a deterrent to crime or other legislative policy issues. *State v. Ali,* 329 N.C. 394, 407 S.E.2d 183 (1991)

(f) Questions concerning juror perceptions of the meaning of life imprisonment.

5. Counsel are properly permitted to ask questions reasonably directed toward determining that the juror has formed no opinion as to the guilt or innocence of the defendant, can fairly and impartially discharge the duties of a juror and can follow the law as instructed by the court. Such questions include, for example:

(a) Asking jurors if they can follow the law as provided by the court regarding particular trial issues. *State v. Hedgepeth,* 66 N.C. App. 390, ___ S.E.2d ___ (1984);

(b) "Death qualifying" questions, asking whether a juror's views about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. 412 (1985); *State v. Brown,* 327 N.C. 1, ___ S.E.2d ___ (1990);

(c) "Non-death qualifying" questions, asking prospective jurors as to whether they would automatically vote for the death penalty following conviction of first degree murder, without regard to the existence of mitigating circumstances. *Morgan v. Illinois,* 504 U.S. 719 (1992); *State v. Fletcher,* 348 N.C. 292, ___ S.E.2d ___ (1998)

6. The Court shall determine, in the exercise of discretion, whether to require that *voir dire* be conducted solely by one of defendant's two co-counsel, or to permit alternation of questions between counsel at appropriate intervals. *State v. Fullwood,* 343 N.C. 725, ___ S.E.2d ___ (1996).

STATE OF NORTH CAROLINA

COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NUMBER 00 CR 10369

STATE OF NORTH CAROLINA

VS

KOVA DUAN WRIGHT

JUROR RESPONSIBILITIES

****

As a juror selected in the above captioned case, I understand that I have these duties and responsibilities:

1. I will serve for the duration of the case. During the trial of this case, I will pay attention to the evidence and I will base my verdict on the evidence as presented in court and on the law as instructed by the presiding judge.

2. I will not talk with any fellow juror about the case until instructed by the judge. I understand that the only place this case may be talked about is in the jury room, and then only after the jury has begun deliberations, after hearing all of the evidence, closing arguments by the attorneys and instructions on the law from the Judge.

3. I will not talk about this case with anyone else, or allow anyone else to talk with me or say anything in my presence about this case, until the case has concluded. If anyone communicates or attempts to communicate with me or in my presence about this case, I will notify the presiding Judge of that fact immediately.

4. I will not form an opinion about the case, nor will I express to anyone any opinion about the case, until the presiding Judge has to the jury to begin its deliberations.

5. I will not read, watch, or listen to any media accounts of the jury selection or the trial.

6. I will not go to the scene where the events of this trial are alleged to have taken place, nor will I attempt to personally investigate any aspect of the case.

In the event anyone seeks to talk to me about the case or if I have a personal emergency, I will bring that matter to the attention of the courtroom baliff as soon as possible. The bailiff will bring it to the attention of the judge.

Juror's signature: _____

Printed name of juror: _____

Telephone: *Home*: _____ *Office*: _____

EXHIBIT LIST

EXHIBIT #	DESCRIPTION	PURPOSE	AUTHENTICATED	OFFERED	ADMITTED	BIOLOGICAL?	WHO COLLECTED?	PRESERVE?
S-1	Photo- victim- alive	Illustrative	Sadler	Y	Y			
S-2	Photo - victim- dead	Illustrative	Stip	Y	Y			
S-3	Photo Robt Howard	Illustrative						
S-4	Statement to police fr Darlene White	Corroborative	White					
S-5	Photo- front porch of 926 Druid Cir	Illustrative	Burke	Y	Y			
S-6	Photo- view of crime scene from next door	Illustrative	Burke	Y	Y			
S-7	Photo- above w/ police cars	Illustrative	Burke	Y	Y			
S-9	Drawing of Druid & Edison	Illustrative	Oteka	Y	Y			
S-10	Photo of house where victim	Illustrative	Oteka	Y	Y			
S-11	Photo of Druid & Edison Sts	Illustrative	Oteka	Y	Y			
S-12	Photo of 922 Druid Cir	Illustrative	Hardin	Y	Y			
S-13	Photo - another view of 922	Illustrative	Hardin	Y	Y			
S-14	Photo- closeup of porch of	Illustrative	Hardin	Y	Y			

NOTICE TO ATTORNEYS CONCERNING CLOSING ARGUMENTS

Counsel are reminded of the provisions of G.S. 15A-1230 setting parameters for closing arguments, as well as the cases cited below. Jury arguments that violate these parameters will not be permitted in the trial of this case, with or without objection from opposing counsel. In the event of any doubt as to the propriety of a planned argument, counsel should address those concerns during the charge conference.

In closing arguments to the jury, an attorney shall not:

(1) become abusive,

(2) express his personal belief as to the truth or falsity of the evidence,

(3) express his personal belief as to which party should prevail, or

(4) make arguments premised on matters outside the record.

The trial court will monitor vigilantly the course of such arguments, intervene as warranted, entertain objections, and impose remedies pertaining to those objections. Such remedies include, but are not necessarily limited to, requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments. ***State v. Jones,*** **355 N.C. 117, ___ S,E2d ___ (1998).**

EXAMPLES OF IMPROPER ARGUMENTS:

1. ***Reference to notorious crimes; personally degrading remarks.*** **A prosecutor's reference to the "Columbine [school] shootings" and the "Oklahoma City bombing" as examples of national tragedies; degrading remarks against the defendant, saying "You got this quitter, this loser, this worthless piece of -- who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly..." An argument containing these remarks was improper for three reasons: (1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice.** ***State v. Jones,*** **355 N.C. 117, ___ S.E.2d ___ (1998).**

2. ***Expressing an opinion that a witness is lying.*** **"He can argue to the jury that they should not believe a witness, but he should not call him a liar."** ***State v. Golphin,*** **352 N.C. 364, ___ S,E.2d ___ ( ).**

3. ***Reference to Defendant's failure to testify.*** **The prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State, but it is error for the prosecutor to comment directly on a defendant's right not to testify by stating, "'The defendant has not taken the stand in this case."** ***State v. Barden,*** **356 N.C. 316, ___ S.E.2d ___ (2002).**

4. *Urging jury to make an example of this defendant.* It is error for counsel for the state, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant. *State v. Phifer,* 197 N.C. 729, 150 S.E. 353 (1929).

5. *Urging the jury to follow community sentiment.* It is proper to tell the jury that they are the voice and conscience of the community, but it is improper to demand punishment because of community sentiment, asking the jury to lend an *ear* to the community rather than a *voice. State v. Scott,* 314 N.C. 309, 333 S.E.2d 296 (1985).

6. *Argument conveying perceived accountability of jury to the victim, the witnesses, the community, or society in general. State v. Boyd,* 311 N.C. 408, 319 S.E.2d 189 (1984).

EXAMPLES OF PROPER ARGUMENTS:

1. *Urging jury to disbelieve certain testimony.* Counsel are entitled to comment during closing argument on any contradictory evidence as the basis for the jury's disbelief of a witness' story. Where the record includes evidence contradicting the witness' statement, counsel may comment on the untruthfulness of that statement. *State v. Golphin,* 352 N.C. 364, ___ S.E.2d ___ ( ).

2. *Reminding jury of their duty to make a decision.* It is permissible for a prosecutor to argue that "the buck stops here" or that jurors had become "judges" or had become the "they" as in "they ought to do something". These statements correctly inform the jury that for purposes of the trial they have become representatives of the community and it is proper for them to act as the voice and conscience of the community, so as to temper the harshness of the law with the common sense judgment of the community. *State v. Scott,* 314 N.C. 309, 333 S.E.2d 296 (1985).

EXAMINATION OF MULTIPLE DEFENDANTS WITH ONE ATTORNEY

1. Do you understand that you are entitled to the right to have the independent judgment of an attorney free of any possible conflicts of interests?

------ Have you talked with your attorney about the advantages and disadvantages of joint representation?

------ Do you understand that there are all kinds of potential problems with your being represented by the same attorney who represents a co-defendant?

------ Do you now consent to a joint representation of you by your attorney, at the same time representing a co-defendant, fully understanding that this joint representation could damage your position in this case?

------ Do you understand that, by insisting upon joint representation of yourself and co-defendants by your attorney, you will be waiving, or giving up, any right to argue on appeal that you were not provided effective assistance of counsel at trial due to a conflict of interest?

------ Do you understand that by agreeing to a joint representation of yourself and co-defendants by your attorney, you are waiving certain protections afforded to you by the Sixth Amendment of the Constitution of the United States?

------ What is the likelihood that one defendant may testify against another in this case?

For further guidance, see State v. Yelton, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

2. Do you understand that, because your attorney is jointly representing you and other defendants, he may be prevented from opening possible plea negotiations on your behalf and from a possible agreement for you to testify for the prosecution in exchange for a lesser charge or a recommendation for leniency?

3. Do you understand that you and the other defendants could possibly occupy opposing positions at the trial?

4. Do you understand that your attorney's joint representation may cause the jury to link you with one or more of the other defendants?

5. Do you understand that one or more of the other defendants may choose to testify in his defense, and, if so, your attorney will not be able to cross-examine such defendant in your behalf?

6. Do you understand that your attorney may fail or refrain from cross-examining a State's witness about matters helpful to you but harmful to another defendant; and he may fail to object to the admission of evidence which might otherwise be inadmissible because it helps another defendant but is harmful to you; and he may fail or refrain from objecting to evidence harmful to you, but of help to another defendant?

7. Do you understand that your attorney may be prohibited from attempting to shift the blame from you in the crime charged to a co-defendant, because he represents both of you?

8. Do you understand that if you are convicted, this same attorney will be representing you at the sentencing hearing where aggravating and mitigating circumstances will be considered by the court as they may apply to you and any co-defendants also represented by the same attorney?

9. Do you understand that one of the other defendants may plead guilty and thereafter reveal to the State information damaging to you which he received as a result of joint representation?

10. I also advise you that it is not possible for me to enumerate all of the possible conflicts of interest which might occur between you and your attorney by virtue of his joint representation of you and others. Do you understand that there might be other conflicts of interest?

11. With these things in mind, do you have any questions that you want to ask me about any of these things I have said to you?

12. Do you now of your own free will, understandingly and voluntarily waive your right to representation by an attorney unhindered by a possible conflict of interest?

13. With all this in mind, are you now satisfied for your attorney, _____, to represent you in this case?

GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule 12. Courtroom decorum.

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators.

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court.

PRINCIPLES OF PROFESSIONALISM FOR ATTORNEYS AND JUDGES

PREAMBLE

The following guidelines are hereby adopted for attorneys practicing within the 27B Judicial District or appearing in Court before the undersigned Judge. These standards are not intended to supplant other rules; all attorneys are bound by the Code of Professional Responsibility and the Rules of Court. Through the Chief Justice's initiative on professionalism, attorneys are encouraged to aspire to a higher standard than is required by existing rules. Consequently, attorneys who fail to comply with these guidelines may expect a gentle reminder from the presiding judge. The gentleness of the reminder may be inversely proportional to the degree by which the attorney's conduct falls short of these expectations.

I. CIVILITY

Professionalism requires civility by attorneys toward one another in the courtroom and in every other professional encounter. No matter how high the stakes or how hotly contested a matter might be, attorneys should be able to shake hands with opposing counsel at the beginning and end of each court appearance or other transaction. Lawyers should seek to maintain a relationship of courtesy, cordiality and respect with opposing counsel, reserving the right to disagree without being disagreeable.

II. COLLEGIALITY

Attorneys should remember at all times to treat their profession as a calling. It is important that each attorney take pride in the profession and conduct himself or herself at all times in a manner that will enhance the profession in the eyes of the community. Remember that your opposing counsel is an adversary, not an enemy.

III. DILIGENCE

Professionalism requires an attorney to attend to his or her business in a diligent manner. Files and clients should not go neglected and telephone calls should be returned in a timely manner.

IV. CANDOR

Professionalism not only demands honesty on the part of an attorney but also requires candor in all communications with the Court, opposing counsel, and the client. The protection of client confidence often will prevent disclosure of certain information but will never justify misrepresentation of facts or misleading comments.

V. SEEK A MENTOR/ BE A MENTOR

Because the law is a seamless web, mastering the nuances of practice is usually a daunting task. Experienced lawyers can be of great help to less seasoned practitioners, but all of us can benefit from consultation with others from time to time.

VI. RESPECT

Professionalism means that each attorney will hold and show the utmost respect for the American court system, the presiding judge, opposing counsel, the client, court personnel and self. Each time that you appear in court you should remember that you are not only addressing "Your Honor" but you are also addressing a matter of your honor. As long as you remind yourself of this point, you will not be tempted to engage in personal attacks on opposing counsel, engage in talking objections, openly criticize rulings of the Court, or otherwise engage in conduct that would tend to bring the profession into disrepute. Some examples of the manner in which this respect should be demonstrated include:

1. A lawyer should speak and write courteously and respectfully in all communications with the Court and opposing counsel.
2. Before scheduling depositions, hearing or motions, a lawyer should endeavor to contact opposing counsel and seek mutually acceptable settings. Upon learning that a cancellation may become necessary or requested, opposing counsel should be promptly notified.
3. If a lawyer knows that the client is going to submit to a voluntary dismissal of a matter, the lawyer should promptly notify opposing counsel so as to avoid unnecessary trial preparation and expense.
4. A lawyer should make a diligent effort to identify clearly for opposing counsel or parties all changes made in documents circulated for review.
5. In the courtroom, counsel should:
    a. Avoid interruption of opposing counsel except when necessary to voice an objection.
    b. Always offer an exhibit or provide a copy in advance to opposing counsel before presenting the exhibit to a witness.
    c. Make reasonable efforts to resolve discovery disputes prior to seeking intervention by the Court.
    d. Act and speak respectfully to all court personnel.
    e. Avoid visual or verbal displays of temper toward the Court, particularly upon an adverse ruling from the bench.
6. In the courtroom, a judge should:
    a. Avoid visual or verbal displays of temper toward counsel.
    b. Accommodate reasonable personal requests by lawyers.

c. Treat lawyers and litigants with courtesy, and, while maintaining control of proceedings, attempt to do so in a manner intended to avoid personal humiliation.
d. Conduct themselves at all times, in and outside court, in a way that recognizes and avoids the perceptions of favoritism that may arise from actions that are not clearly enunciated.

BATSON CHECKLIST

INFORMATION NEEDED TO MAKE A BATSON DETERMINATION

1. Take note of the apparent race and sex of each juror as each juror is called into the jury box.

2. Take note of the apparent race and sex of each attorney in the case, the defendant, the judge and as many of the potential witnesses as possible.

3. Keep track of each peremptory challenge exercised by each side, noting apparent race and sex of the jurors excused.

4. Keep track of each challenge for cause allowed, noting the apparent race and sex of the jurors excused.

5. Keep track of the apparent race and sex of the jurors for which no challenge has been exercised.

6. Pay attention to the answers given by potential jurors to questions asked by the attorneys so as to form an impression as to the legitimacy of any racially neutral reasons for exercising peremptory challenges.

7. Take note of any questions posed by the attorneys tending to indicate any pattern of racial motivation for exercise of peremptory challenges.

8. Taking into consideration each of the factors listed above, look for any pattern that might point toward purposeful discrimination.

9. During any *Batson* hearing, make note of the reasons given by Prosecutor (or Defense Attorney) for the exercise of a peremptory challenge.

PROCEDURE FOR DETERMINING *BATSON* OBJECTION

1. Ask objecting party to state the basis for *Batson* objection

2. Allow opposing counsel to respond to the objection

3. Initial ruling must determine:
   a. Whether objecting party has established a *Batson* issue (is there sufficient evidence of a "protected class"? *Do not take judicial notice of race of individuals in question, do not rely on court reporter to note race of individuals*).
   b. Whether objecting party has established a prima facie case that the peremptory challenge was exercised on the basis of race or gender.

4. If there is a prima facie showing, allow opposing counsel an opportunity to provide racially neutral reasons for the exercise of the peremptory challenge. *YOU WILL NOT SWEAR WITNESSES OR RECEIVE EVIDENCE ON THESE POINTS, BUT YOU WILL MAKE DETERMINATIONS OF CREDIBILITY OF COUNSEL AS THEY MAKE THEIR STATEMENTS.*

5. Allow an opportunity for rebuttal by objecting party.

6. Make your determination, using the attached Sample Batson order.

SAMPLE BATSON ORDER

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. ____ CRS _____

STATE OF NORTH CAROLINA

VS.

_____,
Defendant

This matter was heard in open Court upon the State's attempt to exercise a peremptory challenge as to potential juror number ___, **Mr./Ms.** _____, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times the Defendant was present and represented by counsel.

Upon indication by counsel of the Batson issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the Batson objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The State then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the State for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT**:

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.

2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.

3. The Defendant in this case is **(black/white)**_____; the alleged victim in this case **is/was (black/white)**_____; the key witnesses in this case are **(black/white)**_____.

4. As of the time that the State attempted to exercise this peremptory challenge, _____ jurors had been accepted by the State, of which ____ are white and ____ are black.

5. As of the time that the State attempted to exercise this peremptory challenge, the State has exercised ____ prior peremptory challenges, of which ____ were of persons of the African American race.

6. Statements and questions of the State which tend to support an inference of discrimination in the jury selection process are:

7. Statements and questions of the State which tend to refute an inference of discrimination in the jury selection process are:

8. The State **has/has not** repeatedly used peremptory challenges against blacks so as to tend to establish a pattern of strikes against blacks in the venire.

9. The State **has/has not** used a disproportionate number of peremptory challenges to strike black jurors in this case.

10. The State's acceptance rate of potential black jurors does/does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant **has/has not** made a prima facie showing of discrimination in the jury selection process.

12. Because the Defendant has not made a prima facie showing of discrimination, no further findings are necessary.

OR

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

OR

12. In the exercise of discretion, the Court proceeds with consideration of racially neutral reasons for exercise of the peremptory challenge without first determining whether or not a prima facie case of discrimination has been shown. The reasons offered by the State were as follows:

13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

_____

_____

_____

_____

14. This Court **finds/does not find** the prosecutor to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.

15. In response to such reasons stated by the prosecutor, Defense counsel **has/has not** shown that the prosecutor's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has/has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. No determination has been made as to the presence or absence of sufficient racially neutral reasons for the State's exercise of a peremptory challenge as to this juror, as the Defendant has failed to make out a prima facie showing of discrimination in the jury selection process.

OR

1. Notwithstanding the fact that the Defendant has failed to make out a prima facie showing of racial discrimination in the jury selection process, the Court has, in the exercise of discretion, elected to proceed with consideration of racially neutral reasons provided by the State in connection with its attempt to exercise of this peremptory challenge.

OR

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the State for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:

_____

_____

_____

3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do/do not** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

IT IS THEREFORE ORDERED that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number ___, Mr./Ms._____, is **overruled/sustained** and the peremptory challenge is **allowed/denied.**

This Order is entered in open court, this the ____ day of _____, 199_.

_____
Superior Court Judge

NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 99 CVS 3239

ALFRED E. FORD, ADMINISTRATOR
Of the Estate of GERALDINE LORETTA
FORD, deceased,
Plaintiff

vs.

ROBERT C. RUPPENTHAL, M.D.
And THE NALLE CLINIC, INC.,
Defendants

***Batson* Order**

This matter was heard in open Court upon the Plaintiff's attempt to exercise a peremptory challenge as to potential juror number 11, **Mr.** William Bellamy, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times both parties were present and represented by counsel.

Upon indication by counsel of the Bats*on* issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the Batson objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The Plaintiff then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the Plaintiff for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT**:

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.
2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.
3. The Defendant in this case is **white;** the Plaintiff in this case **is black.** Plaintiff if represented by two counsel, one of which is white and one of which is black. Defendant's counsel is white.
4. As of the time that the Plaintiff attempted to exercise this peremptory challenge, 10 jurors had been accepted by both parties, of which 8 are white and 2 are black.

5. As of the time that the Plaintiff attempted to exercise this peremptory challenge, the Plaintiff had exercised 7prior peremptory challenges, all of which were of persons of the white race.

6. Statements and questions of the Plaintiff which tend to refute an inference of discrimination in the jury selection process are:

a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.

b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.

c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

7. The Plaintiff **has** repeatedly used peremptory challenges against whites so as to tend to establish a pattern of strikes against whites in the venire.

9. The Plaintiff **has** used a disproportionate number of peremptory challenges to strike white jurors in this case.

10. The Plaintiff acceptance rate of potential white jurors does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant **has** made a prima facie showing of discrimination in the jury selection process.

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.

b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.

c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

Defendant contended that the reasons given by Plaintiff's counsel were pretextual, saying that responses given by this potential juror were no different in substance than those given by many of the other jurors who were accepted by both parties.

14. This Court **finds** the Plaintiff's counsel to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.

15. In response to such reasons stated by Plaintiff's counsel, Defendant **has not** shown that Plaintiff's counsel's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the Plaintiff for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:
   a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.
   b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.
   c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

IT IS THEREFORE ORDERED that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number 11, Mr. William Bellamy, is **overruled** and the peremptory challenge is **allowed.**

This Order is entered in open court, this the 19th day of September, 2001.

_____

Superior Court Judge

NEW SUPERIOR COURT JUDGES SCHOOL
CLASS PARTICIPATION

1. SEATING A NEW GRAND JURY

a. You are holding your first week of Superior Court in a rural county. When you arrive, the elected Clerk is waiting in your chambers and says: "Judge, welcome to our county. We need to begin today with seating a new Grand Jury. Judge Bridges was here for the past 6 months and he chose James Markham as Assistant Foreperson. James owns the local insurance agency and has a pretty good head on his shoulders. I have spoken with the Sheriff, the District Attorney and some of our leading defense attorneys. They all agree that Mr. Markham would make a good foreman if you want to appoint him. We have also gone ahead and pulled 9 new names for grand jurors and seated them in the jury box. Does this meet with your approval?"

- ❖ *What do you say?*

b. The grand jury has been hard at work since 930 am that morning. You are conducting court business in an adjacent courtroom and it is now almost 1pm. Its time for lunch and the courtroom personnel are tired and hungry. What do you do?

c. You are in an adjacent courtroom attending to other court business. The Courtroom is full and you have several hours of work left for the afternoon. The grand jury officer informs you the grand jury has completed its work and is ready to go home. What do you do? How do you record the grand jury's work? What else do you discuss with the grand jurors before their departure?

2. CALLING OUT A DEFENDANT

a. During the course of Calendar Call on Monday morning, several defendants fail to answer. The District Attorney asks to have these Defendants "called and failed."

- ❖ *What do you do in response to this request?*
- ❖ *What is the best way to manage non-appearing defendants?*

b. Your courtroom bailiff is a young man who is working his first week of court. When you ask him to call James Blake, he looks down at a card and reads the following:

"James, Blake, James Blake, James Blake, come into court this day and present your evidence or your case will be dismissed."

- ❖ *How do you correct this error?*

c. Once the bailiff has correctly completed his recitation, what language do you use to announce the forfeiture of the bond and to take appropriate action against the defendant?

** *See* NC Superior Court Judges' Benchbook, Criminal, Pretrial Release (note statutory provisions for bond doubling)

3. DETERMINING CAPACITY TO PROCEED

a. During the course of a busy day jammed with guilty pleas, a defendant's case is called in an apparent routine manner for guilty pleas to a number of charges, including First Degree Rape and First Degree Sex Offense. When you call for the Clerk's file, you notice a sealed envelope from Central Regional Hospital. Neither the prosecutor nor the defense attorney mentions anything about the defendant's competence. When you ask if there is any issue concerning the defendant's capacity to proceed, the defendant's attorney answers: "Your Honor, I had some serious concerns about my client's competence, but we had him examined at Dix Hospital [sic] and they found him competent, so I guess that settles the matter."

- ❖ *What do you say?*

b. Upon opening and reviewing the letter from Central Regional Hospital, you find that the forensic psychiatrist has concluded that the Defendant is "competent". During the plea colloquy, the Defendant repeatedly refers to his lawyer as "my District Attorney". At the end of the colloquy, he asks you "How much time can the jury give me for this offense?"

- ❖ *Is this a problem?*
- ❖ *How do you handle it?*

c. Immediately after finding the Defendant competent, the assistant district attorney requests the court accept a guilty plea that has been negotiated by the attorneys and the defense attorney concurs in the request.

- ❖ *Should you take the plea?*
- ❖ *Why or why not?*

4. CHARGING DOCUMENTS / BILL OF INFORMATION

a. The next case also is called for a guilty plea. As the case is called, the prosecutor announces: "Your Honor, this is the case of Alan Redmond, who is charged with the crime of Discharging a Weapon into Occupied Property, the Class E felony. The State has decided to arraign the Defendant on Possession of Firearm by a Felon, a Class G felony. How does he plead?"

- ❖ *What inquiry should you make in this situation?*
- ❖ *Why?*

b. After you raise a question concerning the charging documents, the prosecutor responds, "Judge, if you are going to require a bill of information, I will have to get that drawn by someone else in my office. Right now, we really need to get this plea finished, because we have 75 jurors waiting to begin our first trial. This Defendant has been brought in from out of county to enter this plea and we really need to get it done this morning. I promise I will file the bill of information later this morning if we can just go ahead with this plea." Defendant's attorney joins in the request.

- ❖ *What do you say?*
- ❖ *Why?*
- ❖ *How do you handle this case if Defendant appears pro se?*

c. It is time to begin your first jury trial. The clerk has just handed you the file for *State v. John Walker*, a case in which the Defendant is accused of the first-degree murder of William Bold on January 1, 2014. The Defendant has pled not guilty and the jury has now been brought into the courtroom. Everyone is looking at you to say something to get the ball rolling.

- ❖ *What do you say?*

5. MOTION FOR COMPLETE RECORDATION

a. The defendant before jury selection requests complete recordation of all proceedings and the state objects.

- ❖ *What do you do?*

- ❖ *How does this impact how you conduct your bench conferences, off-the-record discussions, and any other communications with the lawyers?*

6 - A/B. JURY SELECTION ISSUES

During your first jury selection, the following events take place:

a. During the initial questioning of the jurors by the State, juror #5 informs the assistant district attorney that he is the sole provider for his household, he has bills that are quickly coming due and he is the only one at his place of employment that can do his assigned work. The State asks you to excuse the juror for cause and Defendant agrees. The jury pool still has another 50 people left.

❖ *Do you excuse the juror?*

b. After hearing juror #5 asked to be excused, juror #7 rasies her hand says "My employer said I would be fired if I missed work for jury service. I brought the email with me to show you. I need to be excused or I will lose my job."

❖ *What should you do?*

c. One of the attorneys says to the jurors: "Members of the jury, I want to take the next few minutes getting to know each other. That is what we do in jury selection. My name is Ron. Juror # 1, I see that your name is also Ron. Do you mind if I call you Ron?'

d. A few minutes later an attorney asks: "What kind of evidence would you expect to see in a case like this?" What kind of evidence would you require from the State in order to find the Defendant guilty?"

e. Another question is "If the Defendant decides not to offer any evidence, would you hold that against him?"

f. Ron also asks each juror: "What is your definition of 'beyond a reasonable doubt?"

g. Opposing counsel has not objected to any of the questions.

❖ *How do you handle this situation?*

7. THE DEFENDANT BOLTS

a. Jury selection has finally been completed, but it is now 5:15 p.m. Each side agrees that court should recess for the day. The jury has not been impaneled.

- ❖ *What do you say next?*

b. Upon returning on the following morning, you are informed that the Defendant left the courthouse and has not returned. His counsel has no explanation.

- ❖ *What do you do if:*
  - *I. The jury was empaneled on the previous day.*
  - *II. The jury has not yet been impaneled.*

- ❖ *What other information is needed to make a determination on this issue?*

c. After waiting for an hour, you decide to proceed with the trial without the Defendant being present. The jury (surprise!) returns a verdict of guilty.

- ❖ *What do you do next?*

8. TAKING A RECESS

a. The jury has been selected and the trial has begun. It is time for lunch recess.

b. Announce your recess, together with any necessary instructions for the jury.

9. THE CHARGE CONFERENCE

a. The evidence has concluded, Defendant has moved to dismiss the charges and the Motion has been denied. Before proceeding with closing arguments, it is time to create jury instructions.

b. You ask the attorneys in the case if they have any requests for jury instructions. In unison, the attorneys say "whatever you think is appropriate your Honor." How do you proceed?

c. The Defendant requests lesser included offenses. What steps should you follow to address the request? What if the offense does not have a lesser included or there is no evidence of lesser includes?

- ❖ *What do you say?*

10. QUESTIONS FROM THE JURY / THE JURY KNOCKS

a. The jury has knocked, indicating that there is a question. The bailiff goes to the door of the jury room, and returns, saying "The jury wants to know about the Defendant's criminal record."

- ❖ *What do you say?*

b. Later, the jury hands out written questions reading as follows: "We would like to see all of the State's exhibits" and "Can you provide us with a transcript of the officer's testimony?"

- ❖ *Should you just send the Exhibits back?*
- ❖ *IN MY DISCRETION!!!!!!!!!!!!*

11. TAKING THE VERDICT

a. The jury has knocked, indicating that they have a verdict. The courtroom clerk whispers to you that this is her first week in court, that she is too nervous to speak in front of all these people, and that she will die if she has to poll the jury.

- ❖ *How do you take the verdict?*

b. Assume that the Defendant's attorney asks to have the jury polled.

- ❖ *What do you say and do?*

12. SENTENCING A DEFENDANT

You have just concluded a trial (or a guilty plea) in which the Defendant is guilty of common law robbery. The Defendant, an 18-year-old, confronted his former girlfriend on January 4, 2012, and forced her to hand over $40 in cash, threatening to beat her if she refused. Defendant has one prior conviction for possession of cocaine (2 record points). Where do you take the jury? Should the jury watch sentencing? How do you record the verdict?

Announce your judgment, using the information shown below from the front side of the structured sentencing grids:

	I **0-1 Points**	**II** **2-5 Points**
	I/A	I/A
Class G	13-16 *aggravated*	14-18 *aggravated*
Class G	10-13 *presumptive*	12-14 *presumptive*
Class G	8-10 *mitigated*	9-12 *mitigated*

GRAND JURY QUESTIONNAIRE

The presiding judge is required to select a foreperson for the Grand Jury. Please complete this Questionnaire. Your answers will be sealed and can only be opened by order of the Court.

1. Name (please print) _____; Age _____

2. Number of years completed in school. _____

3. Have you ever served on a Grand Jury before (including the past six months)? _____

4. Have you ever served as foreperson of a Grand Jury?
If so, when? _____

5. Have you ever been convicted of a criminal offense (other than minor traffic convictions)? _____

6. Where are you employed? _____

7. How long have you worked there? _____

8. What position do you hold and/or what are your work duties?
_____

9. Do you supervise other employees at work? _____

10. List any professional, religious, or civic organizations to which you belong. _____

11. List any offices or positions of leadership you have held in the above organizations. _____

12. Whom do you recommend (including yourself) to be the foreperson of this Grand Jury? _____

13. If chosen, would you be willing to serve as foreperson for the next six months? _____

_____
Signature

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That ____ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, and that in order to assist the court in making this selection, each grand juror would be required to complete a written questionnaire, such questionnaires being used for purposes of gaining information as to the qualities and characteristics of each grand juror. Upon completion of the questionnaires, each questionnaire was reviewed by the court, paying particular attention to qualities of leadership ability, fairness, education, prior grand jury experience and ability to follow instructions. In selecting a grand jury foreperson, all members of the grand jury were considered as possible candidates and the court specifically made the selection of the foreperson and assistant foreperson in a racially neutral manner.

Considering information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, _____ is a fit and proper person to serve as foreperson of this grand jury and _____ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints _____ as foreperson of the grand jury of this county, and _____ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

It is further ORDERED that the Clerk place the eighteen completed questionnaires in a sealed envelope, not to be opened except by court order, and that it be kept with the permanent minutes of this court.

This the _____ day of _____, 19___.

_____
Forrest Donald Bridges
Superior Court Judge

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That ____ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, but that the court would entertain recommendations from the grand jury for the positions of foreperson and assistant foreperson. The grand jury also was informed by the court that, in making such recommendations, all members of the grand jury should be considered as possible candidates, that any recommendations should be based upon the leadership ability, fairness, education, prior grand jury experience and ability to follow instructions and that the persons recommended must be selected in a racially neutral manner. After receiving the recommendations of the grand jurors, the Court again inquired and was assured that the recommendations had been made in a racially neutral manner.

Considering the recommendations and other information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, _____ is a fit and proper person to serve as foreperson of this grand jury and _____ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints _____ as foreperson of the grand jury of this county, and _____ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

This the _____ day of _____, 19___.

_____
Forrest Donald Bridges
Superior Court Judge

Exhibit 4

STATE OF NORTH CAROLINA
COUNTY OF LINCOLN

IN THE GENRAL COURT OF JUSTICE
SUPERIOR COURT DIVISIONT

TO THE HONORABLE JUDGE PRESIDING:

GRAND JURY REPORT

We, the Grand Jury for the May 16, 2022 Session of Criminal Superior Court of Lincoln County, North Carolina, respectfully submit the following report:

We were presented with 177 bills of indictment.

We found 162 True bills.

We found 4 not True bills.

We continued 11 for lack of witnesses.

14 members of the Grand Jury were present.

Respectfully submitted,

Donna Bud

Foreman of the Grand Jury

Exhibit 5

STATE OF NORTH CAROLINA
COUNTY OF LINCOLN

IN THE GENRAL COURT OF JUSTICE
SUPERIOR COURT DIVISIONT

TO THE HONORABLE JUDGE PRESIDING:

GRAND JURY REPORT

We, the Grand Jury for the _____

Session of Criminal Superior Court of Lincoln County, North Carolina, respectfully submit the following report:

We were presented with _____ bills of indictment.

We found _____ True bills.

We found _____ not True bills.

We continued _____ for lack of witnesses.

_____ members of the Grand Jury were present.

Respectfully submitted,

_____

Foreman of the Grand Jury

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name And Address Of Defendant

Race	*Sex*	*Date Of Birth*

INFORMATION

G.S. 15A-644

	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.
I.				
II.				
III.				
IV.				
V.				
VI.				
VII.				
VIII.				
IX.				
X.				

I. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

(Over)

STATE VERSUS	File No.
Name Of Defendant	

SIGNATURE OF PROSECUTOR

Signature Of Prosecutor

WAIVER

I, the undersigned defendant, waive the finding and return of a Bill of Indictment into Court and agree that the case may be tried upon the above information.

Date	*Signature Of Defendant*	*Signature Of Attorney For Defendant*

Exhibit 7

STATE OF NORTH CAROLINA

LINCOLN County

File No. 22 CRS 284302

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

STATE VERSUS

Name And Address Of Defendant
DAQUAN WHITTENBURG

1610 W. FRANKLIN STREET
MONROE NC 28112

Race	Sex	Date Of Birth
B	M	09/10/1995

INFORMATION

G.S. 15A-644

Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.
I. INTERFERE WITH ELECTRONIC MONITORING DEVICE	8/27/2022	14-226.3(B)	
II.			
III.			

I. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

knowingly and without authority circumvent the operation of an electronic monitoring device that is being used for the purpose of monitoring a person as a condition of probation. The electronic monitoring was imposed on the above Defendant in Lincoln County Superior Court case 22 CRS 000481.

II. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

(Over)

III. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above an in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

Signature Of Prosecutor

WAIVER

I, the undersigned defendant, waive the finding and return of a Bill of Indictment into Court and agree that the case may be tried upon the above information.

Date	Signature Of Defendant	Signature Of Attorney For Defendant
1/11/2023		

Exhibit 8

In The General Court Of Justice District Court Division

C 5340579-7

STATE OF NORTH CAROLINA Lincoln County

File No.

NORTH CAROLINA UNIFORM CITATION

Defendant To Appear At District Court

Lincolnton N.C.

Day Of Week: Friday 3 3 23 9:00 AM PM

☑ DL ☐ DCL ☐ Other | # Of Chgs 2 | Interpreter Needed ☐ SP ☐ OTS ☐ ASL

THE STATE OF NORTH CAROLINA VS.

Name Of Defendant: Stamey, Jerry Allen

Address: 3940 Teaberry LN

City: newton | State: NC | Zip: 28658

Drivers License No.: 23775503 | State | CDL | Class

Race: W | Sex: M | Date Of Birth: 5-28-82 | Age: 40

Social Security No. Of Defendant | Telephone No.

Vehicle License No.: FFB-2402 | State: NC

Vehicle Type: D | Trailer Type | CMV | Haz. Mat. | Make: Acura | Year

Name And Telephone No. Of Defendant's Employer

Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card)

ACKNOWLEDGMENT/NONRESIDENT PERSONAL RECOGNIZANCE FOR APPEARANCE

I acknowledge receipt of this Citation ☐ and I promise to appear in the named court at the time and place designated herein to answer the charge(s). I understand that my failure to appear or to dispose of this Citation by other acceptable legal means, such as waiver, will result in my operator's license issued by my state of residence being suspended until I have done so. Also, I may go before a magistrate and make bail in lieu of my personal recognizance.

Date: 1-9-23 | Signature Of Defendant: Copy given

DEPARTMENTAL USE ONLY

Officer: N. McKinney | No.: 256 | Troop | District: 27B

SHP Code | ☐ N.C. Patrol ☑ Lincoln County Police/Sheriff

Area: R | Wea.: C | Vis.: C | Traffic: L | Accident | Speed

On Highway No./Street: E Hwy 27 | ☐ Injury Or Serious Injury ☐ Passenger(s) Under 18

In Vicinity/City Of: Lincolnton | At/Near/Intersection: Low Bridge Rd

Wit. | Chemical Analyst | ☐ AC ☐ Refused ☐ BAC

ORIGINAL - COURT COPY

The undersigned officer has probable cause to believe that on or about Monday 11:03 (a.m.) p.m., the 9 day of January 2023, the named county, the named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) (public vehicular area)

- ☐ 1. At a speed of _____ MPH in a _____ MPH ☐ zone. G.S. 20-141. 77. ☐ work zone. G.S. 20-141(j2) 88. ☐ school zone. G.S. 20-141.1.
- ☐ 2. In forward motion without having the provided seat belt properly fastened about the defendant's body. G.S. 20-135.2A
- ☐ 3. By transporting a passenger of less than 16 years of age without having the passenger in a (weight appropriate child passenger restraint system) (seat belt). G.S. 20-137.1.
- ☐ 4. By transporting a child of less than five years of age and less than 40 pounds in weight without the child being secured in the rear seat, when the vehicle was equipped with an active passenger-side front air bag and the vehicle had a rear seat. G.S. 20-137.1(a1).
- ☐ 5. While impaired. G.S. 20-138.1
- ☐ 6. Without being licensed [illegible] North Carolina G.S. 20-7(a)
- ☐ 7. While the defendant's [illegible] was revoked, G.S. 20-28, 33 [illegible] G.S. 20-28(a1)
- ☐ 8. While displaying an [illegible] to be expired. G.S. 20-111(2)
- ☐ 9. Without (displaying thereon a current approved inspection certificate) (having a current electronic inspection authorization for the vehicle), such vehicle requiring inspection in North Carolina. G.S. 20-183.8. Month Expired: _____
- ☐ 10. By failing to see before (starting) (stopping) (turning from a direct line) that such movement could be made in safety. G.S. 20-154.
- ☐ 11. By failing to stop at a duly erected (stop sign) (flashing red light). G.S. 20-158(b)(1), (b)(3).
- ☐ 12. By entering an intersection while a traffic signal was emitting a steady red circular light for traffic in defendant's direction of travel. G.S. 20-158(b)(2).
- ☐ 13. Without [illegible] required by G.S. 20-313 [illegible] (registered) [illegible] G.S. 20-313
- ☐ 14. (Possess an open container of) (Consume) an alcoholic beverage in the passenger area of a motor vehicle. G.S. 20-138.7(a1). [NOTE: *Strike "operate a (motor) vehicle" and "(public vehicular area)" above.*]
- ☐ 15. Without decreasing speed as necessary to avoid colliding with a (vehicle) (person). G.S. 20-141(m).
- ☑ 16. Display a Registration number plate knowing the same to be fictitious g.s 20-111(2)
- ☐ 17. And on or about the date and time shown above in the named county, the named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) (public vehicular area)

Date | Signature Of Officer

The named defendant has been arrested without a warrant and there is probable cause for the defendant's detention on the stated charges. This Magistrate's Order is issued upon information furnished under oath by the named officer. A copy of this Order has been delivered to the defendant.

Date | Signature Of Magistrate/Deputy/Assistant/CSC

COURT USE ONLY

District Attorney | Attorney For Defendant At Time Of Trial Or Plea | Appointed ☐ Retained ☐ Waived

PRIOR CONVICTIONS: No./Level: 0 ☐ I (9) ☐ II (1-4) ☐ III (5+)

MISD. CLASS: ☐ A1 ☐ 1 ☐ 2 ☐ 3 | MISD. CLASS: ☐ A1 ☐ 1 ☐ 2 ☐ 3 | ☐ V/D

PLEA: ☐ guilty/resp. ☐ no contest ☐ guilty/resp. ☐ no contest ☐ guilty/resp. ☐ not guilty/resp.

VERDICT/FINDING: ☐ guilty/resp. ☐ guilty/resp. ☐ not guilty/resp.

JUDGMENT: The defendant appeared in open court and freely, voluntarily and understandingly entered the above plea; on the above verdict/finding, it is ORDERED that the defendant: ☐ pay costs and a fine/penalty of $_____, ☐ be imprisoned for a term of _____ days in custody of the sheriff. Pretrial credit _____ days served. ☐ The Court finds that a ☐ longer ☐ shorter period of probation than specified in G.S. 15A-1343.2(d) is necessary. ☐ Execution of sentence is suspended and the defendant is placed on unsupervised probation for _____ months, subject to the regular conditions of probation and the following: ☐ (1) pay costs and a fine/penalty of $_____; ☐ (2) not operate a motor vehicle until properly licensed by DMV; ☐ (3) complete _____ hours of community service within _____ days and pay the fee; ☐ (4) Other: _____

☐ It is ORDERED that this: ☐ Judgment is continued upon payment of costs. ☐ case be consolidated for judgment with _____

☐ ☐ sentence is to run at expiration of sentence in _____. ☐ The Court finds just cause to waive costs as ordered on attached ☐ AOC-CR-618. ☐ Other: _____

☐ COMMITMENT: It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff and that the sheriff cause the defendant to be retained in custody to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☐ The defendant in open court, gives notice of appeal to the Superior Court. ☐ The current pretrial release order is modified as follows: _____

Signature Of District Court Judge | Date | I certify that this Judgment is a true copy. | Signature Of Deputy/Assistant/CSC | Date

AOC-CR-500, Rev. 1/18, © 2019 Administrative Office of the Courts

Printed on: 12/15/2022, 12:48 AM

Exhibit 9

File No.	Law Enforcement Case No.	LID No.	SID No.	FBI No.
22CR309439-540	2022-05261 LINCOLN COUNTY SHERIFFS OFFICE			

WARRANT FOR ARREST

THE STATE OF NORTH CAROLINA VS.

Name And Address Of Defendant
JAQUAVION MARQUIS ABRAMS
3176 KEISLER DAIRY RD

CONOVER NC 28613-9141
170 COUNTY (704) 678-1291

STATE OF NORTH CAROLINA

LINCOLN County

In The General Court Of Justice
District Court Division

Race	Sex	Date Of Birth	Age
B	M	11/22/2002	19

Social Security No./Tax ID No.	Drivers License No. & State
684-01-5756	41720058 NC

Name Of Defendant's Employer

Date Of Offense: 10/2/2022

☐ Misdemeanor Offense Which Requires Fingerprinting Per Fingerprint Plan

Date Of Arrest & Check Digit No. (as shown on fingerprint card)

Complainant (name, address or department)
Willie Armstrong
LINCOLN COUNTY SHERIFFS OFFICE
PO BOX 506
LINCOLNTON NC 28093
LINCOLN

Names & Addresses Of Witnesses (including counties & telephone nos.)

OFFENSE(S) *(see AOC-CR-100 Continuation(s) for charging text)*

Count No.	Offense	Offense in Violation Of G.S.	Offense Code
1	FLEE/ELUDE ARREST W/MV (F)	20-141.5(B)	5641
2	INJURING UTILITY WIRES/FIXTURE	14-154	2944
3	CARRYING CONCEALED GUN(M)	14-269(A1)	5240
4	RESISTING PUBLIC OFFICER	14-223	5310
5	RECKLESS DRIVING TO ENDANGER	20-140(B)	5446
6	HIT/RUN LEAVE SCENE PROP DAM	20-166(C)(1)	5584

TO ANY OFFICER WITH AUTHORITY AND JURISDICTION TO EXECUTE A WARRANT FOR ARREST FOR THE OFFENSE(S) CHARGED IN THIS WARRANT:
I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did commit the offense(s) set forth above and on the attached AOC-CR-100 Continuation(s), which is (are) incorporated by reference. This act(s) was in violation of the law referred to in this Warrant For Arrest. This Warrant For Arrest is issued upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring the defendant before a judicial official without unnecessary delay to answer the charge(s) above.

Date Issued	Name Of Issuing Official	Signature	
10/2/2022	Paige Beal		☒ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ District Court Judge ☐ Superior Court Judge

Location Of Court	Court Date	Court Time

WAIVER OF PROBABLE CAUSE HEARING

The undersigned defendant, with the consent of his/her attorney, waives the right to a probable cause hearing.

Date Waived	Signature Of Defendant	Name Of Attorney	Signature Of Attorney

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS Date Of Issuance Of Warrant For Arrest: 10/2/2022	NOTE: *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	

OFFENSES (continued)

Count 1. Offense: FLEE/ELUDE ARREST W/MV (F)

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully, willfully, and feloniously did operate a motor vehicle on a highway , N New NC 16 Hwy , while fleeing a law enforcement officer, W. Armstrong , in the lawful performance of the officer's duties Traffic Stop . At the time of the violation, the defendant was driving recklessly in violation of G.S./ 20-140, the defendant was speeding in excess of 15 miles per hour over the legal speed limit, the defendant was driving negligently leading to an accident causing property damage in excess of $1,000 .

Count 2. Offense: INJURING UTILITY WIRES/FIXTURE

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully, willfully, and feloniously did INJURING WIRES AND FIXTURES OF UTILITY COMPANIES G.S 14-154.

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-5
Name Of Defendant: JAQUAVION MARQUIS ABRAMS	NOTE: *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A*	
Date Of Issuance Of Warrant For Arrest: 10/2/2022		

OFFENSES (continued)

Count 3. Offense: CARRYING CONCEALED GUN(M)

Charging Text For This Count

On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did carry concealed about the defendant's person while c defendant's own premises a gun, Glock 26 Gen 5 9mm SN:AGGA200 .

Count 4. Offense: RESISTING PUBLIC OFFICER

Charging Text For This Count

On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did resist, delay, and obstruct W. Armstrong , a public o the office of Lincoln County Sheriff's Office , by running from vehicle after fleeing Law Enforcement . At the time, the officer was discharging and attempting to dis official duty by conducting a traffic stop .

Orginal

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS Date Of Issuance Of Warrant For Arrest: 10/2/2022	**NOTE:** *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	

OFFENSES (continued)

Count 5. Offense: RECKLESS DRIVING TO ENDANGER

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did operate a motor vehicle on a street or highway without due caution and circumspection and at a speed or in a manner so as to endanger persons or property. G.S. 20-140(b).

Count 6. Offense: HIT/RUN LEAVE SCENE PROP DAM

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did at the scene of an accident and collision occurring 3490 N OLIVERS RD NEWTON NC 28658 , in which the vehicle driven by the defendant was involved, fail to give the defendant's name, address, driver's license number, and license plate number to the driver and occupants of the vehicle involved in the accident and collision . The defendant knew and reasonably should have known that the vehicle the defendant was operating was involved in the accident and collision. The accident and collision had resulted in property damage POWER POLE, ENERGY WIRES, AND RESIDENTIAL FENCE .

Original

STATE VERSUS	LINCOLN County	File No 22CR309439-540
Name Of Defendant JAQUAVION MARQUIS ABRAMS	**NOTE:** *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	
Date Of Issuance Of Warrant For Arrest 10/2/2022		

OFFENSES (continued)

Count 7. Offense:

Charging Text For This Count

Count 8. Offense:

Charging Text For This Count

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS Date Of Issuance Of Warrant For Arrest: 10/2/2022	**NOTE:** *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	

OFFENSES (continued)

Count 9. Offense:

Charging Text For This Count

Count 10. Offense:

Charging Text For This Count

Original

Printed on: 12/15/2022, 12:48 AM

STATE VERSUS

LINCOLN County

File No. 22CR309439-540

Name Of Defendant
JAQUAVION MARQUIS ABRAMS

Date Of Issuance Of Warrant For Arrest
10/2/2022

If the Warrant For Arrest is not served within one hundred and eighty (180) days, it must be returned to the Clerk of Court in the county in which it was issued with the reason for the failure of service noted thereon.

RETURN OF SERVICE

I certify that the Warrant For Arrest issued in this case on the date noted above for the defendant named above, was received and served as follows:

Date Received	*Date Served*	*Time Served*	*Date Returned*
12/15/2022	12/15/2022	1249 AM	12/15/2022

☒ By arresting the defendant and bringing the defendant before:

Name Of Judicial Official
Magistrate - Tyrone Jotner

☐ The Warrant WAS NOT served for the following reason:

Signature Of Officer Making Return
TB Hatch

Name Of Officer (type or print)
TB Hatch

Department Or Agency Of Officer
Greensboro Police Department

REDELIVERY/REISSUANCE

Date	*Name Of Clerk (type or print)*	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

RETURN FOLLOWING REDELIVERY/REISSUANCE

I certify that the Warrant For Arrest issued in this case on the date noted above for the defendant named above, was received and served as follows:

Date Received	*Date Served*	*Time Served*	*Date Returned*

☐ By arresting the defendant and bringing the defendant before:

Name Of Judicial Official

☐ The Warrant WAS NOT served for the following reason:

Signature Of Officer Making Return

Name Of Officer (type or print)

Department Or Agency Of Officer

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS	**NOTE:** *Use this page to enter judgment on a Warrant For Arrest. Use this Judgment page only if imposing a single, consolidated judgment for all offenses of conviction charged under this file number. Do not use this Judgment page to impose sentence: (i) if imposing separate judgments for separate offenses of conviction charged under this file number; (ii) to impose supervised probation; or (iii) for DWI sentences under G.S. 20-179. For DWI, use AOC-CR-342 (active) or AOC-CR-310 (probation). For structured sentencing offenses, use AOC-CR-602 (active) or AOC-CR-604 (probation).*	
Date Of Issuance Of Warrant For Arrest: 10/2/2022		

JUDGMENT

District Attorney	☐ Def. Waived Attorney ☐ Def. Found Not Indigent ☐ Def. Denied Appointed Counsel	Attorney For Defendant	☐ Appointed ☐ Retained	PRIOR CONVICTIONS: No./Level: 0 ☐ I (0) ☐ II (1-4) ☐ III (5+)

OFFENSES: The following offenses, which are set forth by Count No. in the Warrant For Arrest issued in this case on the date noted above for the defendant named above, are the subject of this Judgment:

Count 1	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 2	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 3	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 4	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 5	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 6	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 7	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 8	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 9	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 10	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3

(Over)

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant JAQUAVION MARQUIS ABRAMS	**NOTE:** *Use this Judgment page only if imposing a single, consolidated judgment for all offenses of conviction charged under this file number. Do not use this Judgment page to impose sentence: (i) if imposing separate judgments for separate offenses of conviction charged under this file number; (ii) to impose supervised probation; or (iii) for DWI sentences under G.S. 20-179. For DWI, use AOC-CR-342 (active) or AOC-CR-310 (probation). For structured sentencing offenses, use AOC-CR-602 (active) or AOC-CR-604 (probation).*	

JUDGMENT (continued)

JUDGMENT: The defendant appeared in open court and freely, voluntarily and understandingly entered the plea(s) on Side One. On the verdict(s) from Side One, it is **ORDERED** that all offenses of conviction, if more than one, be consolidated for judgment with Count No. _____ *(list count of lead offense)* and that the defendant:

☐ pay the following fine/penalty and costs:

Amount Of Fine/Penalty	*Costs*
$	$

☐ be imprisoned for a term of _____ days in custody of the ☐ sheriff. ☐ MCP. ☐ Other:* _____. Pretrial credit _____ days served.

☐ Work release ☐ is recommended. ☐ is not recommended. **(NOTE:** *To order work release, use form AOC-CR-602 to impose judgment.)*

☐ The Court finds that a ☐ longer ☐ shorter period of probation than that which is specified in G.S. 15A-1343.2(d) is necessary.

☐ Execution of the sentence is suspended and the defendant is placed on unsupervised probation* for _____ months, subject to the following conditions:

1. commit no criminal offense in any jurisdiction. 2. possess no firearm, explosive or other deadly weapon listed in G.S. 14-269.
3. remain gainfully and suitably employed, or faithfully pursue a course of study or of vocational training that will equip the defendant for suitable employment and abide by all rules of the institution.
4. satisfy child support and family obligations, as required by the Court. 5. Submit to the taking of digitized photographs, including photographs of the defendant's face, scars, marks, and tattoos, to be included in the defendant's records. 6. pay to the Clerk the costs of court and any additional sums shown below.

Costs	*Fine*	*Restitution***	*Attorney's Fee*	*Community Service Fee*	*Other*	*Total Amount Due*
$	$	$	$	$	$	$

***Name(s), address(es), and amount(s) for aggrieved party(ies) to receive restitution: (NOTE TO CLERK:** *Record SSN or Tax ID No. of aggrieved party(ies) on AOC-CR-382, "Certification Of Identity (Victims' Restitution)/ Certification Of Identity (Witness Attendance).")*

☐ 7. complete _____ hours of community service during the first _____ days of probation, as directed by the judicial services coordinator, and pay the fee prescribed by G.S. 143B-708 within _____ days.

☐ 8. not be found in or on the premises of the complainant or _____.

☐ 9. not assault, communicate with or be in the presence of the complainant or _____.

☐ 10. provide a DNA sample pursuant to G.S. 15A-266.4. (AOC-CR-319 required)

☐ 11. Other: _____

☐ The Court finds just cause to waive costs as ordered on attached ☐ AOC-CR-415. ☐ AOC-CR-618. ☐ Other: _____.

It is **ORDERED** that this: ☐ Judgment is continued upon payment of costs.
☐ case be consolidated for judgment with _____.
☐ sentence is to run at the expiration of the sentence in _____.

☐ **COMMITMENT:** It is **ORDERED** that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff and that the sheriff cause the defendant to be retained in custody to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

PROBABLE CAUSE: ☐ Probable cause is found as to all Counts except _____, and the defendant is bound over to Superior Court for action by the grand jury.
☐ No probable cause is found as to Count(s) _____ of this Warrant and the Count(s) is dismissed.

Date	*Name Of District Court Judge Or Magistrate (type or print)*	*Signature Of District Court Judge Or Magistrate*

APPEAL ENTRIES

☐ The defendant, in open court, gives notice of appeal to the ☐ District ☐ Superior Court.

☐ The current pretrial release order is modified as follows: _____

Date	*Name Of District Court Judge Or Magistrate (type or print)*	*Signature Of District Court Judge Or Magistrate*

CERTIFICATION

I certify that this Judgment is a true and complete copy of the original which is on file in this case.	*Date*	*Date Delivered To Sheriff*	*Signature*	☐ *Dep CSC* ☐ *Asst CSC* ☐ *Clerk Of Superior Court*

Original

Exhibit 10

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name And Address Of Defendant

Race	*Sex*	*Date Of Birth*

MISDEMEANOR STATEMENT OF CHARGES

G.S. 15A-922

Count No.	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.

CHARGING LANGUAGE

I, the undersigned, upon information and belief allege that on or about the date(s) of offense shown and in the county named above, the defendant named above did unlawfully and willfully

☐ See additional information on reverse.

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

NOTE TO PROSECUTOR: *For a multi-page statement of charges, complete the signature line on the last page.*

(Over - See Side Two for Prosecutor's continuation, if applicable, of CHARGING LANGUAGE section)

STATE VERSUS	File No.
Name Of Defendant	

CHARGING LANGUAGE (continued)

I, the undersigned, upon information and belief allege that on or about the date(s) of offense shown and in the county named above, the defendant named above did unlawfully and willfully

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

N.C.P.I -Crim 100.22
INTRODUCTORY REMARKS.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

100.22 INTRODUCTORY REMARKS.

NOTE WELL: This is a suggestive model and the judge can modify as deemed appropriate

Adapted From: NORTH CAROLINA TRIAL JUDGES' BENCH BOOK, SUPERIOR COURT, VOL 1 (Criminal), Appendix, Pretrial Section at pp. 38-40 (3rd ed.) (Institute of Government 1999) (out of print)

I want to welcome those of you who have been selected to serve as jurors for this criminal session of Superior Court in _____ County.

Let me introduce myself. I am _____. I am a Judge of the Superior Court. I live in _____in _____ County and I have been assigned to preside at this session of Superior Court in your county by the Chief Justice of the Supreme Court of North Carolina.

In order that you will know the court personnel with whom you will be working, and their respective duties. I will introduce them to you at this time.

The Deputy (Assistant) Clerk of Superior Court is _____. She (He) administers oaths to witnesses and keeps the court's records.

The Court Reporter is _____. She (He) takes down and transcribes everything that is said in the courtroom during a trial and upon hearing of the various motions.

The Bailiff is _____. She (He) enforces the court's orders and is in charge of the jury while it is away from the courtroom. If you desire

N.C.P.I -Crim 100.22
INTRODUCTORY REMARKS.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

at any time to inquire of any matters touching on your personal welfare apart from the case that is being tried, you should address your inquiries to the bailiff who will, if necessary, arrange for me to hear you on such matters.

In order to minimize noise and confusion in the courtroom, I am going to ask that all jurors, witnesses, defendants, and spectators remain seated while court is in session.

This call upon your time does not come frequently and may never be repeated in your lifetime. It is one of the obligations of citizenship. It represents your contribution to our democratic way of life. It is an assurance of your guarantee that if chance or design brings you to a court of law in any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice and protected by the same considerations that you discharge here in your duties as jurors.

You are being asked to perform one of the highest duties that can be imposed on any citizen, and that is to sit in judgment on the facts which will determine and settle disputes among your fellow citizens. Trial by jury is a right guaranteed to every citizen.

After you have been selected as a juror and have qualified by taking the oaths, you become the sole judges of the weight to be given any evidence and the credibility of each witness. Any decision agreed to by all twelve jurors which is free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment, based on credible evidence, and in accord with the court's instructions, becomes a final result in a case.

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You will become, in effect, officers of the court. It is my duty to see that the trial is conducted in accord with the rules of law that prescribe trial procedure, to rule on points of evidence, to maintain order, to preserve decorum, and to instruct you on the law that you are to apply to the facts as you find the facts to be.

You must understand that neither the court, nor the parties, nor the witnesses, nor the lawyers, may have any private contact or conversation with you during this week.

Your entry upon this service will impose upon you important duties and grave responsibilities. It requires that you be prompt in attendance, attentive to your duties, faithful to your oaths, considerate and tolerant of your fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions.

It is the public policy of North Carolina that all qualified citizens, without exception, serve as jurors. To be eligible to serve as a juror you must be a citizen of North Carolina and resident of _____ County, at least 18 years of age, physically and mentally competent, able to understand the English language, and not have been convicted of a felony nor have pleaded guilty (unless your citizenship has been restored), not have been adjudged incompetent, not have served on a trial jury in the state courts during the last two years, and not have served a full term of service on a grand jury during the last six years.

I recognize that each of you will be inconvenienced by serving on the jury for this week, and every effort will be made to see that your time is not wasted. When it can be foreseen that you will not be needed in the

courtroom for an extended period, you will be released and given a definite time to return. Please return promptly at the specified time.

I realize that there may be instances when service as a juror would be more than merely inconvenient and would constitute a great hardship. Under these circumstances you may have your service as a juror deferred to a later time by the court.

You have previously had the opportunity to present to a judge of the District Court any reason you feel you should not serve. I realize, however, that situations may have arisen since then that you feel entitle you to defer your service. Before hearing any requests for deferring service because of hardship, however, I would remind you, first, that your services are needed at this session of court; second, that jury service is a duty of citizenship and for that reason no qualified persons are exempt from jury service; and third, that if the court excuses you at this time, you will be required to serve at a later session.

If any of you who has been summoned for jury service would now like to request that your jury service be deferred until a later court session, please raise your hand/stand at this time.

Please approach the bench (one at a time) OR Please state your reason for request for deferral. (*Note: It is a good idea to have these deferrals done on the record and not at the bench.*)

Rule on the deferment, then have clerk swear remaining jurors.

N.C.P.I -Crim 100.21
REMARKS TO PROSPECTIVE JURORS AFTER EXCUSES HEARD.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

100.21 REMARKS TO PROSPECTIVE JURORS AFTER EXCUSES HEARD.

NOTE WELL: This is a suggestive model and the judge can modify as deemed appropriate

Source: NORTH CAROLINA TRIAL JUDGE'S BENCH BOOK, SUPERIOR COURT. VOL. 1 (Criminal), Appendix, Pretrial Section at pp. 41-42 (3rd ed.) (Institute of Government 1999)

Ladies and Gentlemen, because of your special status as jurors, it is important that you remember that during this week of court it is your duty not to talk among yourselves about the proceedings in this court or about the cases here for trial and not to talk with any of the parties, any of the witnesses or any of the lawyers about the cases set for trial, or to engage in any type of conversation with them even if it is only to pass the time of day.

The State of North Carolina and the parties in the cases to be tried this week are entitled to jurors who approach their cases with open minds and who agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice or sympathy, and must not be influenced by preconceived ideas either as to facts or as to the law. You must not form an opinion or express an opinion about any of the cases until you are deliberating in the jury room.

During jury selection, the court and the lawyers will ask you questions. These questions are not designed to pry into your personal affairs, or to cause you any personal discomfort. The questions are designed to discover if you have any knowledge of the case to be tried, if you have any preconceived opinion that you cannot lay aside, or if you have any experience that might cause you to identify yourself with either party in a

case. These questions are necessary to assure each party an impartial jury.

There may have been some publicity in a case at the time it happened or since then. You must not permit anything you have read or heard or seen to influence your verdict, because what you have read, heard or seen was not under oath at this trial. It is not evidence. None of you would want to be tried based on what was reported by others outside the courtroom. Being fair-minded persons, certainly none of us would rely on that kind of information in the trial of a case. You must exclude all that you have seen, heard or read and render a verdict based solely on the evidence brought out in court and the law I give you in my charge or instructions.

You may not let your present opinion or information influence your decision in a case or let it prevent you from rendering any proper verdict required by the facts and the law. The test for qualification for jury service is not the private feelings of a juror; rather, it is whether the juror can honestly set aside any such feelings, fairly consider the law and evidence, and impartially determine the issues.

In the process of selecting a jury, jurors may be excused by the court for cause if there is a valid reason why he or she cannot serve. In addition, counsel on each side may excuse a limited number without giving a reason for doing so.

If you are excused by one of the lawyers from serving on the jury, you should not be concerned about that or be upset with the lawyer who excused you. The fact that a lawyer may excuse you in one case does not mean that the same lawyer will object to your serving as a juror in another case which is called for trial.

N.C.P.I -Crim 100.21
REMARKS TO PROSPECTIVE JURORS AFTER EXCUSES HEARD.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

I hope you will enjoy your week of jury service. You should not be scared or afraid of serving as a juror. We ask no more of you this week than that you use the same good judgment and common sense that you used in handling your own affairs last week and that you will use in the handling of your own affairs in the weeks to come.

I also hope that these introductory remarks will serve to make you feel at ease here and that they will impress upon you the importance of jury service, acquaint you with what will be expected of you, and strengthen your will and desire to enter upon your duties with the determination to discharge them honorably.

Optional additional topics:

- Court will try to be efficient in its work and in use of jurors' time.

- Court is no assembly line; it does not deal with inanimate objects, but with people.

- Certain seats are set aside for jury use.

- Jurors' badges should be worn at all times.

- Jury telephone call-back service.

- Recesses.

- Chambers matters (*i.e.*, judge is working even when not on bench).

- When jurors excused (certain proceedings must take place out of jurors' presence).

STANDARD REMARKS TO JURORS (CRIMINAL)

Remarks to Jurors Before Selection of Jury in a Specific Case

Source: NORTH CAROLINA TRIAL JUDGES' BENCH BOOK, SUPERIOR COURT, VOL. 1 (Criminal), Appendix, Pretrial Section at pp. 35-36 (3rd ed.) (Institute of Government 1999

I address myself now to all of you who have been selected and sworn to serve as jurors at this session of Superior Court in _____ County.

The District Attorney has now called for trial the case(s) entitled "The State of North Carolina versus_____(name of defendant)_____.

I inform you that the defendant(s) in this case is(are) _____.

With the defendant(s) is (are) his (her) (their) attorney(s), _____.

At the other table is the (Assistant) District Attorney, _____, the lawyer for the State of North Carolina.

The defendant(s) has/have been charged with _____. The offense is alleged to have occurred on or about _____.

The alleged victim of the offense is _____.

The defendant(s) has/have entered a plea of not guilty (and has/have given notice of the affirmative defense of _____).

After a jury has been selected and impaneled in this case, you will hear the evidence. The evidence is presented according to certain rules of law. The judge enforces those rules and determines what evidence may be admitted.

After all of the evidence has been presented and after you have listened to the arguments of counsel, I will instruct you as to all of the law that you are to apply to the evidence in this case. It is your duty to apply the law as I will give it to you, and not as you think the law is, or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied in each such case.

At this point you are not expected to know the law. Counsel should not question you about the law except to ask whether you will accept and follow the law as given by the court.

I now want to tell you a few preliminary things about the law in a criminal case.

The defendant(s) has/have entered a plea of "not guilty." Under our system of justice, a defendant who pleads "not guilty" is not required to prove his (her) innocence but is presumed to be innocent. This presumption remains with a defendant throughout the trial until the jury selected to hear the case is convinced, from the facts and the law, beyond a reasonable doubt of the guilt of the defendant.

The burden of proof is on the State to prove to you that the defendant(s) is/are guilty beyond a reasonable doubt. [A reasonable doubt is not a vain or fanciful doubt. It is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.]

[There is no burden or duty of any kind on the defendant. The mere fact that the defendant has been charged with a crime is no evidence of guilt. A charge is merely the mechanical or administrative way by which any person is brought to a trial.]

If the State proves guilt beyond a reasonable doubt, then the function of this jury by its verdict is to say "guilty." If the State fails to prove guilt, or you have a reasonable doubt, then, of course, you must say "not guilty."

(At this point the court may wish to initiate questioning of the jurors concerning their fitness and competency to serve.)

Now, ladies and gentlemen, the (Assistant) District Attorney and counsel for the defendant(s) will have the opportunity to ask you certain questions. I would ask them that whenever possible questions be asked to the group collectively and that they be discreet and reasonable in their questions.

NOTICE TO ATTORNEYS CONCERNING JURY SELECTION

Counsel are expected to familiarize themselves prior to trial with the provisions of G.S. 15A-1214 and related case law pertaining to jury selection. During the course of jury selection, counsel should anticipate that those provisions will be enforced, including, but not limited to the following:

1. **The purpose of the jury selection process is to provide reasonable opportunity for counsel to satisfy themselves and the people they represent that prospective jurors meet the qualifications required by law, can and will serve as fair and impartial jurors throughout the trial of the matter, decide the case based upon the evidence presented in the courtroom and follow the law as instructed by the court.**
2. **Counsel should not attempt to use the jury selection process for purposes of:**
   - **(a) Visiting with or seeking to establish rapport with the jurors;**
   - **(b) Indoctrinating the jurors to a particular view;**
   - **(c) Arguing the case during questioning; or**
   - **(d) Asking what kind of verdict they would render under certain circumstances.**
3. **General questions should be addressed to the jury panel as a whole and counsel should seek to avoid undue repetition arising from asking the same questions to each individual juror. Counsel may address jurors individually when asking questions that apply only to that person, questions prompted by affirmative answers to general questions, or questions relating to unique personal experiences of that juror. *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980).**
4. **Examples of *improper* questions from counsel during jury *selection that will not be permitted* include:**
   - **(a) Hypothetical questions tending to "stake out" the juror or elicit in advance what a juror's decision will be, given certain facts. *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975); *State v. Hunt*, 37 N.C. App. 315, 246 S.E.2d 159 (1978). Examples of improper hypotheticals include:**
     - **(1) Asking a juror how he would weight a particular mitigating or aggravating circumstance. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995);**
     - **(2) "If you were to find that the defendant had previously been convicted of a murder, could you still follow the judge's instructions..." *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994);**
     - **(3) "If I choose not to put on a defense, would you hold that against me..." *State v. Blankenship*, 337 N.C. 543, 447 S.E. 727 (1994) *as distinguished from* "If the defendant chooses not to testify..."**

(b) Questions that include an incorrect statement of law. *State v. Hedgepeth,* 66 N.C. App. 390, ___ S.E.2d ___ (1984)

(c) Questions of law posed to a juror (the jurors are not expected to know the law until receiving instructions from the court).

(d) Questions about parole eligibility. *State v. Payne,* 337 N.C. 505, 448 S.E.2d 93 (1994); *State v. Smith,* 347 N.C. App. 453, 496 S.E.2d 841 (1995)

(e) Questions about capital punishment as a deterrent to crime or other legislative policy issues. *State v. Ali,* 329 N.C. 394, 407 S.E.2d 183 (1991)

(f) Questions concerning juror perceptions of the meaning of life imprisonment.

5. Counsel are properly permitted to ask questions reasonably directed toward determining that the juror has formed no opinion as to the guilt or innocence of the defendant, can fairly and impartially discharge the duties of a juror and can follow the law as instructed by the court. Such questions include, for example:

(a) Asking jurors if they can follow the law as provided by the court regarding particular trial issues. *State v. Hedgepeth,* 66 N.C. App. 390, ___ S.E.2d ___ (1984);

(b) "Death qualifying" questions, asking whether a juror's views about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. 412 (1985); *State v. Brown,* 327 N.C. 1, ___ S.E.2d ___ (1990);

(c) "Non-death qualifying" questions, asking prospective jurors as to whether they would automatically vote for the death penalty following conviction of first degree murder, without regard to the existence of mitigating circumstances. *Morgan v. Illinois,* 504 U.S. 719 (1992); *State v. Fletcher,* 348 N.C. 292, ___ S.E.2d ___ (1998)

6. The Court shall determine, in the exercise of discretion, whether to require that *voir dire* be conducted solely by one of defendant's two co-counsel, or to permit alternation of questions between counsel at appropriate intervals. *State v. Fullwood,* 343 N.C. 725, ___ S.E.2d ___ (1996).

STATE OF NORTH CAROLINA

COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NUMBER 00 CR 10369

STATE OF NORTH CAROLINA

VS

KOVA DUAN WRIGHT

****

JUROR RESPONSIBILITIES

As a juror selected in the above captioned case, I understand that I have these duties and responsibilities:

1. I will serve for the duration of the case. During the trial of this case, I will pay attention to the evidence and I will base my verdict on the evidence as presented in court and on the law as instructed by the presiding judge.

2. I will not talk with any fellow juror about the case until instructed by the judge. I understand that the only place this case may be talked about is in the jury room, and then only after the jury has begun deliberations, after hearing all of the evidence, closing arguments by the attorneys and instructions on the law from the Judge.

3. I will not talk about this case with anyone else, or allow anyone else to talk with me or say anything in my presence about this case, until the case has concluded. If anyone communicates or attempts to communicate with me or in my presence about this case, I will notify the presiding Judge of that fact immediately.

4. I will not form an opinion about the case, nor will I express to anyone any opinion about the case, until the presiding Judge has to the jury to begin its deliberations.

5. I will not read, watch, or listen to any media accounts of the jury selection or the trial.

6. I will not go to the scene where the events of this trial are alleged to have taken place, nor will I attempt to personally investigate any aspect of the case.

In the event anyone seeks to talk to me about the case or if I have a personal emergency, I will bring that matter to the attention of the courtroom baliff as soon as possible. The bailiff will bring it to the attention of the judge.

Juror's signature: _____

Printed name of juror: _____

Telephone: *Home:* _____ *Office:* _____

BATSON CHECKLIST

INFORMATION NEEDED TO MAKE A BATSON DETERMINATION

1. Take note of the apparent race and sex of each juror as each juror is called into the jury box.

2. Take note of the apparent race and sex of each attorney in the case, the defendant, the judge and as many of the potential witnesses as possible.

3. Keep track of each peremptory challenge exercised by each side, noting apparent race and sex of the jurors excused.

4. Keep track of each challenge for cause allowed, noting the apparent race and sex of the jurors excused.

5. Keep track of the apparent race and sex of the jurors for which no challenge has been exercised.

6. Pay attention to the answers given by potential jurors to questions asked by the attorneys so as to form an impression as to the legitimacy of any racially neutral reasons for exercising peremptory challenges.

7. Take note of any questions posed by the attorneys tending to indicate any pattern of racial motivation for exercise of peremptory challenges.

8. Taking into consideration each of the factors listed above, look for any pattern that might point toward purposeful discrimination.

9. During any *Batson* hearing, make note of the reasons given by Prosecutor (or Defense Attorney) for the exercise of a peremptory challenge.

PROCEDURE FOR DETERMINING *BATSON* OBJECTION

1. Ask objecting party to state the basis for *Batson* objection

2. Allow opposing counsel to respond to the objection

3. Initial ruling must determine:
   a. Whether objecting party has established a *Batson* issue (is there sufficient evidence of a "protected class"? *Do not take judicial notice of race of individuals in question, do not rely on court reporter to note race of individuals*).
   b. Whether objecting party has established a prima facie case that the peremptory challenge was exercised on the basis of race or gender.

4. If there is a prima facie showing, allow opposing counsel an opportunity to provide racially neutral reasons for the exercise of the peremptory challenge. *YOU WILL NOT SWEAR WITNESSES OR RECEIVE EVIDENCE ON THESE POINTS, BUT YOU WILL MAKE DETERMINATIONS OF CREDIBILITY OF COUNSEL AS THEY MAKE THEIR STATEMENTS.*

5. Allow an opportunity for rebuttal by objecting party.

6. Make your determination, using the attached Sample Batson order.

SAMPLE BATSON ORDER

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. ____ CRS _____

STATE OF NORTH CAROLINA

VS.

_____,
Defendant

This matter was heard in open Court upon the State's attempt to exercise a peremptory challenge as to potential juror number ___, **Mr./Ms.** _____, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times the Defendant was present and represented by counsel.

Upon indication by counsel of the Batson issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the Batson objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The State then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the State for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT:**

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.

2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.

3. The Defendant in this case is **(black/white)**_____; the alleged victim in this case **is/was (black/white)**_____; the key witnesses in this case are **(black/white)**_____.

4. As of the time that the State attempted to exercise this peremptory challenge, _____ jurors had been accepted by the State, of which ____ are white and ____ are black.

5. As of the time that the State attempted to exercise this peremptory challenge, the State has exercised ____ prior peremptory challenges, of which ____ were of persons of the African American race.

6. Statements and questions of the State which tend to support an inference of discrimination in the jury selection process are:

7. Statements and questions of the State which tend to refute an inference of discrimination in the jury selection process are:

8. The State **has/has not** repeatedly used peremptory challenges against blacks so as to tend to establish a pattern of strikes against blacks in the venire.

9. The State **has/has not** used a disproportionate number of peremptory challenges to strike black jurors in this case.

10. The State's acceptance rate of potential black jurors does/does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant **has/has not** made a prima facie showing of discrimination in the jury selection process.

12. Because the Defendant has not made a prima facie showing of discrimination, no further findings are necessary.

OR

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

OR

12. In the exercise of discretion, the Court proceeds with consideration of racially neutral reasons for exercise of the peremptory challenge without first determining whether or not a prima facie case of discrimination has been shown. The reasons offered by the State were as follows:

13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

_____

_____

_____

_____

14. This Court **finds/does not find** the prosecutor to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.

15. In response to such reasons stated by the prosecutor, Defense counsel **has/has not** shown that the prosecutor's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has/has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. No determination has been made as to the presence or absence of sufficient racially neutral reasons for the State's exercise of a peremptory challenge as to this juror, as the Defendant has failed to make out a prima facie showing of discrimination in the jury selection process.

OR

1. Notwithstanding the fact that the Defendant has failed to make out a prima facie showing of racial discrimination in the jury selection process, the Court has, in the exercise of discretion, elected to proceed with consideration of racially neutral reasons provided by the State in connection with its attempt to exercise of this peremptory challenge.

OR

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the State for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:

_____

_____

_____

3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do/do not** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

IT IS THEREFORE ORDERED that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number ___, Mr./Ms._____, is **overruled/sustained** and the peremptory challenge is **allowed/denied.**

This Order is entered in open court, this the ____ day of _____, 199_.

_____

Superior Court Judge

NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 99 CVS 3239

ALFRED E. FORD, ADMINISTRATOR
Of the Estate of GERALDINE LORETTA
FORD, deceased,
Plaintiff

vs.

ROBERT C. RUPPENTHAL, M.D.
And THE NALLE CLINIC, INC.,
Defendants

***Batson* Order**

This matter was heard in open Court upon the Plaintiff's attempt to exercise a peremptory challenge as to potential juror number 11, **Mr.** William Bellamy, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times both parties were present and represented by counsel.

Upon indication by counsel of the Bats*on* issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the Batson objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The Plaintiff then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the Plaintiff for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT**:

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.
2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.
3. The Defendant in this case is **white**; the Plaintiff in this case **is black.** Plaintiff if represented by two counsel, one of which is white and one of which is black. Defendant's counsel is white.
4. As of the time that the Plaintiff attempted to exercise this peremptory challenge, 10 jurors had been accepted by both parties, of which 8 are white and 2 are black.

5. As of the time that the Plaintiff attempted to exercise this peremptory challenge, the Plaintiff had exercised 7prior peremptory challenges, all of which were of persons of the white race.

6. Statements and questions of the Plaintiff which tend to refute an inference of discrimination in the jury selection process are:

a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.

b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.

c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

7. The Plaintiff has repeatedly used peremptory challenges against whites so as to tend to establish a pattern of strikes against whites in the venire.

9. The Plaintiff has used a disproportionate number of peremptory challenges to strike white jurors in this case.

10. The Plaintiff acceptance rate of potential white jurors does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant has made a prima facie showing of discrimination in the jury selection process.

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.

b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.

c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

Defendant contended that the reasons given by Plaintiff's counsel were pretextual, saying that responses given by this potential juror were no different in substance than those given by many of the other jurors who were accepted by both parties.

14. This Court finds the Plaintiff's counsel to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.

15. In response to such reasons stated by Plaintiff's counsel, Defendant **has not** shown that Plaintiff's counsel's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the Plaintiff for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:
   a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.
   b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.
   c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

IT IS THEREFORE ORDERED that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number 11, Mr. William Bellamy, is **overruled** and the peremptory challenge is **allowed.**

This Order is entered in open court, this the 19th day of September, 2001.

_____

Superior Court Judge

N.C.P.I.-Crim 100.30
MAKING NOTES BY JURORS.
JUNE 2008
N.C. Gen. Stat. § 15A-1228

100.30 MAKING NOTES BY JURORS.

NOTE WELL: N.C. Gen. Stat. § 15A-1228 permits a jury in a criminal case to make notes and take them into the jury room (except where the judge on his own motion or the motion of a party rules otherwise in his discretion).[1]

[In my discretion, members of the jury, you will not be allowed to take notes in this case.]

[In this case, you will be allowed to take notes.

When you begin your deliberations, you may use your notes to help refresh your memory as to what was said in court. I caution you, however, not to give your notes or the notes of any of the other jurors undue significance. While taking notes, a juror may fail to hear important portions of testimony.

Any notes taken by you are not to be considered evidence in this case. Your notes are not an official transcript of the trial. For that reason, you must remember that in your jury deliberations notes are not entitled to any greater weight than the individual recollections of other jurors.

If you take notes, you may disclose them only to your fellow jurors during your deliberations. You are not to show them to anyone else. While I will permit you to take notes, I instruct you to listen intently at all times to the testimony.]

N.C.P.I.-Crim 100.30
MAKING NOTES BY JURORS.
JUNE 2008
N.C. Gen. Stat. § 15A-1228

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1. Absent a statute permitting or prohibiting note-taking by jurors, the majority of federal circuits have held that the decision lies in the discretion of the trial judge. That the decision should lie within the trial judge's discretion is supported by the fact that neither arguments for or against this issue are so dispositive and outweighing that note-taking should or should not be allowed as a matter of law. Those arguments favoring note-taking are that it is, "when done properly, . . . a valuable method of refreshing memory. In addition, note-taking may help focus jurors' concentration on the proceedings and help prevent their attention from wandering." *United States v. Maclean*, 578 F.2d 64, 66 (3rd Cir. 1978). Arguments against note-taking contend that too much significance will be placed on all matters "arbitrarily" excluded from the notes by the note-taker. Similarly, the few note-takers might dominate jury deliberations and even falsify testimony deliberately. Additionally, by busying themselves with note-taking, some believe that these jurors will miss important testimony. Finally, some simply believe that the "average" juror cannot take notes well and will therefore take notes of inconsequential and irrelevant matters while excluding the substantial issues of the case. *Id.*

Exhibit 19

EXHIBIT LIST

EXHIBIT #	DESCRIPTION	PURPOSE	AUTHENTICATED	OFFERED	ADMITTED	BIOLOGICAL?	WHO COLLECTED?	PRESERVE?
S-1	Photo- victim- alive	Illustrative	Sadler	Y	Y			
S-2	Photo - victim- dead	Illustrative	Stip	Y	Y			
S-3	Photo Robt Howard	Illustrative						
S-4	Statement to police fr Darlene White	Corroborative	White					
S-5	Photo- front porch of 926 Druid Cir	Illustrative	Burke	Y	Y			
S-6	Photo- view of crime scene from next door	Illustrative	Burke	Y	Y			
S-7	Photo- above w/ police cars	Illustrative	Burke	Y	Y			
S-9	Drawing of Druid & Edison	Illustrative	Oteka	Y	Y			
S-10	Photo of house where victim	Illustrative	Oteka	Y	Y			
S-11	Photo of Druid & Edison Sts	Illustrative	Oteka	Y	Y			
S-12	Photo of 922 Druid Cir	Illustrative	Hardin	Y	Y			
S-13	Photo - another view of 922	Illustrative	Hardin	Y	Y			
S-14	Photo- closeup of porch of	Illustrative	Hardin	Y	Y			

NOTICE TO ATTORNEYS CONCERNING CLOSING ARGUMENTS

Counsel are reminded of the provisions of G.S. 15A-1230 setting parameters for closing arguments, as well as the cases cited below. Jury arguments that violate these parameters will not be permitted in the trial of this case, with or without objection from opposing counsel. In the event of any doubt as to the propriety of a planned argument, counsel should address those concerns during the charge conference.

In closing arguments to the jury, an attorney shall not:

(1) become abusive,

(2) express his personal belief as to the truth or falsity of the evidence,

(3) express his personal belief as to which party should prevail, or

(4) make arguments premised on matters outside the record.

The trial court will monitor vigilantly the course of such arguments, intervene as warranted, entertain objections, and impose remedies pertaining to those objections. Such remedies include, but are not necessarily limited to, requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments. *State v. Jones,* 355 N.C. 117, ___ S,E2d ___ (1998).

EXAMPLES OF IMPROPER ARGUMENTS:

1. *Reference to notorious crimes; personally degrading remarks.* A prosecutor's reference to the "Columbine [school] shootings" and the "Oklahoma City bombing" as examples of national tragedies; degrading remarks against the defendant, saying "You got this quitter, this loser, this worthless piece of – who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly..." An argument containing these remarks was improper for three reasons: (1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice. *State v. Jones,* 355 N.C. 117, ___ S.E.2d ___ (1998).

2. *Expressing an opinion that a witness is lying.* "He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Golphin,* 352 N.C. 364, ___ S,E.2d ___ ( ).

3. *Reference to Defendant's failure to testify.* The prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State, but it is error for the prosecutor to comment directly on a defendant's right not to testify by stating, "'The defendant has not taken the stand in this case." *State v. Barden,* 356 N.C. 316, ___ S.E.2d ___ (2002).

4. *Urging jury to make an example of this defendant.* It is error for counsel for the state, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant. *State v. Phifer,* 197 N.C. 729, 150 S.E. 353 (1929).

5. *Urging the jury to follow community sentiment.* It is proper to tell the jury that they are the voice and conscience of the community, but it is improper to demand punishment because of community sentiment, asking the jury to lend an *ear* to the community rather than a *voice. State v. Scott,* 314 N.C. 309, 333 S.E.2d 296 (1985).

6. *Argument conveying perceived accountability of jury to the victim, the witnesses, the community, or society in general. State v. Boyd,* 311 N.C. 408, 319 S.E.2d 189 (1984).

EXAMPLES OF PROPER ARGUMENTS:

1. *Urging jury to disbelieve certain testimony.* Counsel are entitled to comment during closing argument on any contradictory evidence as the basis for the jury's disbelief of a witness' story. Where the record includes evidence contradicting the witness' statement, counsel may comment on the untruthfulness of that statement. *State v. Golphin,* 352 N.C. 364, ___ S.E.2d ___ ( ).

2. *Reminding jury of their duty to make a decision.* It is permissible for a prosecutor to argue that "the buck stops here" or that jurors had become "judges" or had become the "they" as in "they ought to do something". These statements correctly inform the jury that for purposes of the trial they have become representatives of the community and it is proper for them to act as the voice and conscience of the community, so as to temper the harshness of the law with the common sense judgment of the community. *State v. Scott,* 314 N.C. 309, 333 S.E.2d 296 (1985).

GRAND JURY QUESTIONNAIRE

The presiding judge is required to select a foreperson for the Grand Jury. Please complete this Questionnaire. Your answers will be sealed and can only be opened by order of the Court.

1. Name (please print) _____; Age _____

2. Number of years completed in school. _____

3. Have you ever served on a Grand Jury before (including the past six months)? _____

4. Have you ever served as foreperson of a Grand Jury?
If so, when? _____

5. Have you ever been convicted of a criminal offense (other than minor traffic convictions)? _____

6. Where are you employed? _____

7. How long have you worked there? _____

8. What position do you hold and/or what are your work duties?
_____

9. Do you supervise other employees at work? _____

10. List any professional, religious, or civic organizations to which you belong. _____

11. List any offices or positions of leadership you have held in the above organizations. _____

12. Whom do you recommend (including yourself) to be the foreperson of this Grand Jury? _____

13. If chosen, would you be willing to serve as foreperson for the next six months? _____

_____
Signature

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That ____ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, and that in order to assist the court in making this selection, each grand juror would be required to complete a written questionnaire, such questionnaires being used for purposes of gaining information as to the qualities and characteristics of each grand juror. Upon completion of the questionnaires, each questionnaire was reviewed by the court, paying particular attention to qualities of leadership ability, fairness, education, prior grand jury experience and ability to follow instructions. In selecting a grand jury foreperson, all members of the grand jury were considered as possible candidates and the court specifically made the selection of the foreperson and assistant foreperson in a racially neutral manner.

Considering information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, _____ is a fit and proper person to serve as foreperson of this grand jury and _____ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints _____ as foreperson of the grand jury of this county, and _____ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

It is further ORDERED that the Clerk place the eighteen completed questionnaires in a sealed envelope, not to be opened except by court order, and that it be kept with the permanent minutes of this court.

This the _____ day of _____, 19___.

_____
Forrest Donald Bridges
Superior Court Judge

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That ____ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, but that the court would entertain recommendations from the grand jury for the positions of foreperson and assistant foreperson. The grand jury also was informed by the court that, in making such recommendations, all members of the grand jury should be considered as possible candidates, that any recommendations should be based upon the leadership ability, fairness, education, prior grand jury experience and ability to follow instructions and that the persons recommended must be selected in a racially neutral manner. After receiving the recommendations of the grand jurors, the Court again inquired and was assured that the recommendations had been made in a racially neutral manner.

Considering the recommendations and other information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, _____ is a fit and proper person to serve as foreperson of this grand jury and _____ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints _____ as foreperson of the grand jury of this county, and _____ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

This the _____ day of _____, 19___.

_____
Forrest Donald Bridges
Superior Court Judge

Exhibit 4

STATE OF NORTH CAROLINA
COUNTY OF LINCOLN

IN THE GENRAL COURT OF JUSTICE
SUPERIOR COURT DIVISIONT

TO THE HONORABLE JUDGE PRESIDING:

GRAND JURY REPORT

We, the Grand Jury for the May 16, 2022 Session of Criminal Superior Court of Lincoln County, North Carolina, respectfully submit the following report:

We were presented with 177 bills of indictment.

We found 162 True bills.

We found 4 not True bills.

We continued 11 for lack of witnesses.

14 members of the Grand Jury were present.

Respectfully submitted,

Donna Bud

Foreman of the Grand Jury

Exhibit 5

STATE OF NORTH CAROLINA
COUNTY OF LINCOLN

IN THE GENRAL COURT OF JUSTICE
SUPERIOR COURT DIVISIONT

TO THE HONORABLE JUDGE PRESIDING:

GRAND JURY REPORT

We, the Grand Jury for the _____

Session of Criminal Superior Court of Lincoln County, North Carolina, respectfully submit the following report:

We were presented with _____ bills of indictment.

We found _____ True bills.

We found _____ not True bills.

We continued _____ for lack of witnesses.

_____ members of the Grand Jury were present.

Respectfully submitted,

_____

Foreman of the Grand Jury

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name And Address Of Defendant

Race	*Sex*	*Date Of Birth*

INFORMATION

G.S. 15A-644

	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.
I.				
II.				
III.				
IV.				
V.				
VI.				
VII.				
VIII.				
IX.				
X.				

I. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

(Over)

STATE VERSUS	File No.
Name Of Defendant	

SIGNATURE OF PROSECUTOR

Signature Of Prosecutor

WAIVER

I, the undersigned defendant, waive the finding and return of a Bill of Indictment into Court and agree that the case may be tried upon the above information.

Date	*Signature Of Defendant*	*Signature Of Attorney For Defendant*

Exhibit 7

STATE OF NORTH CAROLINA

LINCOLN County

File No. 22 CRS 284302

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

STATE VERSUS

Name And Address Of Defendant
DAQUAN WHITTENBURG

1610 W. FRANKLIN STREET
MONROE NC 28112

Race	Sex	Date Of Birth
B	M	09/10/1995

INFORMATION

G.S. 15A-644

Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.
I. INTERFERE WITH ELECTRONIC MONITORING DEVICE	8/27/2022	14-226.3(B)	
II.			
III.			

I. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

knowingly and without authority circumvent the operation of an electronic monitoring device that is being used for the purpose of monitoring a person as a condition of probation. The electronic monitoring was imposed on the above Defendant in Lincoln County Superior Court case 22 CRS 000481.

II. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

(Over)

III. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above an in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

Signature Of Prosecutor

WAIVER

I, the undersigned defendant, waive the finding and return of a Bill of Indictment into Court and agree that the case may be tried upon the above information.

Date	Signature Of Defendant	Signature Of Attorney For Defendant
1/11/2023		

Exhibit 8

In The General Court Of Justice District Court Division

C 5340579-7

STATE OF NORTH CAROLINA Lincoln County

File No.

NORTH CAROLINA UNIFORM CITATION

Defendant To Appear At District Court

Lincolnton N.C.

Day Of Week: Friday 3 3 23 9:00 AM PM

☑ DL ☐ DCL ☐ Other | # Of Chgs 2 | Interpreter Needed ☐ SP ☐ OTS ☐ ASL

THE STATE OF NORTH CAROLINA VS.

Name Of Defendant: Stamey, Jerry Allen

Address: 3940 Teaberry LN

City: newton | State: NC | Zip: 28658

Drivers License No.: 23775503 | State | CDL | Class

Race: W | Sex: M | Date Of Birth: 5-28-82 | Age: 40

Social Security No. Of Defendant | Telephone No.

Vehicle License No.: FFB-2402 | State: NC

Vehicle Type: D | Trailer Type | CMV | Haz. Mat. | Make: Acura | Year

Name And Telephone No. Of Defendant's Employer

Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card)

ACKNOWLEDGMENT/NONRESIDENT PERSONAL RECOGNIZANCE FOR APPEARANCE

I acknowledge receipt of this Citation ☐ and I promise to appear in the named court at the time and place designated herein to answer the charge(s). I understand that my failure to appear or to dispose of this Citation by other acceptable legal means, such as waiver, will result in my operator's license issued by my state of residence being suspended until I have done so. Also, I may go before a magistrate and make bail in lieu of my personal recognizance.

Date: 1-9-23 | Signature Of Defendant: Copy given

DEPARTMENTAL USE ONLY

Officer: N. McKinney | No.: 256 | Troop | District: 27B

SHP Code | ☐ N.C. Patrol ☑ Lincoln County Police/Sheriff

Area: R | Wea.: C | Vis.: C | Traffic: L | Accident | Speed

On Highway No./Street: E Hwy 27 | ☐ Injury Or Serious Injury ☐ Passenger(s) Under 18

In Vicinity/City Of: Lincolnton | At/Near/Intersection: Low Bridge Rd

Wit. | Chemical Analyst | ☐ AC ☐ Refused ☐ BAC

ORIGINAL - COURT COPY

The undersigned officer has probable cause to believe that on or about Monday 11:03 (a.m.) p.m., the 9 day of January 2023, the named county, the named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) (public vehicular area)

- ☐ 1. At a speed of _____ MPH in a _____ MPH ☐ zone. G.S. 20-141. 77. ☐ work zone. G.S. 20-141(j2) 88. ☐ school zone. G.S. 20-141.1.
- ☐ 2. In forward motion without having the provided seat belt properly fastened about the defendant's body. G.S. 20-135.2A
- ☐ 3. By transporting a passenger of less than 16 years of age without having the passenger in a (weight appropriate child passenger restraint system) (seat belt). G.S. 20-137.1.
- ☐ 4. By transporting a child of less than five years of age and less than 40 pounds in weight without the child being secured in the rear seat, when the vehicle was equipped with an active passenger-side front air bag and the vehicle had a rear seat. G.S. 20-137.1(a1).
- ☐ 5. While impaired. G.S. 20-138.1
- ☐ 6. Without being licensed [illegible] North Carolina G.S. 20-7(a)
- ☐ 7. While the defendant's [illegible] was revoked, G.S. 20-28, 33 [illegible] G.S. 20-28(a1)
- ☐ 8. While displaying an [illegible] to be expired. G.S. 20-111(2)
- ☐ 9. Without (displaying thereon a current approved inspection certificate) (having a current electronic inspection authorization for the vehicle), such vehicle requiring inspection in North Carolina. G.S. 20-183.8. Month Expired: _____
- ☐ 10. By failing to see before (starting) (stopping) (turning from a direct line) that such movement could be made in safety. G.S. 20-154.
- ☐ 11. By failing to stop at a duly erected (stop sign) (flashing red light). G.S. 20-158(b)(1), (b)(3).
- ☐ 12. By entering an intersection while a traffic signal was emitting a steady red circular light for traffic in defendant's direction of travel. G.S. 20-158(b)(2).
- ☐ 13. Without [illegible] required by G.S. 20-313 [illegible] (registered) [illegible] G.S. 20-313
- ☐ 14. (Possess an open container of) (Consume) an alcoholic beverage in the passenger area of a motor vehicle. G.S. 20-138.7(a1). [NOTE: *Strike "operate a (motor) vehicle" and "(public vehicular area)" above.*]
- ☐ 15. Without decreasing speed as necessary to avoid colliding with a (vehicle) (person). G.S. 20-141(m).
- ☑ 16. Display a Registration number plate knowing the same to be fictitious g.s 20-111(2)
- ☐ 17. And on or about the date and time shown above in the named county, the named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) (public vehicular area)

Date | Signature Of Officer

The named defendant has been arrested without a warrant and there is probable cause for the defendant's detention on the stated charges. This Magistrate's Order is issued upon information furnished under oath by the named officer. A copy of this Order has been delivered to the defendant.

Date | Signature Of Magistrate/Deputy/Assistant/CSC

COURT USE ONLY

District Attorney | Attorney For Defendant At Time Of Trial Or Plea | Appointed ☐ Retained ☐ Waived

PRIOR CONVICTIONS: No./Level: 0 ☐ I (9) ☐ II (1-4) ☐ III (5+)

MISD. CLASS: ☐ A1 ☐ 1 ☐ 2 ☐ 3 | MISD. CLASS: ☐ A1 ☐ 1 ☐ 2 ☐ 3 | ☐ V/D

PLEA: ☐ guilty/resp. ☐ no contest ☐ guilty/resp. ☐ no contest ☐ guilty/resp. ☐ not guilty/resp.

VERDICT/FINDING: ☐ guilty/resp. ☐ guilty/resp. ☐ not guilty/resp.

JUDGMENT: The defendant appeared in open court and freely, voluntarily and understandingly entered the above plea; on the above verdict/finding, it is ORDERED that the defendant: ☐ pay costs and a fine/penalty of $_____, ☐ be imprisoned for a term of _____ days in custody of the sheriff. Pretrial credit _____ days served. ☐ The Court finds that a ☐ longer ☐ shorter period of probation than specified in G.S. 15A-1343.2(d) is necessary. ☐ Execution of sentence is suspended and the defendant is placed on unsupervised probation for _____ months, subject to the regular conditions of probation and the following: ☐ (1) pay costs and a fine/penalty of $_____; ☐ (2) not operate a motor vehicle until properly licensed by DMV; ☐ (3) complete _____ hours of community service within _____ days and pay the fee; ☐ (4) Other: _____

☐ It is ORDERED that this: ☐ Judgment is continued upon payment of costs. ☐ case be consolidated for judgment with _____

☐ ☐ sentence is to run at expiration of sentence in _____. ☐ The Court finds just cause to waive costs as ordered on attached ☐ AOC-CR-618. ☐ Other: _____

☐ COMMITMENT: It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff and that the sheriff cause the defendant to be retained in custody to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☐ The defendant in open court, gives notice of appeal to the Superior Court. ☐ The current pretrial release order is modified as follows: _____

Signature Of District Court Judge | Date | I certify that this Judgment is a true copy. | Signature Of Deputy/Assistant/CSC | Date

AOC-CR-500, Rev. 1/18, © 2019 Administrative Office of the Courts

Printed on: 12/15/2022, 12:48 AM

Exhibit 9

File No.	Law Enforcement Case No.	LID No.	SID No.	FBI No.
22CR309439-540	2022-05261 LINCOLN COUNTY SHERIFFS OFFICE			

WARRANT FOR ARREST

THE STATE OF NORTH CAROLINA VS.

Name And Address Of Defendant
JAQUAVION MARQUIS ABRAMS
3176 KEISLER DAIRY RD

CONOVER NC 28613-9141
170 COUNTY (704) 678-1291

STATE OF NORTH CAROLINA

LINCOLN County

In The General Court Of Justice
District Court Division

Race	Sex	Date Of Birth	Age
B	M	11/22/2002	19

Social Security No./Tax ID No.	Drivers License No. & State
684-01-5756	41720058 NC

Name Of Defendant's Employer

Date Of Offense: 10/2/2022

☐ Misdemeanor Offense Which Requires Fingerprinting Per Fingerprint Plan

Date Of Arrest & Check Digit No. (as shown on fingerprint card)

Complainant (name, address or department)
Willie Armstrong
LINCOLN COUNTY SHERIFFS OFFICE
PO BOX 506
LINCOLNTON NC 28093
LINCOLN

Names & Addresses Of Witnesses (including counties & telephone nos.)

OFFENSE(S) *(see AOC-CR-100 Continuation(s) for charging text)*

Count No.	Offense	Offense in Violation Of G.S.	Offense Code
1	FLEE/ELUDE ARREST W/MV (F)	20-141.5(B)	5641
2	INJURING UTILITY WIRES/FIXTURE	14-154	2944
3	CARRYING CONCEALED GUN(M)	14-269(A1)	5240
4	RESISTING PUBLIC OFFICER	14-223	5310
5	RECKLESS DRIVING TO ENDANGER	20-140(B)	5446
6	HIT/RUN LEAVE SCENE PROP DAM	20-166(C)(1)	5584

TO ANY OFFICER WITH AUTHORITY AND JURISDICTION TO EXECUTE A WARRANT FOR ARREST FOR THE OFFENSE(S) CHARGED IN THIS WARRANT:
I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did commit the offense(s) set forth above and on the attached AOC-CR-100 Continuation(s), which is (are) incorporated by reference. This act(s) was in violation of the law referred to in this Warrant For Arrest. This Warrant For Arrest is issued upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring the defendant before a judicial official without unnecessary delay to answer the charge(s) above.

Date Issued	Name Of Issuing Official	Signature	
10/2/2022	Paige Beal		☒ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ District Court Judge ☐ Superior Court Judge

Location Of Court	Court Date	Court Time

WAIVER OF PROBABLE CAUSE HEARING

The undersigned defendant, with the consent of his/her attorney, waives the right to a probable cause hearing.

Date Waived	Signature Of Defendant	Name Of Attorney	Signature Of Attorney

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS Date Of Issuance Of Warrant For Arrest: 10/2/2022	NOTE: *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	

OFFENSES (continued)

Count 1. Offense: FLEE/ELUDE ARREST W/MV (F)

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully, willfully, and feloniously did operate a motor vehicle on a highway , N New NC 16 Hwy , while fleeing a law enforcement officer, W. Armstrong , in the lawful performance of the officer's duties Traffic Stop . At the time of the violation, the defendant was driving recklessly in violation of G.S./ 20-140, the defendant was speeding in excess of 15 miles per hour over the legal speed limit, the defendant was driving negligently leading to an accident causing property damage in excess of $1,000 .

Count 2. Offense: INJURING UTILITY WIRES/FIXTURE

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully, willfully, and feloniously did INJURING WIRES AND FIXTURES OF UTILITY COMPANIES G.S 14-154.

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-5
Name Of Defendant: JAQUAVION MARQUIS ABRAMS	NOTE: *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A*	
Date Of Issuance Of Warrant For Arrest: 10/2/2022		

OFFENSES (continued)

Count 3. Offense: CARRYING CONCEALED GUN(M)

Charging Text For This Count

On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did carry concealed about the defendant's person while c defendant's own premises a gun, Glock 26 Gen 5 9mm SN:AGGA200 .

Count 4. Offense: RESISTING PUBLIC OFFICER

Charging Text For This Count

On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did resist, delay, and obstruct W. Armstrong , a public o the office of Lincoln County Sheriff's Office , by running from vehicle after fleeing Law Enforcement . At the time, the officer was discharging and attempting to dis official duty by conducting a traffic stop .

Orginal

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS Date Of Issuance Of Warrant For Arrest: 10/2/2022	**NOTE:** *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	

OFFENSES (continued)

Count 5. Offense: RECKLESS DRIVING TO ENDANGER

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did operate a motor vehicle on a street or highway without due caution and circumspection and at a speed or in a manner so as to endanger persons or property. G.S. 20-140(b).

Count 6. Offense: HIT/RUN LEAVE SCENE PROP DAM

Charging Text For This Count
On or about the date of offense shown and in the county named above the defendant unlawfully and willfully did at the scene of an accident and collision occurring 3490 N OLIVERS RD NEWTON NC 28658 , in which the vehicle driven by the defendant was involved, fail to give the defendant's name, address, driver's license number, and license plate number to the driver and occupants of the vehicle involved in the accident and collision . The defendant knew and reasonably should have known that the vehicle the defendant was operating was involved in the accident and collision. The accident and collision had resulted in property damage POWER POLE, ENERGY WIRES, AND RESIDENTIAL FENCE .

Original

STATE VERSUS	LINCOLN County	File No 22CR309439-540
Name Of Defendant JAQUAVION MARQUIS ABRAMS	**NOTE:** *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	
Date Of Issuance Of Warrant For Arrest 10/2/2022		

OFFENSES (continued)

Count 7. Offense:

Charging Text For This Count

Count 8. Offense:

Charging Text For This Count

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS Date Of Issuance Of Warrant For Arrest: 10/2/2022	**NOTE:** *Use this page to set forth the charging text for each offense listed on the AOC-CR-100. G.S. 15A-924(a)(5).*	

OFFENSES (continued)

Count 9. Offense:

Charging Text For This Count

Count 10. Offense:

Charging Text For This Count

Original

Printed on: 12/15/2022, 12:48 AM

STATE VERSUS

LINCOLN County

File No. 22CR309439-540

Name Of Defendant
JAQUAVION MARQUIS ABRAMS

Date Of Issuance Of Warrant For Arrest
10/2/2022

If the Warrant For Arrest is not served within one hundred and eighty (180) days, it must be returned to the Clerk of Court in the county in which it was issued with the reason for the failure of service noted thereon.

RETURN OF SERVICE

I certify that the Warrant For Arrest issued in this case on the date noted above for the defendant named above, was received and served as follows:

Date Received	*Date Served*	*Time Served*	*Date Returned*
12/15/2022	12/15/2022	1249 AM	12/15/2022

☒ By arresting the defendant and bringing the defendant before:

Name Of Judicial Official
Magistrate - Tyrone Jotner

☐ The Warrant WAS NOT served for the following reason:

Signature Of Officer Making Return
TB Hatch

Name Of Officer (type or print)
TB Hatch

Department Or Agency Of Officer
Greensboro Police Department

REDELIVERY/REISSUANCE

Date	*Name Of Clerk (type or print)*	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

RETURN FOLLOWING REDELIVERY/REISSUANCE

I certify that the Warrant For Arrest issued in this case on the date noted above for the defendant named above, was received and served as follows:

Date Received	*Date Served*	*Time Served*	*Date Returned*

☐ By arresting the defendant and bringing the defendant before:

Name Of Judicial Official

☐ The Warrant WAS NOT served for the following reason:

Signature Of Officer Making Return

Name Of Officer (type or print)

Department Or Agency Of Officer

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant: JAQUAVION MARQUIS ABRAMS	**NOTE:** *Use this page to enter judgment on a Warrant For Arrest. Use this Judgment page only if imposing a single, consolidated judgment for all offenses of conviction charged under this file number. Do not use this Judgment page to impose sentence: (i) if imposing separate judgments for separate offenses of conviction charged under this file number; (ii) to impose supervised probation; or (iii) for DWI sentences under G.S. 20-179. For DWI, use AOC-CR-342 (active) or AOC-CR-310 (probation). For structured sentencing offenses, use AOC-CR-602 (active) or AOC-CR-604 (probation).*	
Date Of Issuance Of Warrant For Arrest: 10/2/2022		

JUDGMENT

District Attorney	☐ Def. Waived Attorney ☐ Def. Found Not Indigent ☐ Def. Denied Appointed Counsel	Attorney For Defendant	☐ Appointed ☐ Retained	PRIOR CONVICTIONS: No./Level: 0 ☐ I (0) ☐ II (1-4) ☐ III (5+)

OFFENSES: The following offenses, which are set forth by Count No. in the Warrant For Arrest issued in this case on the date noted above for the defendant named above, are the subject of this Judgment:

Count 1	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 2	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 3	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 4	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 5	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 6	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 7	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 8	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 9	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3
Count 10	**PLEA:** ☐ guilty ☐ not guilty ☐ no contest _____	**VERDICT:** ☐ guilty ☐ not guilty _____	M.CL.: ☐ A1 ☐ 1 ☐ 2 ☐ 3

(Over)

Original

STATE VERSUS	LINCOLN County	File No. 22CR309439-540
Name Of Defendant JAQUAVION MARQUIS ABRAMS	**NOTE:** *Use this Judgment page only if imposing a single, consolidated judgment for all offenses of conviction charged under this file number. Do not use this Judgment page to impose sentence: (i) if imposing separate judgments for separate offenses of conviction charged under this file number; (ii) to impose supervised probation; or (iii) for DWI sentences under G.S. 20-179. For DWI, use AOC-CR-342 (active) or AOC-CR-310 (probation). For structured sentencing offenses, use AOC-CR-602 (active) or AOC-CR-604 (probation).*	

JUDGMENT (continued)

JUDGMENT: The defendant appeared in open court and freely, voluntarily and understandingly entered the plea(s) on Side One. On the verdict(s) from Side One, it is **ORDERED** that all offenses of conviction, if more than one, be consolidated for judgment with Count No. _____ *(list count of lead offense)* and that the defendant:

☐ pay the following fine/penalty and costs:

Amount Of Fine/Penalty	*Costs*
$	$

☐ be imprisoned for a term of _____ days in custody of the ☐ sheriff. ☐ MCP. ☐ Other:* _____. Pretrial credit _____ days served.

☐ Work release ☐ is recommended. ☐ is not recommended. **(NOTE:** *To order work release, use form AOC-CR-602 to impose judgment.)*

☐ The Court finds that a ☐ longer ☐ shorter period of probation than that which is specified in G.S. 15A-1343.2(d) is necessary.

☐ Execution of the sentence is suspended and the defendant is placed on unsupervised probation* for _____ months, subject to the following conditions:

1. commit no criminal offense in any jurisdiction. 2. possess no firearm, explosive or other deadly weapon listed in G.S. 14-269.
3. remain gainfully and suitably employed, or faithfully pursue a course of study or of vocational training that will equip the defendant for suitable employment and abide by all rules of the institution.
4. satisfy child support and family obligations, as required by the Court. 5. Submit to the taking of digitized photographs, including photographs of the defendant's face, scars, marks, and tattoos, to be included in the defendant's records. 6. pay to the Clerk the costs of court and any additional sums shown below.

Costs	*Fine*	*Restitution***	*Attorney's Fee*	*Community Service Fee*	*Other*	*Total Amount Due*
$	$	$	$	$	$	$

***Name(s), address(es), and amount(s) for aggrieved party(ies) to receive restitution: (NOTE TO CLERK:** *Record SSN or Tax ID No. of aggrieved party(ies) on AOC-CR-382, "Certification Of Identity (Victims' Restitution)/ Certification Of Identity (Witness Attendance).")*

☐ 7. complete _____ hours of community service during the first _____ days of probation, as directed by the judicial services coordinator, and pay the fee prescribed by G.S. 143B-708 within _____ days.

☐ 8. not be found in or on the premises of the complainant or _____.

☐ 9. not assault, communicate with or be in the presence of the complainant or _____.

☐ 10. provide a DNA sample pursuant to G.S. 15A-266.4. (AOC-CR-319 required)

☐ 11. Other: _____

☐ The Court finds just cause to waive costs as ordered on attached ☐ AOC-CR-415. ☐ AOC-CR-618. ☐ Other: _____.

It is **ORDERED** that this: ☐ Judgment is continued upon payment of costs.
☐ case be consolidated for judgment with _____.
☐ sentence is to run at the expiration of the sentence in _____.

☐ **COMMITMENT:** It is **ORDERED** that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff and that the sheriff cause the defendant to be retained in custody to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

PROBABLE CAUSE: ☐ Probable cause is found as to all Counts except _____, and the defendant is bound over to Superior Court for action by the grand jury.
☐ No probable cause is found as to Count(s) _____ of this Warrant and the Count(s) is dismissed.

Date	*Name Of District Court Judge Or Magistrate (type or print)*	*Signature Of District Court Judge Or Magistrate*

APPEAL ENTRIES

☐ The defendant, in open court, gives notice of appeal to the ☐ District ☐ Superior Court.

☐ The current pretrial release order is modified as follows: _____

Date	*Name Of District Court Judge Or Magistrate (type or print)*	*Signature Of District Court Judge Or Magistrate*

CERTIFICATION

I certify that this Judgment is a true and complete copy of the original which is on file in this case.	*Date*	*Date Delivered To Sheriff*	*Signature*	☐ *Dep CSC* ☐ *Asst CSC* ☐ *Clerk Of Superior Court*

Original

Exhibit 10

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name And Address Of Defendant

Race	*Sex*	*Date Of Birth*

MISDEMEANOR STATEMENT OF CHARGES

G.S. 15A-922

Count No.	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.

CHARGING LANGUAGE

I, the undersigned, upon information and belief allege that on or about the date(s) of offense shown and in the county named above, the defendant named above did unlawfully and willfully

☐ See additional information on reverse.

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

NOTE TO PROSECUTOR: *For a multi-page statement of charges, complete the signature line on the last page.*

(Over - See Side Two for Prosecutor's continuation, if applicable, of CHARGING LANGUAGE section)

STATE VERSUS	File No.
Name Of Defendant	

CHARGING LANGUAGE (continued)

I, the undersigned, upon information and belief allege that on or about the date(s) of offense shown and in the county named above, the defendant named above did unlawfully and willfully

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

N.C.P.I -Crim 100.22
INTRODUCTORY REMARKS.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

100.22 INTRODUCTORY REMARKS.

NOTE WELL: This is a suggestive model and the judge can modify as deemed appropriate

Adapted From: NORTH CAROLINA TRIAL JUDGES' BENCH BOOK, SUPERIOR COURT, VOL 1 (Criminal), Appendix, Pretrial Section at pp. 38-40 (3rd ed.) (Institute of Government 1999) (out of print)

I want to welcome those of you who have been selected to serve as jurors for this criminal session of Superior Court in _____ County.

Let me introduce myself. I am _____. I am a Judge of the Superior Court. I live in _____in _____ County and I have been assigned to preside at this session of Superior Court in your county by the Chief Justice of the Supreme Court of North Carolina.

In order that you will know the court personnel with whom you will be working, and their respective duties. I will introduce them to you at this time.

The Deputy (Assistant) Clerk of Superior Court is _____. She (He) administers oaths to witnesses and keeps the court's records.

The Court Reporter is _____. She (He) takes down and transcribes everything that is said in the courtroom during a trial and upon hearing of the various motions.

The Bailiff is _____. She (He) enforces the court's orders and is in charge of the jury while it is away from the courtroom. If you desire

N.C.P.I -Crim 100.22
INTRODUCTORY REMARKS.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

at any time to inquire of any matters touching on your personal welfare apart from the case that is being tried, you should address your inquiries to the bailiff who will, if necessary, arrange for me to hear you on such matters.

In order to minimize noise and confusion in the courtroom, I am going to ask that all jurors, witnesses, defendants, and spectators remain seated while court is in session.

This call upon your time does not come frequently and may never be repeated in your lifetime. It is one of the obligations of citizenship. It represents your contribution to our democratic way of life. It is an assurance of your guarantee that if chance or design brings you to a court of law in any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice and protected by the same considerations that you discharge here in your duties as jurors.

You are being asked to perform one of the highest duties that can be imposed on any citizen, and that is to sit in judgment on the facts which will determine and settle disputes among your fellow citizens. Trial by jury is a right guaranteed to every citizen.

After you have been selected as a juror and have qualified by taking the oaths, you become the sole judges of the weight to be given any evidence and the credibility of each witness. Any decision agreed to by all twelve jurors which is free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment, based on credible evidence, and in accord with the court's instructions, becomes a final result in a case.

N.C.P.I -Crim 100.22
INTRODUCTORY REMARKS.
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N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

You will become, in effect, officers of the court. It is my duty to see that the trial is conducted in accord with the rules of law that prescribe trial procedure, to rule on points of evidence, to maintain order, to preserve decorum, and to instruct you on the law that you are to apply to the facts as you find the facts to be.

You must understand that neither the court, nor the parties, nor the witnesses, nor the lawyers, may have any private contact or conversation with you during this week.

Your entry upon this service will impose upon you important duties and grave responsibilities. It requires that you be prompt in attendance, attentive to your duties, faithful to your oaths, considerate and tolerant of your fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions.

It is the public policy of North Carolina that all qualified citizens, without exception, serve as jurors. To be eligible to serve as a juror you must be a citizen of North Carolina and resident of _____ County, at least 18 years of age, physically and mentally competent, able to understand the English language, and not have been convicted of a felony nor have pleaded guilty (unless your citizenship has been restored), not have been adjudged incompetent, not have served on a trial jury in the state courts during the last two years, and not have served a full term of service on a grand jury during the last six years.

I recognize that each of you will be inconvenienced by serving on the jury for this week, and every effort will be made to see that your time is not wasted. When it can be foreseen that you will not be needed in the

courtroom for an extended period, you will be released and given a definite time to return. Please return promptly at the specified time.

I realize that there may be instances when service as a juror would be more than merely inconvenient and would constitute a great hardship. Under these circumstances you may have your service as a juror deferred to a later time by the court.

You have previously had the opportunity to present to a judge of the District Court any reason you feel you should not serve. I realize, however, that situations may have arisen since then that you feel entitle you to defer your service. Before hearing any requests for deferring service because of hardship, however, I would remind you, first, that your services are needed at this session of court; second, that jury service is a duty of citizenship and for that reason no qualified persons are exempt from jury service; and third, that if the court excuses you at this time, you will be required to serve at a later session.

If any of you who has been summoned for jury service would now like to request that your jury service be deferred until a later court session, please raise your hand/stand at this time.

Please approach the bench (one at a time) OR Please state your reason for request for deferral. (*Note: It is a good idea to have these deferrals done on the record and not at the bench.*)

Rule on the deferment, then have clerk swear remaining jurors.

N.C.P.I -Crim 100.21
REMARKS TO PROSPECTIVE JURORS AFTER EXCUSES HEARD.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

100.21 REMARKS TO PROSPECTIVE JURORS AFTER EXCUSES HEARD.

NOTE WELL: This is a suggestive model and the judge can modify as deemed appropriate

Source: NORTH CAROLINA TRIAL JUDGE'S BENCH BOOK, SUPERIOR COURT. VOL. 1 (Criminal), Appendix, Pretrial Section at pp. 41-42 (3rd ed.) (Institute of Government 1999)

Ladies and Gentlemen, because of your special status as jurors, it is important that you remember that during this week of court it is your duty not to talk among yourselves about the proceedings in this court or about the cases here for trial and not to talk with any of the parties, any of the witnesses or any of the lawyers about the cases set for trial, or to engage in any type of conversation with them even if it is only to pass the time of day.

The State of North Carolina and the parties in the cases to be tried this week are entitled to jurors who approach their cases with open minds and who agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice or sympathy, and must not be influenced by preconceived ideas either as to facts or as to the law. You must not form an opinion or express an opinion about any of the cases until you are deliberating in the jury room.

During jury selection, the court and the lawyers will ask you questions. These questions are not designed to pry into your personal affairs, or to cause you any personal discomfort. The questions are designed to discover if you have any knowledge of the case to be tried, if you have any preconceived opinion that you cannot lay aside, or if you have any experience that might cause you to identify yourself with either party in a

case. These questions are necessary to assure each party an impartial jury.

There may have been some publicity in a case at the time it happened or since then. You must not permit anything you have read or heard or seen to influence your verdict, because what you have read, heard or seen was not under oath at this trial. It is not evidence. None of you would want to be tried based on what was reported by others outside the courtroom. Being fair-minded persons, certainly none of us would rely on that kind of information in the trial of a case. You must exclude all that you have seen, heard or read and render a verdict based solely on the evidence brought out in court and the law I give you in my charge or instructions.

You may not let your present opinion or information influence your decision in a case or let it prevent you from rendering any proper verdict required by the facts and the law. The test for qualification for jury service is not the private feelings of a juror; rather, it is whether the juror can honestly set aside any such feelings, fairly consider the law and evidence, and impartially determine the issues.

In the process of selecting a jury, jurors may be excused by the court for cause if there is a valid reason why he or she cannot serve. In addition, counsel on each side may excuse a limited number without giving a reason for doing so.

If you are excused by one of the lawyers from serving on the jury, you should not be concerned about that or be upset with the lawyer who excused you. The fact that a lawyer may excuse you in one case does not mean that the same lawyer will object to your serving as a juror in another case which is called for trial.

N.C.P.I -Crim 100.21
REMARKS TO PROSPECTIVE JURORS AFTER EXCUSES HEARD.
JUNE 2015
N.C. Gen. Stat. §§ 15A-622(h), 15A-623(h)

I hope you will enjoy your week of jury service. You should not be scared or afraid of serving as a juror. We ask no more of you this week than that you use the same good judgment and common sense that you used in handling your own affairs last week and that you will use in the handling of your own affairs in the weeks to come.

I also hope that these introductory remarks will serve to make you feel at ease here and that they will impress upon you the importance of jury service, acquaint you with what will be expected of you, and strengthen your will and desire to enter upon your duties with the determination to discharge them honorably.

Optional additional topics:

- Court will try to be efficient in its work and in use of jurors' time.

- Court is no assembly line; it does not deal with inanimate objects, but with people.

- Certain seats are set aside for jury use.

- Jurors' badges should be worn at all times.

- Jury telephone call-back service.

- Recesses.

- Chambers matters (*i.e.*, judge is working even when not on bench).

- When jurors excused (certain proceedings must take place out of jurors' presence).

STANDARD REMARKS TO JURORS (CRIMINAL)

Remarks to Jurors Before Selection of Jury in a Specific Case

Source: NORTH CAROLINA TRIAL JUDGES' BENCH BOOK, SUPERIOR COURT, VOL. 1 (Criminal), Appendix, Pretrial Section at pp. 35-36 (3rd ed.) (Institute of Government 1999

I address myself now to all of you who have been selected and sworn to serve as jurors at this session of Superior Court in _____ County.

The District Attorney has now called for trial the case(s) entitled "The State of North Carolina versus_____(name of defendant)_____.

I inform you that the defendant(s) in this case is(are) _____.

With the defendant(s) is (are) his (her) (their) attorney(s), _____.

At the other table is the (Assistant) District Attorney, _____, the lawyer for the State of North Carolina.

The defendant(s) has/have been charged with _____. The offense is alleged to have occurred on or about _____.

The alleged victim of the offense is _____.

The defendant(s) has/have entered a plea of not guilty (and has/have given notice of the affirmative defense of _____).

After a jury has been selected and impaneled in this case, you will hear the evidence. The evidence is presented according to certain rules of law. The judge enforces those rules and determines what evidence may be admitted.

After all of the evidence has been presented and after you have listened to the arguments of counsel, I will instruct you as to all of the law that you are to apply to the evidence in this case. It is your duty to apply the law as I will give it to you, and not as you think the law is, or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied in each such case.

At this point you are not expected to know the law. Counsel should not question you about the law except to ask whether you will accept and follow the law as given by the court.

I now want to tell you a few preliminary things about the law in a criminal case.

The defendant(s) has/have entered a plea of "not guilty." Under our system of justice, a defendant who pleads "not guilty" is not required to prove his (her) innocence but is presumed to be innocent. This presumption remains with a defendant throughout the trial until the jury selected to hear the case is convinced, from the facts and the law, beyond a reasonable doubt of the guilt of the defendant.

The burden of proof is on the State to prove to you that the defendant(s) is/are guilty beyond a reasonable doubt. [A reasonable doubt is not a vain or fanciful doubt. It is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.]

[There is no burden or duty of any kind on the defendant. The mere fact that the defendant has been charged with a crime is no evidence of guilt. A charge is merely the mechanical or administrative way by which any person is brought to a trial.]

If the State proves guilt beyond a reasonable doubt, then the function of this jury by its verdict is to say "guilty." If the State fails to prove guilt, or you have a reasonable doubt, then, of course, you must say "not guilty."

(At this point the court may wish to initiate questioning of the jurors concerning their fitness and competency to serve.)

Now, ladies and gentlemen, the (Assistant) District Attorney and counsel for the defendant(s) will have the opportunity to ask you certain questions. I would ask them that whenever possible questions be asked to the group collectively and that they be discreet and reasonable in their questions.

NOTICE TO ATTORNEYS CONCERNING JURY SELECTION

Counsel are expected to familiarize themselves prior to trial with the provisions of G.S. 15A-1214 and related case law pertaining to jury selection. During the course of jury selection, counsel should anticipate that those provisions will be enforced, including, but not limited to the following:

1. **The purpose of the jury selection process is to provide reasonable opportunity for counsel to satisfy themselves and the people they represent that prospective jurors meet the qualifications required by law, can and will serve as fair and impartial jurors throughout the trial of the matter, decide the case based upon the evidence presented in the courtroom and follow the law as instructed by the court.**
2. **Counsel should not attempt to use the jury selection process for purposes of:**
   - **(a) Visiting with or seeking to establish rapport with the jurors;**
   - **(b) Indoctrinating the jurors to a particular view;**
   - **(c) Arguing the case during questioning; or**
   - **(d) Asking what kind of verdict they would render under certain circumstances.**
3. **General questions should be addressed to the jury panel as a whole and counsel should seek to avoid undue repetition arising from asking the same questions to each individual juror. Counsel may address jurors individually when asking questions that apply only to that person, questions prompted by affirmative answers to general questions, or questions relating to unique personal experiences of that juror. *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980).**
4. **Examples of *improper* questions from counsel during jury *selection that will not be permitted* include:**
   - **(a) Hypothetical questions tending to "stake out" the juror or elicit in advance what a juror's decision will be, given certain facts. *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975); *State v. Hunt*, 37 N.C. App. 315, 246 S.E.2d 159 (1978). Examples of improper hypotheticals include:**
     - **(1) Asking a juror how he would weight a particular mitigating or aggravating circumstance. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995);**
     - **(2) "If you were to find that the defendant had previously been convicted of a murder, could you still follow the judge's instructions..." *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994);**
     - **(3) "If I choose not to put on a defense, would you hold that against me..." *State v. Blankenship*, 337 N.C. 543, 447 S.E. 727 (1994) *as distinguished from* "If the defendant chooses not to testify..."**

(b) Questions that include an incorrect statement of law. *State v. Hedgepeth,* 66 N.C. App. 390, ___ S.E.2d ___ (1984)

(c) Questions of law posed to a juror (the jurors are not expected to know the law until receiving instructions from the court).

(d) Questions about parole eligibility. *State v. Payne,* 337 N.C. 505, 448 S.E.2d 93 (1994); *State v. Smith,* 347 N.C. App. 453, 496 S.E.2d 841 (1995)

(e) Questions about capital punishment as a deterrent to crime or other legislative policy issues. *State v. Ali,* 329 N.C. 394, 407 S.E.2d 183 (1991)

(f) Questions concerning juror perceptions of the meaning of life imprisonment.

5. Counsel are properly permitted to ask questions reasonably directed toward determining that the juror has formed no opinion as to the guilt or innocence of the defendant, can fairly and impartially discharge the duties of a juror and can follow the law as instructed by the court. Such questions include, for example:

(a) Asking jurors if they can follow the law as provided by the court regarding particular trial issues. *State v. Hedgepeth,* 66 N.C. App. 390, ___ S.E.2d ___ (1984);

(b) "Death qualifying" questions, asking whether a juror's views about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. 412 (1985); *State v. Brown,* 327 N.C. 1, ___ S.E.2d ___ (1990);

(c) "Non-death qualifying" questions, asking prospective jurors as to whether they would automatically vote for the death penalty following conviction of first degree murder, without regard to the existence of mitigating circumstances. *Morgan v. Illinois,* 504 U.S. 719 (1992); *State v. Fletcher,* 348 N.C. 292, ___ S.E.2d ___ (1998)

6. The Court shall determine, in the exercise of discretion, whether to require that *voir dire* be conducted solely by one of defendant's two co-counsel, or to permit alternation of questions between counsel at appropriate intervals. *State v. Fullwood,* 343 N.C. 725, ___ S.E.2d ___ (1996).

STATE OF NORTH CAROLINA

COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NUMBER 00 CR 10369

STATE OF NORTH CAROLINA

VS

KOVA DUAN WRIGHT

****

JUROR RESPONSIBILITIES

As a juror selected in the above captioned case, I understand that I have these duties and responsibilities:

1. I will serve for the duration of the case. During the trial of this case, I will pay attention to the evidence and I will base my verdict on the evidence as presented in court and on the law as instructed by the presiding judge.

2. I will not talk with any fellow juror about the case until instructed by the judge. I understand that the only place this case may be talked about is in the jury room, and then only after the jury has begun deliberations, after hearing all of the evidence, closing arguments by the attorneys and instructions on the law from the Judge.

3. I will not talk about this case with anyone else, or allow anyone else to talk with me or say anything in my presence about this case, until the case has concluded. If anyone communicates or attempts to communicate with me or in my presence about this case, I will notify the presiding Judge of that fact immediately.

4. I will not form an opinion about the case, nor will I express to anyone any opinion about the case, until the presiding Judge has to the jury to begin its deliberations.

5. I will not read, watch, or listen to any media accounts of the jury selection or the trial.

6. I will not go to the scene where the events of this trial are alleged to have taken place, nor will I attempt to personally investigate any aspect of the case.

In the event anyone seeks to talk to me about the case or if I have a personal emergency, I will bring that matter to the attention of the courtroom baliff as soon as possible. The bailiff will bring it to the attention of the judge.

Juror's signature: _____

Printed name of juror: _____

Telephone: *Home:* _____ *Office:* _____

BATSON CHECKLIST

INFORMATION NEEDED TO MAKE A BATSON DETERMINATION

1. Take note of the apparent race and sex of each juror as each juror is called into the jury box.

2. Take note of the apparent race and sex of each attorney in the case, the defendant, the judge and as many of the potential witnesses as possible.

3. Keep track of each peremptory challenge exercised by each side, noting apparent race and sex of the jurors excused.

4. Keep track of each challenge for cause allowed, noting the apparent race and sex of the jurors excused.

5. Keep track of the apparent race and sex of the jurors for which no challenge has been exercised.

6. Pay attention to the answers given by potential jurors to questions asked by the attorneys so as to form an impression as to the legitimacy of any racially neutral reasons for exercising peremptory challenges.

7. Take note of any questions posed by the attorneys tending to indicate any pattern of racial motivation for exercise of peremptory challenges.

8. Taking into consideration each of the factors listed above, look for any pattern that might point toward purposeful discrimination.

9. During any *Batson* hearing, make note of the reasons given by Prosecutor (or Defense Attorney) for the exercise of a peremptory challenge.

PROCEDURE FOR DETERMINING *BATSON* OBJECTION

1. Ask objecting party to state the basis for *Batson* objection

2. Allow opposing counsel to respond to the objection

3. Initial ruling must determine:
   a. Whether objecting party has established a *Batson* issue (is there sufficient evidence of a "protected class"? *Do not take judicial notice of race of individuals in question, do not rely on court reporter to note race of individuals*).
   b. Whether objecting party has established a prima facie case that the peremptory challenge was exercised on the basis of race or gender.

4. If there is a prima facie showing, allow opposing counsel an opportunity to provide racially neutral reasons for the exercise of the peremptory challenge. *YOU WILL NOT SWEAR WITNESSES OR RECEIVE EVIDENCE ON THESE POINTS, BUT YOU WILL MAKE DETERMINATIONS OF CREDIBILITY OF COUNSEL AS THEY MAKE THEIR STATEMENTS.*

5. Allow an opportunity for rebuttal by objecting party.

6. Make your determination, using the attached Sample Batson order.

SAMPLE BATSON ORDER

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. ____ CRS _____

STATE OF NORTH CAROLINA

VS.

_____,
Defendant

This matter was heard in open Court upon the State's attempt to exercise a peremptory challenge as to potential juror number ___, **Mr./Ms.** _____, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times the Defendant was present and represented by counsel.

Upon indication by counsel of the Batson issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the Batson objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The State then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the State for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT:**

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.

2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.

3. The Defendant in this case is **(black/white)**_____; the alleged victim in this case **is/was (black/white)**_____; the key witnesses in this case are **(black/white)**_____.

4. As of the time that the State attempted to exercise this peremptory challenge, _____ jurors had been accepted by the State, of which ____ are white and ____ are black.

5. As of the time that the State attempted to exercise this peremptory challenge, the State has exercised ____ prior peremptory challenges, of which ____ were of persons of the African American race.

6. Statements and questions of the State which tend to support an inference of discrimination in the jury selection process are:

7. Statements and questions of the State which tend to refute an inference of discrimination in the jury selection process are:

8. The State **has/has not** repeatedly used peremptory challenges against blacks so as to tend to establish a pattern of strikes against blacks in the venire.

9. The State **has/has not** used a disproportionate number of peremptory challenges to strike black jurors in this case.

10. The State's acceptance rate of potential black jurors does/does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant **has/has not** made a prima facie showing of discrimination in the jury selection process.

12. Because the Defendant has not made a prima facie showing of discrimination, no further findings are necessary.

OR

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

OR

12. In the exercise of discretion, the Court proceeds with consideration of racially neutral reasons for exercise of the peremptory challenge without first determining whether or not a prima facie case of discrimination has been shown. The reasons offered by the State were as follows:

13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

_____

_____

_____

_____

14. This Court **finds/does not find** the prosecutor to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.

15. In response to such reasons stated by the prosecutor, Defense counsel **has/has not** shown that the prosecutor's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has/has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. No determination has been made as to the presence or absence of sufficient racially neutral reasons for the State's exercise of a peremptory challenge as to this juror, as the Defendant has failed to make out a prima facie showing of discrimination in the jury selection process.

OR

1. Notwithstanding the fact that the Defendant has failed to make out a prima facie showing of racial discrimination in the jury selection process, the Court has, in the exercise of discretion, elected to proceed with consideration of racially neutral reasons provided by the State in connection with its attempt to exercise of this peremptory challenge.

OR

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the State for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:

_____

_____

_____

3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do/do not** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

IT IS THEREFORE ORDERED that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number ___, Mr./Ms._____, is **overruled/sustained** and the peremptory challenge is **allowed/denied.**

This Order is entered in open court, this the ____ day of _____, 199_.

_____

Superior Court Judge

NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 99 CVS 3239

ALFRED E. FORD, ADMINISTRATOR
Of the Estate of GERALDINE LORETTA
FORD, deceased,
Plaintiff

vs.

ROBERT C. RUPPENTHAL, M.D.
And THE NALLE CLINIC, INC.,
Defendants

***Batson* Order**

This matter was heard in open Court upon the Plaintiff's attempt to exercise a peremptory challenge as to potential juror number 11, **Mr.** William Bellamy, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times both parties were present and represented by counsel.

Upon indication by counsel of the Bats*on* issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the Batson objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The Plaintiff then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the Plaintiff for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT**:

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.
2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.
3. The Defendant in this case is **white**; the Plaintiff in this case **is black.** Plaintiff if represented by two counsel, one of which is white and one of which is black. Defendant's counsel is white.
4. As of the time that the Plaintiff attempted to exercise this peremptory challenge, 10 jurors had been accepted by both parties, of which 8 are white and 2 are black.

5. As of the time that the Plaintiff attempted to exercise this peremptory challenge, the Plaintiff had exercised 7prior peremptory challenges, all of which were of persons of the white race.

6. Statements and questions of the Plaintiff which tend to refute an inference of discrimination in the jury selection process are:

a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.

b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.

c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

7. The Plaintiff has repeatedly used peremptory challenges against whites so as to tend to establish a pattern of strikes against whites in the venire.

9. The Plaintiff has used a disproportionate number of peremptory challenges to strike white jurors in this case.

10. The Plaintiff acceptance rate of potential white jurors does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant has made a prima facie showing of discrimination in the jury selection process.

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.

b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.

c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

Defendant contended that the reasons given by Plaintiff's counsel were pretextual, saying that responses given by this potential juror were no different in substance than those given by many of the other jurors who were accepted by both parties.

14. This Court finds the Plaintiff's counsel to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.

15. In response to such reasons stated by Plaintiff's counsel, Defendant **has not** shown that Plaintiff's counsel's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the Plaintiff for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:
   a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.
   b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.
   c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

IT IS THEREFORE ORDERED that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number 11, Mr. William Bellamy, is **overruled** and the peremptory challenge is **allowed.**

This Order is entered in open court, this the 19th day of September, 2001.

_____

Superior Court Judge

N.C.P.I.-Crim 100.30
MAKING NOTES BY JURORS.
JUNE 2008
N.C. Gen. Stat. § 15A-1228

100.30 MAKING NOTES BY JURORS.

NOTE WELL: N.C. Gen. Stat. § 15A-1228 permits a jury in a criminal case to make notes and take them into the jury room (except where the judge on his own motion or the motion of a party rules otherwise in his discretion).[1]

[In my discretion, members of the jury, you will not be allowed to take notes in this case.]

[In this case, you will be allowed to take notes.

When you begin your deliberations, you may use your notes to help refresh your memory as to what was said in court. I caution you, however, not to give your notes or the notes of any of the other jurors undue significance. While taking notes, a juror may fail to hear important portions of testimony.

Any notes taken by you are not to be considered evidence in this case. Your notes are not an official transcript of the trial. For that reason, you must remember that in your jury deliberations notes are not entitled to any greater weight than the individual recollections of other jurors.

If you take notes, you may disclose them only to your fellow jurors during your deliberations. You are not to show them to anyone else. While I will permit you to take notes, I instruct you to listen intently at all times to the testimony.]

N.C.P.I.-Crim 100.30
MAKING NOTES BY JURORS.
JUNE 2008
N.C. Gen. Stat. § 15A-1228

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1. Absent a statute permitting or prohibiting note-taking by jurors, the majority of federal circuits have held that the decision lies in the discretion of the trial judge. That the decision should lie within the trial judge's discretion is supported by the fact that neither arguments for or against this issue are so dispositive and outweighing that note-taking should or should not be allowed as a matter of law. Those arguments favoring note-taking are that it is, "when done properly, . . . a valuable method of refreshing memory. In addition, note-taking may help focus jurors' concentration on the proceedings and help prevent their attention from wandering." *United States v. Maclean*, 578 F.2d 64, 66 (3rd Cir. 1978). Arguments against note-taking contend that too much significance will be placed on all matters "arbitrarily" excluded from the notes by the note-taker. Similarly, the few note-takers might dominate jury deliberations and even falsify testimony deliberately. Additionally, by busying themselves with note-taking, some believe that these jurors will miss important testimony. Finally, some simply believe that the "average" juror cannot take notes well and will therefore take notes of inconsequential and irrelevant matters while excluding the substantial issues of the case. *Id.*

Exhibit 19

EXHIBIT LIST

EXHIBIT #	DESCRIPTION	PURPOSE	AUTHENTICATED	OFFERED	ADMITTED	BIOLOGICAL?	WHO COLLECTED?	PRESERVE?
S-1	Photo- victim- alive	Illustrative	Sadler	Y	Y			
S-2	Photo - victim- dead	Illustrative	Stip	Y	Y			
S-3	Photo Robt Howard	Illustrative						
S-4	Statement to police fr Darlene White	Corroborative	White					
S-5	Photo- front porch of 926 Druid Cir	Illustrative	Burke	Y	Y			
S-6	Photo- view of crime scene from next door	Illustrative	Burke	Y	Y			
S-7	Photo- above w/ police cars	Illustrative	Burke	Y	Y			
S-9	Drawing of Druid & Edison	Illustrative	Oteka	Y	Y			
S-10	Photo of house where victim	Illustrative	Oteka	Y	Y			
S-11	Photo of Druid & Edison Sts	Illustrative	Oteka	Y	Y			
S-12	Photo of 922 Druid Cir	Illustrative	Hardin	Y	Y			
S-13	Photo - another view of 922	Illustrative	Hardin	Y	Y			
S-14	Photo- closeup of porch of	Illustrative	Hardin	Y	Y			

NOTICE TO ATTORNEYS CONCERNING CLOSING ARGUMENTS

Counsel are reminded of the provisions of G.S. 15A-1230 setting parameters for closing arguments, as well as the cases cited below. Jury arguments that violate these parameters will not be permitted in the trial of this case, with or without objection from opposing counsel. In the event of any doubt as to the propriety of a planned argument, counsel should address those concerns during the charge conference.

In closing arguments to the jury, an attorney shall not:

(1) become abusive,

(2) express his personal belief as to the truth or falsity of the evidence,

(3) express his personal belief as to which party should prevail, or

(4) make arguments premised on matters outside the record.

The trial court will monitor vigilantly the course of such arguments, intervene as warranted, entertain objections, and impose remedies pertaining to those objections. Such remedies include, but are not necessarily limited to, requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments. *State v. Jones,* 355 N.C. 117, ___ S,E2d ___ (1998).

EXAMPLES OF IMPROPER ARGUMENTS:

1. *Reference to notorious crimes; personally degrading remarks.* A prosecutor's reference to the "Columbine [school] shootings" and the "Oklahoma City bombing" as examples of national tragedies; degrading remarks against the defendant, saying "You got this quitter, this loser, this worthless piece of – who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly..." An argument containing these remarks was improper for three reasons: (1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice. *State v. Jones,* 355 N.C. 117, ___ S.E.2d ___ (1998).

2. *Expressing an opinion that a witness is lying.* "He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Golphin,* 352 N.C. 364, ___ S,E.2d ___ ( ).

3. *Reference to Defendant's failure to testify.* The prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State, but it is error for the prosecutor to comment directly on a defendant's right not to testify by stating, "'The defendant has not taken the stand in this case." *State v. Barden,* 356 N.C. 316, ___ S.E.2d ___ (2002).

4. *Urging jury to make an example of this defendant.* It is error for counsel for the state, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant. *State v. Phifer,* 197 N.C. 729, 150 S.E. 353 (1929).

5. *Urging the jury to follow community sentiment.* It is proper to tell the jury that they are the voice and conscience of the community, but it is improper to demand punishment because of community sentiment, asking the jury to lend an *ear* to the community rather than a *voice. State v. Scott,* 314 N.C. 309, 333 S.E.2d 296 (1985).

6. *Argument conveying perceived accountability of jury to the victim, the witnesses, the community, or society in general. State v. Boyd,* 311 N.C. 408, 319 S.E.2d 189 (1984).

EXAMPLES OF PROPER ARGUMENTS:

1. *Urging jury to disbelieve certain testimony.* Counsel are entitled to comment during closing argument on any contradictory evidence as the basis for the jury's disbelief of a witness' story. Where the record includes evidence contradicting the witness' statement, counsel may comment on the untruthfulness of that statement. *State v. Golphin,* 352 N.C. 364, ___ S.E.2d ___ ( ).

2. *Reminding jury of their duty to make a decision.* It is permissible for a prosecutor to argue that "the buck stops here" or that jurors had become "judges" or had become the "they" as in "they ought to do something". These statements correctly inform the jury that for purposes of the trial they have become representatives of the community and it is proper for them to act as the voice and conscience of the community, so as to temper the harshness of the law with the common sense judgment of the community. *State v. Scott,* 314 N.C. 309, 333 S.E.2d 296 (1985).

Tab 14
Guilty Pleas

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
(2) Determining that he understands the nature of the charge;
(3) Informing him that he has a right to plead not guilty;
(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
(5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
(6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1989, c. 280; 1993, c. 538, s. 10; 1994, Ex. Sess., c. 24, s. 14(b).)

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name Of Defendant		
DOB	*Age*	*Highest Level Of Education Completed*

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: *Use this section **ONLY** when the Court is rejecting the plea arrangement.*
☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file. *(Applies to plea arrangements disclosed on or after December 1, 2009.)*

Date	*Name Of Presiding Judge (type or print)*	*Signature Of Presiding Judge*

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☐ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

Answers

1. Are you able to hear and understand me? (1) _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? (2) _____
3. At what grade level can you read and write? (3) _____
4. (a) Are you now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances? (4a) _____
   (b) When was the last time you used or consumed any such substance? (4b) _____
   (c) How long have you been using or consuming this medication or substance? (4c) _____
   (d) Do you believe your mind is clear, and do you understand what you are doing in this hearing? (4d) _____
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge? (5) _____
6. (a) Have you and your lawyer discussed the possible defenses, if any, to the charges? (6a) _____
   (b) Are you satisfied with your lawyer's legal services? (6b) _____
7. (a) Do you understand that you have the right to plead not guilty and be tried by a jury? (7a) _____
   (b) Do you understand that at such trial you have the right to confront and to cross examine witnesses against you? (7b) _____
   (c) Do you understand that by your plea(s) you give up these and other important constitutional rights to a jury trial? (7c) _____
8. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law? (8) _____

☐ 9. Do you understand that upon conviction of a felony you may forfeit any State licensing privileges you have in the event that your probation is revoked? (9) _____

10. Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal? (10) _____
11. Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved? (11) _____

(Over)

12. Do you understand that you are pleading ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges shown below? *(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)* (12) _____

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punishment

☐ See attached AOC-CR-300A, for additional charges.

*G = Guilty GA = *Alford* plea NC = No Contest

TOTAL MAXIMUM PUNISHMENT

MANDATORY MINIMUM FINES & SENTENCES *(if any)*

✓ **NOTE TO CLERK:** *If this column is checked this is an added offense or reduced charge.*

‡ **NOTE:** *Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

13. Do you now personally plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges I just described? (13) _____

14. ☐ (a) Are you in fact guilty? (14a) _____

☐ (b) *(no contest plea)* Do you understand that, upon your plea of no contest, you will be treated as being guilty whether or not you admit that you are in fact guilty? (14b) _____

☐ (c) *(*Alford *guilty plea)*

(1) Do you now consider it to be in your best interest to plead guilty to the charges I just described? (14c1) _____

(2) Do you understand that, upon your "*Alford* guilty plea," you will be treated as being guilty whether or not you admit that you are in fact guilty? (14c2) _____

☐ 15. *(Use if aggravating factors are listed below)* Have you admitted the existence of the following aggravating factors: (15) _____

_____

_____

_____,

have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors?

☐ 16. *(Use if sentencing points are selected below)* Have you admitted the existence of the following sentencing points not related to prior convictions: ☐ offense committed while on supervised or unsupervised probation, parole, or post-release supervision ☐ offense committed while serving a sentence of imprisonment ☐ offense committed while on escape from a correctional institution, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with the appropriate notice about these sentencing points? (16) _____

☐ 17. *(Use if No. 15 or 16 selected above)* Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination? (17) _____

18. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (18) _____

19. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (19) _____

STATE VERSUS	File No.
Name Of Defendant	

20. Have you agreed to plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) _____

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (22) _____

23. Do you now personally accept this arrangement? (23) _____

24. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (24) _____

25. Do you enter this plea of your own free will, and do you fully understand what you are doing? (25) _____

26. Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence? (26) _____

27. Do you have any questions about what has just been said to you or about anything else connected to your case? (27) _____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		*Date*
Date	*Signature*	*Signature Of Defendant*
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*		*Name Of Defendant (type or print)*

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charges to which the defendant is pleading, and the aggravating and mitigating factors and prior record points for sentencing, if any.

Date	*Name Of Lawyer For Defendant (type or print)*	*Signature Of Lawyer For Defendant*

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charges in this case.

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

(Over)

PLEA ADJUDICATION

Upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that:

1. There is a factual basis for the entry of the plea *(and for the admission as to aggravating factors and/or sentencing points)*;
2. The defendant is satisfied with his/her lawyer's legal services;
3. The defendant is competent to stand trial;
4. ☐ The State has provided the defendant with appropriate notice as to the aggravating factors and/or points; ☐ The defendant has waived notice as to the aggravating factors and/or points; and
5. The plea *(and admission)* is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea *(and admission)* is hereby accepted by the Court and is ordered recorded.

Date	*Name Of Presiding Judge (type or print)*	*Signature Of Presiding Judge*

SUPERIOR COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

DISTRICT COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

CERTIFICATION BY PROSECUTOR

The undersigned prosecutor enters a dismissal to the above charges pursuant to a plea arrangement shown on this Transcript Of Plea.

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

Discussion Problem 1:

Judge:	Counselor, I understand that your client Ms. Jones is prepared to plead guilty to felony possession of cocaine. Is that correct?
Defense lawyer:	Yes your honor.
Judge:	Ms. Jones, is it your intention to plead guilty to this crime?
Defendant:	Yes, Sir.
Judge:	Is there is a plea agreement?
Defense lawyer:	No Sir.
Defendant:	No Sir.
Judge:	Ms. Jones, have you completed the Transcript of Plea form with your lawyer?
Defense lawyer:	Yes, she has your honor.
Judge:	Ms. Jones, did you personally complete this form?
Defendant:	Yes, Sir.
Judge:	Is it signed?
Defense lawyer:	Yes.
Judge:	Okay, hand up the form.

[The attached form is handed up. The judge reviews it and sees that it has been completed properly]

Judge:	Okay, everything is in order. Mr. Prosecutor, let's hear the factual basis so that I can take this plea.

STATE OF NORTH CAROLINA

File No. 18-CRS-108854

Orange County

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

STATE VERSUS

Name Of Defendant		
Janet Mc//house Jones		
DOB	Age	Highest Level Of Education Completed
3/6/65	53	8th

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: *Use this section **ONLY** when the Court is rejecting the plea arrangement.*
☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file. *(Applies to plea arrangements disclosed on or after December 1, 2009.)*

Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☒ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

	Answers
1. Are you able to hear and understand me?	(1) Yes
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?	(2) Yes
3. At what grade level can you read and write?	(3) 8th
4. (a) Are you now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances?	(4a) No
(b) When was the last time you used or consumed any such substance?	(4b) N/A
(c) How long have you been using or consuming this medication or substance?	(4c) N/A
(d) Do you believe your mind is clear, and do you understand what you are doing in this hearing?	(4d) Yes
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?	(5) Yes
6. (a) Have you and your lawyer discussed the possible defenses, if any, to the charges?	(6a) Yes
(b) Are you satisfied with your lawyer's legal services?	(6b) Yes
7. (a) Do you understand that you have the right to plead not guilty and be tried by a jury?	(7a) Yes
(b) Do you understand that at such trial you have the right to confront and to cross examine witnesses against you?	(7b) Yes
(c) Do you understand that by your plea(s) you give up these and other important constitutional rights to a jury trial?	(7c) Yes
8. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law?	(8) Yes
☐ 9. Do you understand that upon conviction of a felony you may forfeit any State licensing privileges you have in the event that your probation is revoked?	(9) Yes
10. Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?	(10) Yes
11. Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved?	(11) Yes

(Over)

12. Do you understand that you are pleading ☒ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges shown below? *(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)* (12) _____

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punish
	G	18-CRS-108854	1	Felony Poss of Cocaine	3/9/18	90-95(a)(3)	F	I	—	15 mos.

☐ See attached AOC-CR-300A, for additional charges.

*G = Guilty GA = *Alford* plea NC = No Contest

TOTAL MAXIMUM PUNISHMENT 15 months each

MANDATORY MINIMUM FINES & SENTENCES *(if any)*

✓ **NOTE TO CLERK:** *If this column is checked this is an added offense or reduced charge.*

‡ **NOTE:** *Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

13. Do you now personally plead ☒ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges I just described? (13) Yes

14. ☒ (a) Are you in fact guilty? (14a) Yes

☐ (b) *(no contest plea)* Do you understand that, upon your plea of no contest, you will be treated as being guilty whether or not you admit that you are in fact guilty? (14b) N/A

☐ (c) *(Alford guilty plea)*

(1) Do you now consider it to be in your best interest to plead guilty to the charges I just described? (14c1) N/A

(2) Do you understand that, upon your "*Alford* guilty plea," you will be treated as being guilty whether or not you admit that you are in fact guilty? (14c2) N/A

☐ 15. *(Use if aggravating factors are listed below)* Have you admitted the existence of the following aggravating factors: (15) N/A

_____

_____

_____,

have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors?

☐ 16. *(Use if sentencing points are selected below)* Have you admitted the existence of the following sentencing points not related to prior convictions: ☐ offense committed while on supervised or unsupervised probation, parole, or post-release supervision ☐ offense committed while serving a sentence of imprisonment ☐ offense committed while on escape from a correctional institution, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with the appropriate notice about these sentencing points? (16) N/A

☐ 17. *(Use if No. 15 or 16 selected above)* Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination? (17) N/A

18. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (18) Yes

19. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (19) Yes

STATE VERSUS	File No. 18-CRS-108854

Name Of Defendant: Janet Millhouse Jones

20. Have you agreed to plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) No

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (22) N/A

23. Do you now personally accept this arrangement? (23) N/A

24. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (24) No

25. Do you enter this plea of your own free will, and do you fully understand what you are doing? (25) Yes

26. Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence? (26) Yes

27. Do you have any questions about what has just been said to you or about anything else connected to your case? (27) No

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date	Signature	Signature Of Defendant
1-14-19		Janet Jones

☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

Date: 1-14-19

Name Of Defendant (type or print): Janet M. Jones

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charges to which the defendant is pleading, and the aggravating and mitigating factors and prior record points for sentencing, if any.

Date	Name Of Lawyer For Defendant (type or print)	Signature Of Lawyer For Defendant
1-14-19	Ann Calla	Ann Calla

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charges in this case.

Date	Name Of Prosecutor (type or print)	Signature Of Prosecutor
1-14-19	Allen Michael	

(Over)

PLEA ADJUDICATION

Upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that:

1. There is a factual basis for the entry of the plea *(and for the admission as to aggravating factors and/or sentencing points)*;
2. The defendant is satisfied with his/her lawyer's legal services;
3. The defendant is competent to stand trial;
4. ☐ The State has provided the defendant with appropriate notice as to the aggravating factors and/or points; ☐ The defendant has waived notice as to the aggravating factors and/or points; and
5. The plea *(and admission)* is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea *(and admission)* is hereby accepted by the Court and is ordered recorded.

Date	*Name Of Presiding Judge (type or print)*	*Signature Of Presiding Judge*

SUPERIOR COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

DISTRICT COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

CERTIFICATION BY PROSECUTOR

The undersigned prosecutor enters a dismissal to the above charges pursuant to a plea arrangement shown on this Transcript Of Pl

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

Discussion Problem 2:

Same facts as above but now in addition to reviewing the completed transcript of plea form, the trial judge addresses the defendant personally and determines that the defendant:

- Can hear and understand
- Understands that she has the right to remain silent and that any statement may be used against her
- Completed 8th grade and can read and write at that grade level
- Is not taking any medication and is not under the influence of any drugs or alcohol
- Has had the charge explained to her by her lawyer and understands the nature of the charge and each element
- Wishes to plead guilty to felony possession of cocaine
- Has discussed possible defenses with her lawyer
- Is satisfied with her lawyer's services
- Understands that she has the right to plead not guilty and be tried by a jury
- Understands that at such trial she has the right to confront and cross-examine witnesses
- Understands that by her plea she gives up these and other constitutional rights to a jury trial
- Understands that if she's not a citizen, immigration consequences may result from the plea
- Understands that plea arrangements are permissible
- Is pleading "straight up" and that there is no plea agreement
- Has not been coerced into the plea

Discussion Problem 3:

The following occurs during the Judge's colloquy with the defendant:

Judge: Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other intoxicants.

Defendant: I take my medicine.

Judge: When was the last time you used such substances?

Defendant: Last night. No, sorry, this morning, like always.

Judge: Have the charges been explained to you by your lawyer, and do you understand the nature of such charges, and do you understand each and every element of each charge?

Defendant: Yes

Discussion Problem 4:

Same facts as above, except now the Judge has clarified that the defendant is taking prescribed medications for heart disease and high blood pressure, that the defendant is taking the medication as per a doctor's prescription, and that the defendant does not experience any side effects from these medications that might interfere with her ability to understand the proceedings or to communicate with the judge or counsel.

Judge: Do you drink alcohol?

Defendant: Yes.

Judge: When is the last time you had alcohol?

Defendant: A couple of days ago.

Judge: Are you under the influence of any other intoxicants or drugs?

Defendant: No but I smoked a joint this morning to calm my nerves.

Discussion Problem 5:

Similar situation to Problem 3, but now the following transpires when the Judge asks about medication:

Judge: Are you currently taking any prescribed medication?

Defendant: Yes.

Defense lawyer: Your honor, my client is currently under a doctor's care and is taking the following medications by prescription: Clozapine and Paliperidone.

Judge: Is that it? Any others? Any other drugs, prescription or otherwise?

Defense lawyer: That is it. Nothing else. All taken per prescription.

Discussion Problem 6:

Judge: Have you and your lawyer discussed the possible defenses, if any to the charges?

Defendant: Yeah.

Judge: And are you satisfied with your lawyer's legal services?

Defendant: He's not no hired lawyer.

Judge: Are you satisfied with your lawyer's legal services?

Defendant: Yeah right but he came to see me like once while I was locked up. He hardly talked to me. He's done all right for what he's done but it's been pretty little.

Discussion Problem 7:

Assume that all proper inquiries have been made of the defendant by the Judge.

Judge: Mr. Prosecutor, what's the factual basis for this plea?

Prosecutor: The defendant is pleading guilty to felony possession of cocaine. On August 30, 2010, she was stopped in her vehicle by Officer James Olney of the Chapel Hill Police Department, for a traffic violation. While getting her license and registration, Officer Olney noticed a clear vial with what looked like a rock of crack cocaine on the console by the defendant's right hand. Officer Olney has 10 years of experience identifying crack cocaine. Officer Olney asked the defendant if he could search the vehicle. She agreed. Officer Olney seized the vial and arrested the defendant, on the charges at issue today. I have an SBI lab analysis confirming that the substance was cocaine.

Judge: Anything else?

Prosecutor: I also have a statement by the defendant, admitting that she possessed the vial found in her vehicle on August 30th and that it contained crack cocaine.

Judge: Anything else?

Prosecutor: No.

Judge: Does the defense want to be heard?

Defense lawyer: No your honor.

Discussion Problem 8:

Prosecutor: Your honor, the defendant was originally charged with Sexual Activity With a Student but is pleading guilty pursuant to a plea agreement to Crime Against Nature.

Judge: And the factual basis . . .

Prosecutor: The defendant is a male high school teacher employed by the Chapel Hill Carrboro Public School System. The victim was a student in the defendant's 11th grade AP World History class at Chapel Hill High School. After the victim initiated contact with the defendant outside of school, the defendant eventually agreed to meet the victim one evening. The meeting occurred on September 15, 2019, on school premises in the media resource room. The defendant kissed the victim and engaged in vaginal intercourse with her. The victim never reported the defendant, although she has confirmed this occurred. The two were seen by another teacher, Ms. Ingram, who reported the incident. As I said, the plea is to Crime Against Nature.

Judge: Defense counsel, do you have anything to add?

Defense counsel: No, your honor. That was an accurate statement of the facts. This is a plea agreement. Everything is in order – everything is good.

Discussion Problem 9:

Same facts as Problem 8, except this time, the factual basis reveals that the defendant engaged in an act of oral sex, not vaginal intercourse, with the victim.

The one-count indictment reads in relevant part as follows:

> On or about September 15, 2019, the defendant unlawfully, willfully, and feloniously did engage in cunnilingus and fellatio with Samantha Student. At the time of the offense, the defendant was a teacher at Chapel Hill High School, Chapel Hill, North Carolina, and the victim was a student in this same school.

Discussion Problem 10:

The defense lawyer and the prosecutor say that they want to present a proposed plea agreement to you, indicating that it includes an arrangement as to sentence.

May you hear from them about the proposed arrangement?

Must you hear from them?

If you decide to hear from them, may you indicate whether you will agree to the proposal?

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

(a) In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may recommend that the defendant make restitution or reparation out of any earnings gained by the defendant if he is granted work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order or recommendation providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d) and Article 81C of this Chapter.

If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and the plea agreement may include a provision that the defendant will be ordered to pay for such treatment.

When restitution or reparation is recommended as part of a plea arrangement that results in an active sentence, the sentencing court shall enter as a part of the commitment that restitution or reparation is recommended as part of the plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation recommendations incident to commitments.

Problem 11:

The parties come to you and ask you to consider a proposed plea agreement that includes a sentence. The defendant, originally charged with felony assault is pleading guilty to simple assault on a female. The victim is his wife, the assault occurred after an altercation about money, and the defendant and the victim are still living together. The prosecutor indicates that the defendant is an established member of the community, owns the local sporting goods store, and that this will be his first conviction, for an assault of a minor nature. As part of the plea agreement, the prosecutor has agreed to recommend 10 days of community service. You indicate that you will concur in this recommendation.

Before the case comes before you, you learn that the victim has a partial loss of vision in one eye as a result of the assault, and that she stayed in a women's shelter for a period of time before returning to live with the defendant. Also, the incident came after repeated 911 domestic calls to the house, occurring over a period of 6 months. Assuming that these facts are confirmed, are you bound by your agreement as to the sentence?

Discussion Problem 12:

The parties have not consulted with you prior to the plea. During the plea colloquy, you learn that pursuant to the plea agreement, the prosecutor will recommend a sentence. Based on the factual statement, you think the sentence is simply too low, and are unwilling to impose it. What can you do?

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

(a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the prosecutor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.

(b) Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal.

(c) If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.

PLEAS & PLEA NEGOTIATIONS IN SUPERIOR COURT

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Contents

I. Introduction. Disposition by guilty plea plays a significant role in the administration of criminal justice in the North Carolina court system. In the superior courts, the majority of criminal cases are disposed of by guilty plea. *See* Statistical and Operational Summary of the Judicial Branch of Government, North Carolina Trial Courts FY 2013-14 at 5 (reporting that in 2013-14, 2,732 superior court criminal cases were disposed of by jury trial and 78,693 cases were disposed of by guilty plea).

Pleas and plea negotiations must comply with constitutional requirements. Additionally, North Carolina statutory law provides procedures for taking pleas and conducting plea negotiations. Case law adds to this body of law. This section summarizes that law.

For a discussion of the admissibility of pleas and pleas negotiations at trial see, Criminal Evidence: Pleas and Plea Discussions in this Benchbook.

For a discussion of *Harbison* claims—allegations that defense counsel made an unconsented-to admission of guilt at trial—see Ineffective Assistance of Counsel in this Benchbook.

II. Types of Pleas. A defendant may plead not guilty, guilty, or no contest to a criminal charge. G.S. 15A-1011(a). There is no such thing as a plea of "innocent." State v. Maske, 358 N.C. 40, 61 (2004).

A. Not Guilty.

1. Effect. By pleading not guilty, a defendant requires the State to prove, beyond a reasonable doubt, every element of the charged offense. *Id.* at 61.

2. Defendant May Not Be Penalized for Not Guilty Plea. A defendant has a constitutional right to plead not guilty, *id.* at 61; State v. Larry, 345 N.C. 497, 524 (1997); State v. Kemmerlin, 356 N.C. 446, 482 (2002), and may not be punished for exercising that right. *Maske,* 358 N.C. at 61*;* State v. Boone, 293 N.C. 702, 712-13 (1977). Thus, the fact that a defendant pleaded not guilty may not be considered by the sentencing judge. *Compare Boone,* 293 N.C. at 712-13 (remanding for resentencing where the record revealed that the sentence was induced in part by the defendant's exercise of his right to plead not guilty), State v. Cannon, 326 N.C. 37, 38-39 (1990) ("[w]here it can reasonably be inferred … that the sentence was imposed … in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result"; after the possibility of a negotiated plea was discussed and the defendants demanded a jury trial, the judge told counsel "in no uncertain terms," that if convicted, the defendants would receive the maximum sentence), State v. Peterson, 154 N.C. App. 515, 518 (2002) (judge improperly considered the defendant's exercise of his right to a trial by jury; at sentencing the judge stated that the defendant "tried to be a con artist with the jury", "rolled the dice in a high stakes game with the jury," "[he] lost that gamble", and that "any rational person would never have rolled the dice and asked for a jury trial with such overwhelming evidence"), *and* State v. Pavone, 104 N.C. App. 442, 446 (1991) (trial judge improperly considered the defendant's failure to accept a plea and exercise her right to a jury trial; at sentencing the trial judge noted that plea discussions were not productive and said, "you must understand that having moved through the jury process and having been

convicted, it is a matter in which you are in a different posture"), *with* State v. Johnson, 320 N.C. 746, 753 (1987) (trial court made no statement indicating that the defendant's exercise of the right to a jury trial was considered), *and* State v. Gant, 161 N.C. App. 265, 272 (2003) (although disapproving of the trial court's reference to the defendant's failure to enter a plea agreement, holding that the judge's comments show that the defendant was not punished more severely because he exercised his right to a jury trial).

B. Guilty.

A plea of guilty is a confession that the defendant did the acts in question and "is itself a conviction" in that "nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242 (1969). By pleading guilty, a defendant not only relieves the State of its burden to prove every element of the offense but also waives several constitutional rights. *Id.* at 243; *see also* State v. Pait, 81 N.C. App. 286, 289 (1986). Those waived rights include the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin,* 395 U.S. at 243.

A defendant may plead guilty to a capital charge. *See* Section IV.H., below. A guilty plea may be "straight up"—that is, made without any agreement with the prosecutor—or it may be pursuant to a plea agreement in which the prosecution has offered the defendant some benefit in exchange for pleading guilty. *See* Section III below (plea bargaining). One reason a defendant might plead guilty "straight up," is the belief that accepting responsibility may lead to milder punishment. *See* State v. McClure, 280 N.C. 288, 294 (1972).

1. Effect.

A valid guilty plea acts as a conviction of the offense charged and serves as an admission of all of the facts alleged in the charging document. *Boykin,* 395 U.S. at 242 (1969); State v. Thompson, 314 N.C. 618, 623-24 (1985).

2. *Alford* Pleas.

Under *North Carolina v. Alford*, 400 U.S. 25 (1970), a defendant may plead guilty while factually maintaining innocence, provided that the record contains "strong evidence of actual guilt." *Id.* at 37 ("[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."); *see also* State v. McClure, 280 N.C. 288, 291-94 (1972) (trial judge properly accepted plea although defendant did not expressly admit guilt); State v. Canady, 153 N.C. App. 455, 457-58 (2002) (*Alford* plea requires "strong evidence" of guilt, which was present in this case). Such pleas are known as *Alford* pleas.

a. Effect. An *Alford* plea carries all of the consequences of a guilty plea. State v. Alston, 139 N.C. App. 787, 792 (2000).

Because an *Alford* plea "indicates a reluctance to take full responsibility" for the criminal conduct at issue it may "merit[] against finding" the mitigating sentencing factor that the defendant accepted responsibility for his or her conduct. State v. Meynardie,

172 N.C. App. 127, 133-34 (2005), *aff'd and remanded*, 361 N.C. 416 (2007).

Although it is generally stated that *Alford* pleas estop the defendant from denying guilt in later civil proceedings, jurisdictions differ on that issue. Jeff Welty, *Alford Pleas*, NC CRIM. LAW BLOG (April 13, 2010) (citing cases). The North Carolina courts have not yet decided this issue. *Id.*

Maintaining innocence pursuant to an *Alford* plea does not excuse a defendant's failure to participate in a sex offender rehabilitation program ordered as a condition of probation and requiring an acknowledgment of guilt. *Alston*, 139 N.C. App. at 794.

b. Discretion to Accept or Reject. Is a judge required to accept a knowing and voluntary *Alford* plea when there is strong evidence of guilt? In *Alford,* the Court indicated that a defendant has no constitutional right to have a plea accepted:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, although the States may by statute or otherwise confer such a right.

Alford, 400 U.S. at 38 n.11 (citation omitted). The *Alford* Court went on to note that "[l]ikewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence". *Id.*

As matter of state law, the North Carolina appellate courts do not appear to have addressed this issue. Although the North Carolina General Statutes both limit and afford the trial court discretion with respect to other aspects of plea procedure, *compare, e.g.,* G.S. 15A-1023(c) (providing that when there is a plea arrangement relating to disposition of charges in which the prosecutor has not agreed to make any recommendation as to sentence, the judge "must" accept the plea if it is knowing and voluntary and there is an adequate factual basis), *with* G.S. 15A-1011(b) (a defendant may plead no contest only if the trial judge consents), the statutes are silent on this issue.

C. No Contest. A judge may accept a no contest plea—also called a plea of nolo contendere—if there is a factual basis for the plea. G.S. 15A-1022(d); *see* Section IV.E. below (discussing factual basis). A no contest plea is one "by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." *Alford,* 400 U.S. at 35. Basically: the defendant agrees not to contest the charge. *See* State v. Cooper, 238 N.C. 241, 243 (1953). "Implicit in the nolo contendere cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and

accept the sentence." State v. McClure, 280 N.C. 288, 293 (1972) (quoting North Carolina v. Alford, 400 U.S. 25 (1970)).

1. Effect. A no contest plea is "tantamount to a plea of guilty." *Cooper,* 238 N.C. at 243; *see also Holden,* 321 N.C. at 162. Although a no contest plea is not an admission of guilt and may not be used in another case to prove that the defendant *committed* the crime to which he or she pled no contest, evidence of such a plea may be used to prove that a defendant was *convicted* of the pleaded-to offense. State v. Holden, 321 N.C. 125, 161-62 (1987); State v. Outlaw, 326 N.C. 467, 469 (1990). Thus, a past conviction resulting from a no contest plea

- may be admitted under evidence Rule 609(a) for purposes of impeachment, *Outlaw*, 326 N.C. at 469; *see generally* Rule 609: Impeachment by Evidence of Conviction of a Crime in this Benchbook;
- constitutes a conviction for purposes the G.S. 15A-2000(e)(3) capital aggravating circumstance (defendant was previously convicted of a felony involving the use or threat of violence), *Holden*, 321 N.C. at 161-62; and
- may be used as one of the three prior felony convictions required to support a habitual felon charge, State v. Jones, 151 N.C. App. 317, 329 (2002); *but see* State v. Petty, 100 N.C. App. 465, 468 (1990) (no contest plea entered before 1975 (effective date of amendments to G.S. 15A-1022) may not be used to adjudicate habitual felon status).

The main benefit of a no contest plea is that, unlike a guilty plea, it may not be used in a subsequent civil action to prove that the defendant committed the offense at issue. Wayne R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE §21.4(a), at 793 (3d ed. 2007) [hereinafter CRIMINAL PROCEDURE).

2. Advisement by Judge. When taking a no contest plea, the trial judge must inform the defendant that after the defendant's no contest plea, he or she will be treated as guilty whether or not guilt is admitted. G.S. 15A-1022(d); *see also* State v. May, 159 N.C. App. 159, 166 (2003) (judge sufficiently explained consequences of the no contest plea).

3. Consent Required.
A defendant may plead no contest only if the prosecutor and presiding judge consent. G.S. 15A-1011(b). Few standards exist to guide the judge in the exercise of discretion as to whether to accept a no contest plea. *See* 5 CRIMINAL PROCEDURE § 21.4(a), at 796-97.

D. Conditional Plea. North Carolina law allows a defendant to enter a guilty plea while reserving the right to appeal an adverse ruling on a motion to suppress. The requirements to preserve such an appeal are discussed in Section VII.B.1.c., below.

E. Plea To Aggravating Factors & Prior Record Level Points. Under *Blakely v. Washington,* 542 U.S. 296 (2004), unless pleaded to by a defendant, any fact other than a prior conviction that increases punishment beyond the prescribed statutory maximum must be proved to the jury beyond a reasonable doubt. After

Blakely, the North Carolina statutes were amended to allow for guilty pleas to aggravating factors and prior record level points under G.S. 15A-1340.14(b)(7) (offense committed while the defendant was on probation, parole, or post-release supervision, serving a sentence of imprisonment, or on escape from a correctional institution while serving a sentence of imprisonment). G.S. 15A-1022.1; *see also* State v. Khan, 366 N.C. 448, 455 (2013) (plea that included aggravating factor was proper).

If the defendant admits the aggravating factor or factors but pleads not guilty to the felony, a jury must be empaneled to dispose of the felony; if the defendant pleads guilty to the felony but contests the aggravating factor or factors, a jury must be empaneled to determine if the aggravating factor or factors exist. G.S. 15A-1340.16(a2), (a3).

Procedures for taking pleas to aggravating factors and to the G.S. 15A-1340.14(b)(7) prior record level point are discussed in Section IV.D.5. below.

F. Plea to Habitual Status. A defendant may plead guilty or no contest to a habitual offender status, such as habitual felon, violent habitual felon, habitual breaking and entering, or armed habitual felon. *See, e.g.,* State v. Szucs, 207 N.C. App. 694, 701-02 (2010) (plea to habitual felon was valid); State v. Jones, 151 N.C. App. 317, 330 (2002) (no contest plea to habitual felon). A stipulation to the required prior convictions is insufficient; the trial court must take a plea to the habitual status. State v. Gilmore, 142 N.C. App. 465, 471 (2001) (stipulation insufficient "in the absence of an inquiry by the trial court to establish a record of a guilty plea"); State v. Edwards, 150 N.C. App. 544, 549–50 (2002) (following *Gilmore*). *But see* State v. Williams, 133 N.C. App. 326, 330 (1999) (stipulation to habitual felon status was sufficient when the trial court continued by posing questions to the defendant that "establish[ed] a record of her plea of guilty"). *See generally* Section IV. below (Taking a Plea).

G. Failure to Plead; Waiver of Arraignment. If the defendant fails to plead, the court must record that fact and the defendant must be tried as if he or she had pled not guilty. G.S. 15A-941(a).

If the defendant fails to file a written request for arraignment, the court will enter a plea of not guilty on the defendant's behalf. G.S. 15A-941(d).

III. Plea Bargaining. Some guilty pleas are entered pursuant to a plea bargain with the prosecutor whereby the defendant agrees to plead guilty in exchange for some consideration by the State. The consideration offered can take many forms, such as allowing a plea on a lesser charge, agreeing to dismiss charges or not to bring other charges, or promising to recommend a particular sentence. The defendant's incentives to plea bargain include, among other things, limiting his or her exposure to punishment, controlling the nature of the conviction ultimately entered, and avoiding a criminal trial. *See, e.g.*, Brady v. United States, 397 U.S. 742, 752 (1970). The incentives for the prosecution are varied but no doubt include judicial economy, as plea bargaining allows for quick disposition of a large number of cases. *See, e.g.*, *id.* at 752. The United States Supreme Court has noted that disposition by plea negotiation is a "highly desirable" part of the criminal justice system in that

> [i]t leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the

> public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by, shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971).

A. No Right to Bargaining. Although G.S. 15A-1021(a) allows the prosecution and the defense to negotiate a plea, the defendant has no constitutional right to engage in plea bargaining. Weatherford v. Bursey, 429 U.S. 545, 561 (1977). A prosecutor has broad discretion to decide whether to engage in plea negotiations with a defendant and what plea will be offered. *See* State v. Woodson, 287 N.C. 578, 594-95 (1975) (prosecutor had full authority to negotiate with and accept pleas from two co-defendants but not others), *rev'd on other grounds,* 428 U.S. 280 (1976). To challenge that discretion as unconstitutionally selective, a defendant must prove that the prosecutor's decision was "deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification." *Id.* at 595 (quotation omitted) (no constitutional infirmity in prosecutor's selection, no abuse of discretion and no arbitrary classification); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (selectivity in enforcement does not violate the constitution so long as it is not deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification).

B. Scope of Negotiations.

1. Generally. Plea negotiations may include discussion of the possibility that in exchange for the defendant's guilty or no contest plea, the prosecutor will not charge, will dismiss, will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. G.S. 15A-1021(a). Restitution or reparation may be part of the plea arrangement. G.S. 15A-1021(c). The prosecution may condition a plea offer on the defendant providing information to the prosecution, *Woodson*, 287 N.C. at 593 ("state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not" (quotation omitted)), *rev'd on other grounds*, 428 U.S. 280 (U.S. 1976), or on truthful testimony by the defendant in criminal proceedings. G.S. 15A-1054(a).

It is not a violation of due process for a prosecutor to legitimately threaten a defendant during plea negotiations with institution of more serious charges if the defendant does not plead guilty. *See Bordenkircher*, 434 U.S. at 365. And if the defendant declines to plead guilty, no constitutional violation occurs when the prosecutor carries out that threat. *See id* at 360, 365 (distinguishing a case where the prosecutor without notice brings more serious charges after the defendant insists on pleading not guilty); *see also* United States v. Goodwin, 457 U.S. 368, 380-84 (1982) (presumption of vindictiveness did not apply; after defendant requested a jury trial on misdemeanor charges, he was indicted for a felony).

2. Leniency for Third Parties. Although a prosecutor's offer of leniency to a person other than the defendant has withstood a due process challenge in North Carolina, *see State v. Summerford*, 65 N.C. App. 519, 521-22

(1983) (prosecutor offered to dismiss charges against wife in exchange for husband's guilty plea); *see also* State v. Salvetti¸ 202 N.C. App. 18, 31-32 (2010) (prosecutor did not use improper pressure when he made the defendant's wife's plea deal contingent on the defendant's guilty plea), the United States Supreme Court has indicated that offers of more lenient or adverse treatment of a third party might require heightened scrutiny. *See Bordenkircher*, 434 U.S. at 364 n.8 (such an offer "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider"). Applying the Court's cautionary note some jurisdictions have approved plea deals offering leniency for third parties. *See, e.g.,* Harman v. Mohn, 683 F.2d 834, 837-38 (4th Cir. 1982) (as part of plea bargain, the prosecutor agreed to dismiss an indictment against the defendant's wife; the prosecutor observed "the high standard of good faith required in this type of plea bargain" and the judge carefully examined it).

3. "Package" Pleas. In a "package" plea all defendants must agree to the bargain before any will be allowed to benefit from it. As has been observed:

> Consistent with the package nature of the agreement, defendants' fates are often bound together: If one defendant backs out, the deal's off for everybody. This may well place additional pressure on each of the participants to go along with the deal despite misgivings they might have.

United States v. Caro, 997 F.2d 657, 658-59 (9th Cir. 1993) (footnote omitted). Relying on authority from other jurisdictions, the North Carolina Court of Appeals has rejected the argument that package pleas are per se involuntary. State v. Salvetti, 202 N.C. App. 18, 31-32 (2010) (going on to hold that the prosecutor's offer to give the defendant's wife a plea deal if the defendant pleaded guilty did not constitute improper pressure). Although other jurisdictions also have approved of package pleas, *see, e.g.,* United States v. Morrow, 914 F.2d 608, 613-14 (4th Cir. 1990); United States v. Clements, 992 F.2d 417, 419 (2d Cir. 1993), some have required the trial court to be informed of the package nature of the plea so that it can engage in a "more careful" examination of voluntariness. *Caro,* 997 F.2d at 660. *But see Clements,* 992 F.2d at 419-20 (although the "preferred practice" is to advise the court of the condition, the government's failure to inform the trial court of the package nature of the plea did not mean that the trial court abused its discretion by denying a motion to withdraw the plea where the plea was otherwise voluntary).

4. Appeal & Related Waivers. Although no North Carolina courts have dealt with the issue in a published case, courts in other jurisdictions are split on whether the right to appeal may be waived as part of a negotiated plea. *See* 5 CRIMINAL PROCEDURE § 21.2(b), at 581-87. A number of courts, including the Fourth Circuit, have held that waiver of the right to appeal may be part of a plea bargain. *See* United States v. Davis, 954 F.2d 182, 185-86 (4th Cir. 1992); State v. LeMaster, 403 F.3d 216, 220 (4th Cir. 2005) (so noting). Other Fourth Circuit decisions have recognized that there is a "narrow class of claims" that have been found to survive a

general waiver of appellate rights. *See LeMaster*, 403 F.3d at 220 n.2 (noting for example a claim that a sentence was based on an impermissible factor, such as race, and an allegation that the defendant had been completely deprived of counsel during sentencing). Others conclude that this right is non-negotiable. *See* 5 CRIMINAL PROCEDURE § 21.2(b), at 583.

A number of federal circuit courts, including the Fourth Circuit, have held that a defendant may waive the right to collaterally attack a plea. *LeMaster*, 403 F.3d at 220 (citing cases). In the North Carolina state courts, the procedural device for a collateral attack is a motion for appropriate relief. *See* G.S. 15A-1411 through -1422; *see generally* Motions for Appropriate Relief in this Benchbook.

5. Limits on Prosecutorial Conduct. The Official Commentary to G.S. 15A-1021 suggests that during plea bargaining a prosecutor may not seek to induce a plea of guilty or no contest by:

- Charging or threatening to charge the defendant with a crime not supported by the facts believed by the prosecutor to be provable.
- Charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct at issue.
- Threatening the defendant that if he or she pleads not guilty, his or her sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.

See State v. Salvetti, 202 N.C. App. 18, 32 (2010) (finding that none of these forms of pressure were applied). Additionally, State Bar Ethics opinions provide that during plea bargaining, the prosecutor may not:

- Use or threaten to use the prosecutor's statutory calendaring power to coerce a defendant to plead guilty. NC DEFENDER MANUAL (TRIAL) Ch. 23 at 23-10 (citing North Carolina State Bar Ethics Opinion RPC 243 (1997) (unethical for prosecutor to threaten that if the defendant does not accept the plea bargain, the prosecutor will make the defendant sit in the courtroom all week and then place the defendant's case "on the calendar every Monday morning for weeks to come"), available at www.ncbar.gov/ethics/).
- Offer more advantageous pleas to the defendant in exchange for a donation to a specified charitable organization. *Id.* (citing N.C. State Bar Ethics Opinion RPC 204 (1995) (prosecutors could not ethically offer special treatment to offenders who were charged with violating traffic laws or minor criminal offenses in exchange for their donation to the local school board), available at www.ncbar.gov/ethics/).
- Agree to refrain from informing the court of the defendant's prior record. *Id.* at 23-11.

6. Terms Contrary to Law. A plea agreement term that is contrary to law is unenforceable. State v. Wall, 348 N.C. 671, 676 (1998) (court could not enforce plea agreement term that the sentence for the pleaded-to offenses would run concurrently to a sentence already being served when the law required that the sentences run consecutively). A plea agreement that contains such a term violates that law. State v. Demaio, 216 N.C. App. 558, 565 (2011) (plea agreement sought to preserve the right to appeal adverse rulings on motions to dismiss and in limine when no right to appeal those rulings existed); State v. White, 213 N.C. App. 181, 187-88 (2011) (plea agreement that attempted to preserve the defendant's right to appeal an adverse ruling on his motion to dismiss a felon in possession charge on grounds that the statute was unconstitutional as applied must be vacated); State v. Smith, 193 N.C. App. 739, 742-43 (2008) (similar). When this is the case, the defendant is entitled to withdraw the plea. *Wall,* 348 N.C. at 676; *Demaio,* 216 N.C. App. at 565. The defendant then can opt to go to trial on the original charges or try to renegotiate a plea agreement that does not violate the law. *See, e.g., Demaio,* 216 N.C. App. at 565.

There is however one caveat to this rule. If the defendant is told that the particular term is likely to be unenforceable, its inclusion does not necessarily invalidate the plea. State v. Tinney, __ N.C. App. __, 748 S.E.2d 730, 733-37 (2013) (the defendant's plea was valid even though the plea agreement contained an unenforceable provision preserving his right to appeal the transfer of his juvenile case to superior court; distinguishing cases holding that the inclusion of an invalid provision renders a plea agreement unenforceable, the court noted that here the trial court told the defendant that the provision was, in all probability, unenforceable and the defendant nevertheless elected to proceed with his guilty plea). Notwithstanding this authority, the best practice is to require the parties to present a plea agreement without any unenforceable terms.

C. Judge May Participate in Discussions. A trial judge may participate in plea negotiation discussions. G.S. 15A-1021(a).

D. Defendant's Presence. If represented by counsel, the defendant need not be present during plea negotiation discussions. *Id.*

E. Judge's Authority to Accept or Reject Arrangement. A judge must accept a plea arrangement in which the prosecutor has not agreed to make any recommendations as to sentence, if the plea is the product of informed choice and it is supported by a factual basis. G.S. 15A-1023(c). However, the defendant has no right to have a plea arrangement as to sentencing accepted by the court. G.S. 15A-1023(b) ("Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly."); *see also* State v. Wallace, 345 N.C. 462, 465 (1997) ("A plea agreement involving a sentence recommendation by the State must first have judicial approval before it can be effective; it is merely an executory agreement until approved by the court."); State v. Collins, 300 N.C. 142-149 (1980) (a plea agreement containing a recommended sentence requires judicial

approval). As discussed in Section III.F., below, even when a judge initially approves a plea arrangement as to sentence, the judge may withdraw consent upon learning of information that is inconsistent with the representations made when approval was given.

F. Agreement Regarding Sentence.

1. "Pre-Approval" by Judge. If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a sentence, they may, with the judge's permission, advise the judge of the terms of the arrangement and the reasons for it before the plea is made. G.S. 15A-1021(c). Because the statute uses the permissive "may," the judge is not required to engage in this discussion.

If the judge agrees to consider the arrangement, the judge may indicate to the parties whether he or she will concur in the proposed disposition. G.S. 15A-1021(c). If the judge agrees with the disposition, the judge may change his or her mind upon later learning of information inconsistent with the representations made. *Id.* This procedure allows the parties to get the judge's reaction to the proposed sentence; if the judge reacts negatively, the parties may resume negotiations and bring a revised arrangement back to the judge. Official Commentary to G.S. 15A-1021.

2. Agreement Must Be Disclosed at Time of Plea. Regardless of whether the parties have consulted with the judge before the plea, if they have agreed on a plea arrangement in which the prosecutor will recommend a particular sentence, they must disclose the substance of their agreement to the judge when the plea is taken. G.S. 15A-1023(a).

3. Judge Must Notify Parties of Acceptance/Rejection. Before accepting the plea, the judge must advise the parties whether he or she approves the arrangement and will dispose of the case accordingly. G.S. 15A-1023(b).

4. When Judge Rejects Arrangement.

a. Must Notify Parties & Give Opportunity to Modify. If the judge rejects the arrangement, the judge must inform the parties, refuse to accept the plea, and advise the defendant personally that neither the State nor the defendant is bound by the arrangement. *Id.* The judge must tell the parties why he or she rejected the arrangement and give them a chance to modify it. *Id.; see, e.g.,* State v. Santiago, 148 N.C. App. 62, 68 (2001) (judge rejected arrangement because of concern regarding sentence). However, the State is not required to modify the agreement. State v. Bailey, 145 N.C. App. 13, 21 (2001). As noted in Section III.F.1. above, even if the judge previously indicated that he or she agreed with the proposed disposition, the judge may change positions upon learning of information inconsistent with earlier made representations. *See* G.S. 15A-1021(c).

b. Rejection Must Be Noted in Record. When the trial judge rejects a plea arrangement as to sentence in open court at the time of the plea, the judge must order that the rejection be noted on the plea transcript and that the transcript be made a part of the record. G.S. 15A-1023(b).

c. No Appeal. A judge's decision rejecting a plea arrangement is not subject to appeal. *See* G.S. 15A-1023(b); *see also Santiago*, 148 N.C. App. at 68.

d. Right to Continuance. If the judge rejects the plea arrangement, the defendant is entitled to a continuance until the next session of court. G.S. 15A-1023(b). Although failure to grant a motion for a continuance is reversible error, *see* State v. Tyndall, 55 N.C. App. 57, 62-63 (1981) ("absolute right" to continuance), the court is not required to order a continuance on its own motion. State v. Martin, 77 N.C. App. 61, 65 (1985).

No right to a continuance attaches when a judge denies a defendant's request to plead guilty under a plea arrangement that already has been rejected and thus is null and void. State v. Daniels, 164 N.C. App. 558, 562 (defendant cannot resurrect a plea agreement that had been rejected by the trial court).

5. If Sentence Does Not Conform to Agreement. If at the time of sentencing, the judge decides to impose a sentence other than that provided for in a plea arrangement, the judge must inform the defendant that a different sentence will be imposed and that the defendant may withdraw the plea. G.S. 15A-1024; *compare* State v. Puckett, 299 N.C. 727, 730-31 (1980) (reversing the trial court for failure to comply with G.S. 15A-1024), *and* State v. Rhodes, 163 N.C. App. 191, 194-95 (2004) (same), *with* State v. Blount, 209 N.C. App. 340, 346 (2011) (no violation of G.S. 15A-1024 where plea agreement did not require sentencing in the mitigated range but only that the State "shall not object to punishment in the mitigated range").

Although failure to follow this procedure has been held to be reversible error, *see, e.g., Puckett,* 299 N.C. at 730-31; *Rhodes,* 163 N.C. App. at 194-95, a defendant's lack of diligence in asserting such a failure may waive the right to challenge the plea. *See* State v. Rush, 158 N.C. App. 738, 740-41 (2003) (where the defendant failed to file a motion to withdraw her guilty plea, failed to give notice of appeal within ten days after judgment, and failed to petition for writ of certiorari, she waived challenge to the judgment, which imposed a sentence other than that included in the plea arrangement; issue was not raised until probation was revoked).

The North Carolina Court of Appeals has interpreted the statutory terms "other than provided for in a plea arrangement" to include a sentence that is lighter than the one agreed to in the plea agreement. State v. Wall, 167 N.C. App. 312, 316-17 (2004) (after a successful motion for appropriate relief challenging his initial sentence, the defendant was resentenced to 133-169 months imprisonment; because the plea agreement specified 151-191 months he should have been allowed to withdraw his plea). It also has held that like a sentencing, a resentencing triggers application of G.S. 15A-1024. *See id.*

Upon withdrawal, the defendant is entitled to a continuance until the next session of court. *See* G.S. 15A-1024.

G. Arrangements Relating to Charges Only. If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance

of the arrangement must be disclosed to the judge at the time of the plea. G.S. 15A-1023(c). As noted in Section III.E. above, the judge must accept the plea if it is knowing, voluntary and intelligent and there is a factual basis for it.

H. Effect of Court's Rejection of Plea Arrangement. Once a plea arrangement has been rejected by the court, the arrangement is no longer available for the defendant to accept. State v. Daniels, 164 N.C. App. 558, 561-62 (2004).

I. *De Novo* Trial in Superior Court. If a defendant pleads guilty to a misdemeanor in district court pursuant to a plea arrangement in which misdemeanor charges were dismissed, reduced, or modified and then appeals for a trial *de novo* in superior court, the superior court has jurisdiction to try all of the misdemeanor charges that existed before entry of the plea. G.S. 7A-271(b); G.S. 15A-1431(b). If a felony charge is reduced to a misdemeanor in district court pursuant to a plea arrangement and the defendant appeals for trial *de novo* in superior court, the State may indict the defendant on the original felony and the defendant may be tried for that offense. State v. Fox, 34 N.C. App. 576, 579 (1977).

J. Backing Out of an Agreement.

1. When State May Back Out. The State may withdraw from a plea agreement any time before entry of the plea or before there is an act of detrimental reliance by the defendant. State v. Collins, 300 N.C. 142, 148-49 (1980); State v. Hudson, 331 N.C. 122, 146-49 (1992) (following *Collins*; rejecting the defendant's argument that suspending trial preparation constituted detrimental reliance in a case where plea agreement contained sentence recommendation that had not yet been approved by trial judge); State v. Marlow, 334 N.C. 273, 279-81 (1993) (following *Collins;* rejecting the defendant's argument that submitting to a polygraph constituted detrimental reliance); State v. Johnson, 126 N.C. App. 271 (1997) (following *Collins* and *Marlow*).

2. When Defendant May Back Out. A defendant may withdraw from a plea agreement before entry of the plea, regardless of any prejudice to the prosecution. *Collins,* 300 N.C. at 149. The North Carolina Supreme Court has explained:

> [P]lea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading. Thus, the prosecutor agrees to perform if and when defendant performs but has no right to compel defendant's performance.

Id.

IV. Taking a Plea.

A. Defendant's Decision. Because a plea of guilty or no contest involves a waiver of constitutional rights, "[a] plea decision must be made exclusively by the defendant." State v. Harbison, 315 N.C. 175, 180 (1985); State v. Perez, 135 N.C. App. 543, 547 (1999).

B. Defendant's Presence.

A superior court judge may receive a plea of not guilty, guilty, or no contest only from "the defendant himself," G.S. 15A-1011(a), except when:

- The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer.
- There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945 (providing that a represented defendant who wishes to plead not guilty may waive arraignment prior to the date arraignment is calendared by filing a written plea signed by the defendant and counsel).
- The case involves a misdemeanor and there is a written waiver of appearance submitted with the approval of the presiding judge.
- The defendant executes a waiver of appearance and plea of not guilty as provided in G.S. 15A-1011(d). Under G.S. 15A-1011(d) a defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his or her behalf when:
  - (1) the defendant agrees in writing to waive the right to testify and the right to face his or her accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case;
  - (2) the defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and
  - (3) the judge allows the absence of the defendant because of distance, infirmity or other good cause.

G.S. 15A-1011(a).

C. Plea Arrangement Relating to Sentence. For a discussion of plea procedure when the parties' agreement relates to the sentence, see Section III.F. above.

D. Must Be Knowing, Voluntary & Intelligent. Due process requires that a guilty plea must be knowing, voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238, 244 (1969); *see also* State v. Harbison, 315 N.C. 175, 180 (1985); State v. McClure, 280 N.C. 288, 293 (1972). By pleading guilty, a defendant waives important constitutional rights. *Boykin,* 395 U.S. at 243. Such a waiver must be made freely and with a full understanding of the significance and consequences of the action. *Id.* at 243-44 ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."); Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the

relevant circumstances and likely consequences."). A plea that is not knowing, voluntary and intelligent is void. *Boykin*, 395 U.S. at 243 n.5.

1. Voluntary. The requirement that a plea be a "voluntary expression of [the defendant's] own choice," *Brady,* 397 U.S. at 748, requires that it not have resulted from, for example, actual or threatened physical harm or overbearing mental coercion. *Id.* at 750*; see also* State v. Santos, 210 N.C. App. 448, 451-52 (2011) (rejecting the defendant's argument that his guilty plea was the result of unreasonable and excessive pressure by the State and the trial court; although the defendant asserted that the trial court pressured him to accept the plea during a 15 minute recess, denying him time needed to reflect, the plea offer was made days earlier and the trial judge engaged in an extensive colloquy with the defendant ensuring that the plea was knowing and voluntary); State v. Salvetti, 202 N.C. App. 18, 32 (2010) (the prosecutor's offer of a package deal in which the defendant's wife would get a plea deal if the defendant pleaded guilty did not constitute improper pressure). The constitutional requirement that a plea be voluntary is reflected in the statutory requirement that "[n]o person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest." G.S. 15A-1021(b).

In North Carolina, a judge's comments have been held to have impermissibly imposed such pressure, rendering the plea involuntary. *See* State v. Benfield*,* 264 N.C. 75, 76-77 (1965) (after the judge told defenses counsel that he thought the jury would convict and that if it did so, "he felt inclined to give [the defendant] a long sentence[,]" the defendant, knowing that a co-defendant who pleaded guilty got a suspended sentence, changed his plea to guilty); State v. Pait*,* 81 N.C. App. 286, 287-90 (1986) (when the defendant attempted to plead not guilty, the judge became visibly agitated and said angrily that he was tired of "frivolous pleas;" the judge asked the defendant whether he had made an incriminating statement to the police and when the defendant replied that he did, the judge directed counsel to confer with the defendant and return with an "honest plea"); *see also* State v. Cannon*,* 326 N.C. 37, 38-40 (1990) (when the trial court asked about the possibility of a negotiated plea, counsel advised that the defendants wanted a jury trial; the judge then stated that if the defendants were convicted, they would receive the maximum sentence; the defendants went to trial and were convicted; the appellate court noted that had the defendants pled guilty after they heard the judge's remarks, "serious constitutional questions would have arisen as to the voluntariness of the pleas"). *But see* State v. King*,* 158 N.C. App. 60, 67-70 (2003) (the trial judge explained the habitual felon phase of the trial to the *pro se* defendant and inquired as to whether the defendant wished to plead guilty; although the judge told the defendant that he would give "consideration for someone pleading guilty", the judge also stated that he was not promising the defendant anything or threatening him in any way, and made it clear that if the defendant did not want to plead guilty that the hearing before the jury would proceed; the trial judge appointed a lawyer to represent the defendant and the defendant conferred with the attorney before he accepted the guilty plea; distinguishing *Benfield, Cannon,* and *Pait* and holding that plea was voluntary).

The fact that a plea was entered to avoid a severe penalty, such as the death penalty, does not render it involuntary. North Carolina v. Alford, 400 U.S. 25, 31 (1970); Brady v. United States, 397 U.S. 742, 755 (1970).

2. Knowing & Intelligent. For a plea to be made intelligently, the defendant must understand the nature of the charges, *Brady,* 397 U.S. at 756, their "critical element[s]," *compare* Henderson v. Morgan, 426 U.S. 637, 647 n.18 (1976) (plea was invalid where record showed that a critical element was not explained to the defendant), *with* State v. Barts*,* 321 N.C. 170, 174-76 (1987) (the defendant knowingly entered a plea of guilty as to both felony-murder and premeditation and deliberation theories of first degree murder; trial judge adequately explained both theories and the defendant's responses indicated that he understood the nature of the plea and its possible consequences), and the consequences of the plea. *See Brady,* 397 U.S. at 755; State v. Bozeman*,* 115 N.C. App. 658, 661 (quoting *Brady*); State v. Collins, 221 N.C. App. 604, 608-09 (2012) (the court rejected the defendant's argument that the trial court did not adequately explain that judgment may be entered on his plea to assault on a handicapped person if he did not successfully complete probation on other charges).

With respect to the requirement that the defendant understand the charges, the Supreme Court has observed:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson, 426 U.S. at 647.

The requirement that the defendant understand the consequences of the plea has been interpreted to mean that the defendant must be informed of direct consequences of plea but not of collateral consequences. *Bozeman*, 115 N.C. App. at 661 ("Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be 'entered by one fully aware of the *direct consequences,* including the actual value of any commitments made to him by the court.'" (quoting *Brady,* 397 U.S. at 755)); State v. Reynolds, 218 N.C. App. 433, 434-38 (2012) (plea was invalid where trial court misinformed the defendant regarding a direct consequence; the trial court told the defendant that the maximum possible sentence was 168 months in prison when the maximum sentence (and the term imposed) was 171 months).

a. Direct Consequences. Direct consequences have been broadly defined "as those which have a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Bozeman,* 115 N.C. App. at 661 (quoting Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973)). The

North Carolina courts have held or indicated that the following are direct consequences of a plea:

- The maximum sentence. *See* State v. Smith, 352 N.C. 531, 550 (2000); *Reynolds,* 218 N.C. App. at 434-38 (plea invalid where the trial court misinformed the defendant that the maximum sentence was 168 months when in fact it was 171 months and that period was imposed); *see generally* G.S. 15A-1022(a)(6) (judge must inform the defendant of the maximum sentence). *But see* State v. Szucs, 207 N.C. App. 694, 701-02 (2010) (plea to habitual felon was valid where the trial court told the defendant that the plea would elevate punishment for the underlying offenses from Class H to Class C but did not inform him of the minimum and maximum sentences associated with habitual felon status); State v. Salvetti, 202 N.C. App. 18, 27-28 (2010) (the defendant was not prejudiced by the trial judge's failure to comply with G.S. 15A-1022 and inform him of the maximum possible sentence even where the Transcript of Plea form understated the maximum punishment).
- The mandatory minimum sentence; *see Bozeman*, 115 N.C. App. at 661-62 (drug trafficking case); *Smith*, 352 N.C. at 550; *see generally* G.S. 15A-1022(a)(6) (judge must inform the defendant of mandatory minimum sentence). *But see* State v. Brooks, 105 N.C. App. 413, 419 (1992) (no prejudicial error occurred when judge mistakenly informed the defendant that applicable mandatory minimum was 28 years).
- An additional term of imprisonment associated with habitual offender status. State v. McNeill, 158 N.C. App. 96, 104 (2003) (but finding failure to so inform the defendant was harmless beyond a reasonable doubt).

Also, *State v. Morganherring,* 350 N.C. 701, 719 (1999), can be read as indicating that if, as a result of a guilty plea to a felony the defendant would "in all likelihood" be convicted of felony-murder, the murder conviction is a direct consequence of the felony plea.

b. Collateral Consequences. The North Carolina courts have held the following to be collateral consequences that need not be addressed in the judge's colloquy with the defendant:

- The fact that pleaded-to felonies may establish aggravating circumstances at the penalty phase following the defendant's plea to first-degree murder. State v. Smith, 352 N.C. 531, 551 (2000) ("Nothing is automatic or predictable about how a sentencing jury may weigh these aggravating circumstances or whether countervailing mitigating circumstances will be offered or how they will be weighed.").

- Sex offender satellite-based monitoring. State v. Bare, 197 N.C. App. 461, 478-80 (2009).
- Parole eligibility. State v. Daniels, 114 N.C. App. 501, 502-03 (1994).

c. Defendant's Mistake. The rule that a plea must be intelligently made does not mean that it will be vulnerable to attack if it later turns out that the defendant did not correctly assess all of the relevant factors. *See Brady,* 397 U.S. at 757. As the United States Supreme Court has stated: "A defendant is not entitled to withdraw [a] plea merely because he [or she] discovers long after the plea has been accepted that his [or her] calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* If, however, the defendant was misinformed by counsel or not informed at all by counsel, the defendant may wish to pursue an ineffective assistance of counsel claim. For a discussion of mutual mistakes of law and their impact on the plea, see Section VI.B. below. For a discussion of ineffective assistance claims, see Ineffective Assistance of Counsel in this Benchbook.

3. No Right to Modify. If the plea is rejected on grounds that it is not free and voluntary, failure to provide an opportunity to modify has been held not to be error. State v. Martin, 77 N.C. App. 61, 65 (1985).

4. Colloquy. G.S. 15A-1022(a) is designed to effectuate the constitutional requirement that a guilty plea be knowing, voluntary and intelligent. *See, e.g., Bozeman*, 115 N.C. App. at 661; Official Commentary to G.S. 15A-1022. The statute does not apply when the defendant pleads not guilty. State v. Ruffin, __ N.C. App. __, 754 S.E.2d 685, 689 (2014).

G.S. 15A-1022(a) provides that except when the defendant is a corporation or in misdemeanor cases where there is a waiver of appearance, a superior court judge must address the defendant "personally" and:

- Inform him or her of the right to remain silent and that any statement the defendant makes may be used against him or her.
- Determine that the defendant understands the nature of the charge.
- Inform the defendant that he or she has a right to plead not guilty.
- Inform the defendant that by his or her plea the defendant waives the right to trial by jury and to be confronted by the witnesses against him or her.
- Determine that the defendant, if represented by counsel, is satisfied with counsel's representation.
- Inform the defendant of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.
- Inform the defendant that if he or she is not a citizen, a plea of guilty or no contest may result in deportation, the exclusion from

admission to this country, or the denial of naturalization under federal law.

G.S. 15A-1022(a). Although G.S. 15A-1022 does not require the trial court to inquire of the defendant whether he or she is in fact guilty, *see* State v. Bolinger, 320 N.C. 596, 603 (1987), the Transcript of Plea form includes a question to that effect. *See* AOC-CR-300 (Rev. 3/15) (Question 14(a) states: "Are you in fact guilty?"). As discussed in Section II.B.2. above, a plea may be accepted even if the defendant does not admit guilt, and this possibility is reflected in the questions that follow on the Transcript of Plea. *Id.* at Question 14(c) (*Alford* pleas).

Although not constitutionally required or codified in the statutory plea procedure, the General Assembly has required the North Carolina Administrative Office of the Courts to include the following questions on the Transcript of Plea:

- Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?
- Do you understand that your plea of guilty may impact how biological evidence related to your case (for example blood, hair, skin tissue) will be preserved?

S.L. 2009-86, sec. 1-2. *See generally* G.S. 15A-268 (preservation of biological evidence); G.S. 15A-1444 (appeal; certiorari). *See* Section VII., below (discussing appeals after guilty pleas).

Reflecting the constitutional standards for a knowing, voluntary and intelligent plea discussed above, G.S. 15A-1022(b) provides that a guilty or no contest plea may not be accepted unless the judge determines that it is "a product of informed choice." Similarly reflecting the constitutional standards for voluntariness, G.S. 15A-1021(b) provides that "[n]o person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest" and G.S. 15A-1022(b) makes inquiry into improper pressure in violation of G.S. 15A-1021(b) a part of the judge's colloquy. Specifically, G.S. 15A-1022(b) requires the judge to inquire of the prosecutor, defense counsel, and the defendant "personally" to determine whether there were any prior plea discussions, whether the parties had entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b).

Both G.S. 15A-1022(a) and (b) require the judge to inquire "personally" of the defendant and others. It is not enough to simply accept a completed Transcript of Plea form (AOC-CR-300). State v. Hendricks, 138 N.C. App. 668, 670 (2000) (trial judge erred by failing to personally address the defendant, even though the transcript of plea form covered all the areas omitted by the trial judge; "our legislature's explicit reference to the trial judge addressing the defendant personally and informing him of his rights illustrates that reliance on the transcript of plea alone (with which the judge has no involvement in the first place) is insufficient to meet section 15A-1022's procedural requirements").

5. Pleas to Aggravating Factors & Prior Record Level Points. As noted in Section II.E., above, after *Blakely*, the North Carolina statutes were

amended to allow for guilty pleas to aggravating factors and a prior record level (PRL) point under G.S. 15A-1340.14(b)(7) (offense committed while the defendant was on probation, parole, or post-release supervision, serving a sentence of imprisonment, or on escape from a correctional institution while serving a sentence of imprisonment). Specifically, G.S. 15A-1022.1 provides that before accepting a plea of guilty or no contest to a felony, the trial judge must determine:

- whether the State intends to seek a sentence in the aggravated range and if so, which factors are at issue; and
- whether the State seeks a finding that a PRL point should be found under G.S. 15A-1340.14(b)(7).

If the State seeks a sentence in the aggravated range or a PRL point under G.S. 15A-1340.14(b)(7), the trial court also must determine whether the State has provided the required notice under G.S. 15A-1340.16(a6) or whether such notice has been waived. G.S. 15A-1022.1.

If the defendant admits to the existence of an aggravating factor or to a finding of a point under G.S. 15A-1340.14(b)(7), the trial judge must comply with the basic plea procedure in G.S. 15A-1022(a), *see* Section IV.D.4., above, and all of the regular procedures for handling guilty pleas apply, "unless the context clearly indicates that they are inappropriate." G.S. 15A-1022.1(e). In addition to the basic plea procedures, the trial court must address the defendant "personally" and advise the defendant that he or she:

- is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
- has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

G.S. 15A-1022.1(b).

Before accepting an admission to an aggravating factor or a point under G.S. 15A-1340.14(b)(7), the trial court must determine that there is a factual basis for the admission and that the admission is the result of the defendant's informed choice. G.S. 15A-1022.1(c). The trial court may base its determination on the same evidence considered with respect to the factual basis for the substantive offense, *see* Section IV.E. below, as well as any other appropriate information. G.S. 15A-1022.1(c).

In terms of timing, a defendant may admit to the existence of an aggravating factor or to the existence of a point under G.S. 15A-1340.14(b)(7) before or after the trial of the underlying felony. G.S. 15A-1022.1(d).

6. Mass Pleas. There do not appear to be any North Carolina cases testing the validity of "mass pleas," in which the judge convenes defendants and advises them of their rights in a group setting. Regardless of whether such a procedure is valid or not, it may subject individual pleas to attack.

E. Factual Basis. A judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. G.S. 15A-1022(c); *see* State v. Sinclair, 301 N.C. 193, 197-99 (1980) (insufficient factual basis); State v. Dickens, 299 N.C. 76, 79 (1980) (sufficient factual basis). This determination may be based upon information including but not limited to:

- a statement of the facts by the prosecutor
- a written statement of the defendant
- an examination of the presentence report
- sworn testimony, which may include reliable hearsay
- a statement of facts by the defense counsel

G.S. 15A-1022(c).

The statute "does not require the trial judge to elicit evidence from each, any, or all of the enumerated sources." State v. Barts, 321 N.C. 170, 177 (1987); *see also* State v. Atkins, 349 N.C. 62, 96 (1998); *Sinclair,* 301 N.C. at 198; *Dickens,* 299 N.C. at 79. Rather the judge may consider any information properly brought to his or her attention in determining whether there is a factual basis for the plea. *Barts,* 321 N.C. at 177; *Atkins,* 349 N.C. at 96; *Sinclair,* 301 N.C. at 198; *Dickens,* 299 N.C. at 79. However, whatever information the judge does consider must appear on the record so that an appellate court can determine whether the plea was properly accepted. *Barts,* 321 N.C. at 177; *Atkins,* 349 N.C. at 96; *Sinclair,* 301 N.C. at 198. At a minimum, "some substantive material independent of the plea itself [must] appear of record which tends to show that defendant is, in fact, guilty." *Sinclair,* 301 N.C. at 199 (defendant's bare admission of guilt or plea of no contest provides an insufficient factual basis for a plea). The statute does not set forth the applicable standard of proof that applies to the factual basis determination. However, when the plea is an *Alford* plea, the factual record must show "strong" evidence of guilt. *See* Section II.B.2., above (discussing *Alford* pleas).

F. Pleas to Uncharged & Other Offenses. A judge may not accept a plea to an offense that has not been charged if it is not a lesser included of a charged offense. *See* In Re Fuller, 345 N.C. 157, 160-61 (1996) (stating rule in the context of a judicial discipline issue); State v. Bennett, 271 N.C. 423, 425 (1967) ("a defendant . . . cannot plead guilty to an offense which the indictment does not charge"); State v. Neville, 108 N.C. App. 330, 332-33 (1992) (plea to uttering a forged instrument could not stand where the indictment charged forgery; court lacked jurisdiction to enter the plea). Of course, problems in this regard can be avoided by the filing of an information, as provided in G.S. 15A-644(b).

A judge should not accept a plea to a lesser included offense over the State's objection. State v. Brown, 101 N.C. App. 71, 80-81 (1990) ("The State has every right to attempt to convict a defendant of the crimes charged."). If a judge takes a plea to a lesser included offense over such an objection, double jeopardy does not bar the State from trying the defendant for the greater offense if that offense was pending at the time the plea was entered. Ohio v. Johnson, 467 U.S. 493, 494 (1984); *see also* State v. Hamrick, 110 N.C. App. 60, 66-67 (1993).

Upon entry of a plea of guilty or no contest, the defendant may request permission to enter a plea of guilty or no contest to other crimes with which he or

she is charged in the same or another prosecutorial district. G.S. 15A-1011(c). However, a defendant may not plead to crimes charged in another prosecutorial district unless the district attorney of that district consents in writing. *Id.* The prosecutor or his or her representative may appear in person or by filing an affidavit as to the nature of the evidence gathered as to these other crimes. *Id.* Entry of a plea in this way constitutes a waiver of venue. *Id.*

A superior court has jurisdiction to accept the plea even though the case otherwise may be within the exclusive original jurisdiction of the district court, provided there is an appropriate indictment or information. *Id.* A district court may accept pleas under G.S. 15A-1011(c) only in cases within the original jurisdiction of the district court and in cases within the concurrent jurisdiction of the district and superior courts, as set out in G.S. 7A- 272(c). *Id.* This procedure achieves economies to the State by "wrapping up all charges against a defendant at once." Official Commentary to G.S. 15A-1011. The consent of the prosecutor in any other district in which other charges are pending is designed to cut down on "judge- or [prosecutor]- shopping." *Id.*

G. In Open Court; Record Required. As a general rule, a plea may be received "only from the defendant himself in open court." G.S. 15A-1011(a). For a discussion of when a plea may be received in the defendant's absence, see Section IV.B. above.

When the defendant has pleaded guilty, the record must demonstrate that the plea was made knowingly, voluntarily and intelligently. Brady v. United States, 397 U.S. 742, 747 n.4 (1970) ("[T]he record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily."); *see* Section IV.D., above (discussing the requirement that a plea be knowing, voluntary and intelligent). In *Boykin v. Alabama*, the United States Supreme Court stated that a waiver of constitutional rights would not be presumed from a silent record. 395 U.S. 238, 243 (1969); *see also* State v. Allen, 164 N.C. App. 665, 669-70 (2004). The North Carolina Supreme Court has reiterated this requirement:

> *Boykin* requires us to hold that a plea of guilty or a plea of Nolo contendere may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly. Hence, a plea of guilty or of Nolo contendere, unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated . . . . If the plea is sustained, it must appear affirmatively that it was entered voluntarily and understandingly.

State v. Ford, 281 N.C. 62, 67-68 (1972); *see also* State v. Wilkins, 131 N.C. App. 220, 224 (1998) (plea must be knowing and voluntary and "the record must affirmatively show it on its face").

Additionally, G.S. 15A-1026 requires a verbatim record of proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c). This record must include the judge's advice to the defendant, and his or her inquiries of the defendant, defense counsel, and the prosecutor, and any responses. G.S. 15A-1026. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the

terms of the arrangement be stated for the record and that the assent of the defendant, defense counsel, and the prosecutor be recorded. *Id.* The Transcript of Plea form, AOC-CR-300, helps to create the record of the plea. *But see* Section IV.D.4., above (noting that the court must address the defendant personally and that a completed form alone does not satisfy this requirement). Strict compliance with the requirements for a record helps to protect pleas from collateral attack. *See Boykin,* 395 U.S. at 244 & n.7 (a record "forestalls the spin-off of collateral proceedings that seek to probe murky memories); *Ford,* 281 N.C. at 68 (developing evidence that a plea was entered voluntarily and knowingly serves "generally to protect the plea and judgment from collateral attack in State post-conviction and federal *habeas corpus* proceedings"). As noted in Section III.F.4.b., if the judge rejects a plea agreement as to sentence, that rejection must be made a part of the record. G.S. 15A-1026; G.S. 15A-1023(b).

H. **Capital Cases.** A defendant may plead guilty to first-degree murder and the State may agree to accept a sentence of life imprisonment, even if evidence of an aggravating circumstance exists. *See* G.S. 15A-2001(b). For the procedural rules governing sentencing in a capital case in which there has been a guilty plea, see G.S. 15A-2001(c).

I. **Counsel.** Once the Sixth Amendment right to counsel attaches, *see generally* Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008) (the right attaches at the initial appearance after arrest or when the defendant is indicted or an information has been filed, whichever is earlier), it extends to "critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80-81 (2004). Because plea bargaining and plea proceedings are critical stages, a defendant has a right to counsel at these stages. *See id.* at 81 (entry of guilty plea); State v. Detter, 298 N.C. 604, 619 (1979). Thus, G.S. 15A-1012(a) provides that a defendant may not be called upon to plead until he or she has had an opportunity to retain counsel or, if he or she is eligible for assignment of counsel, until counsel has been assigned or waived.

For a discussion of the procedure for taking a waiver of counsel, see Counsel Issues in this Benchbook. For cases in the original jurisdiction of the superior court, a defendant who waives counsel may not plead within less than seven days following the date he or she was arrested or was otherwise informed of the charge. G.S. 15A-1012(b). The purpose of this delay is to give a "'cooling off' time to the defendant who may during a period of emotional stress decide both to waive counsel and plead guilty." Official Commentary to G.S. 15A-1012(b).

For a discussion of ineffective assistance of counsel claims related to guilty plea proceedings, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES (School of Government, UNC-Chapel Hill 2003).

J. **Competency.** A judge may not accept a plea from a defendant who is not competent. Godinez v. Moran, 509 U.S. 389, 396 (1993); G.S. 15A-1001(a). The standard for incapacity to plead is the same as incapacity to proceed to trial. *Moran*, 509 U.S. at 389-99. G.S. 15A-1001(a) provides that the standard for incapacity is "when by reason of mental illness or defect [the person] is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a

rational or reasonable manner." The constitutional standard, which the North Carolina Supreme Court has said is "essentially the same," State v. LeGrande, 346 N.C. 718, 724 (1997), is whether the defendant has "sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding" and whether the defendant has a "rational as well as factual understanding of the proceedings against him." *See Moran*, 509 U.S. at 396 (internal quotation omitted). The United States Supreme Court has noted that a judge is not required to make a competency determination every time he or she takes a guilty plea. *See id.* at 401 n.13. Rather, it has said: "As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." *Id.*

Difficult questions as to competency can arise when the defendant is taking prescribed medications, or not taking medications as prescribed. The Transcript of Plea Form, *see* AOC-CR-300, includes the following questions:

> 4(a). Are you now under the influence of alcohol, drugs, narcotics, medicines, pills or any other substances?
> 4(b). When was the last time you used or consumed any such substance?"

When the answer to question 4(a) is yes, some follow-up will be required. If a defendant indicates that he or she is taking prescription medications, the judge may wish to follow-up with questions, such as:

1. What are your prescribed medications?
2. What is your prescribed dosage of each one?
3. How often are you supposed to take each medication?
4. For what problems are the medications prescribed?
5. Have you taken each of the medications as prescribed during the past 10 days?
6. When you are taking the medications as prescribed, do any of them cause any side effects, in particular, do they affect your ability to think clearly or communicate with other people?
7. Do you ever suffer any such problems when you do not take the medications as prescribed?
8. As you stand here today, are you able to think clearly? Are you able to understand clearly what I am saying to you? Are you able to express to me the things that you wish to say?
9. Is there anything else that I need to know about your medications or any physical or emotional difficulty?

The importance of such an inquiry is highlighted by cases in which defendants later assert incompetence at the time of their pleas on grounds that they failed to take prescribed medication, *see, e.g.,* State v. Ager, 152 N.C. App. 577, 583-84 (2002) (rejecting the defendant's claim that he was not competent at the time of the plea; the defendant failed to take one of his prescribed medications, Prozac, for two weeks before entry of the plea; rejecting claim that the defendant's medications caused mental confusion), *affirmed per curiam,* 357 N.C. 154 (2003), or that the pleas were not knowing and voluntary.

K. Sentencing. If the sentence is not part of a negotiated plea agreement, sentencing after a guilty plea is conducted just like sentencing after a jury verdict of guilt. The applicable procedure when a plea agreement pertains to sentence is discussed in Section III.F., above. For a discussion of *Blakely v. Washington* and pleas to aggravating factors and prior record level points not involving prior convictions, see Section II.E., above. If the defendant pleads guilty only to the offense and contests an aggravating factor or prior record level point not involving a prior conviction, a jury must be empaneled to decide these issues. G.S. 15A-1340.16(a3), (a5). For sentencing procedures that apply in a capital case in which there has been a guilty plea, see G.S. 15A- 2001(c).

If the plea is pursuant to a plea arrangement that includes restitution or reparation, G.S. 15A-1021(d) contains both guidance and requirements for the trial judge.

V. Withdrawal of a Plea. The standard for allowing withdrawal of a plea differs depending on whether a motion to withdraw is made before or after sentencing. Both standards are discussed below. Regardless of when the motion is made, if it is granted the relief will be the same: the case proceeds as if no plea was in place. This means that the parties are free to try to renegotiate, but are under no obligation to do so.

A. Before Sentencing. As discussed in Section III.F. above, if at the time of sentencing the judge decides to impose a sentence other than that provided for in a negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea. That scenario is the only one that creates a right to withdraw a plea prior to sentencing. However, the trial court may allow the defendant to withdraw a guilty plea prior to sentencing for any "fair and just" reason. State v. Handy, 326 N.C. 532, 539 (1990); *see also* State v. Meyer, 330 N.C. 738, 742 (1992); *Ager*, 152 N.C. App. at 579. While there is no right to withdraw a plea, motions to withdraw made before sentencing, and "especially at a very early stage of the proceedings, should be granted with liberality." *Handy,* 326 N.C. at 537; *Meyer,* 330 N.C. at 742-43. Some of the factors to be considered in determining whether a fair and just reason exists include:

- whether the defendant has asserted legal innocence;
- the strength of the state's proffer of evidence;
- the length of time between entry of the guilty plea and the desire to change it;
- whether the defendant had competent counsel at all relevant times;
- whether the defendant understood the consequences of the plea; and
- whether the plea was entered in haste, under coercion or at the time when the defendant was confused.

Handy, 326 N.C. at 539; *see also Meyer,* 330 N.C. at 743 (quoting *Handy*); *Ager,* 152 N.C. App. at 579 (same); State v. Marshburn, 109 N.C. App. 105, 108 (1993) (same).

If the defendant asserts confusion or misunderstanding at the time of the plea, the "defendant must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter." *Marshburn,* 109 N.C. App. at 109. *Compare Marshburn,* 109 N.C. App. at 109 (the defendant alleged misunderstanding about

the effect of his plea on an unrelated pending federal conviction), *with* State v. Deal, 99 N.C. App. 456, 464 (1990) (the defendant had a "basic misunderstanding of the guilty plea process"). The court of appeals has declined to decide what effect an active misrepresentation by the State as to collateral consequences would have on the right to withdraw a plea. *Marshburn,* 109 N.C. App. at 109 n.1.

Once the defendant makes the required showing, the State may refute it with "evidence of concrete prejudice" to its case by reason of the withdrawal. *Handy*, 326 N.C. at 539; *see also Meyer*, 330 N.C. at 743; *Marshburn*, 109 N.C. App. at 108. Lack of prejudice to the State does not, in and of itself constitute a fair and just reason for withdrawal. *Ager*, 152 N.C. App. at 584. Although the State may refute the defendant's motion to withdraw with evidence of prejudice, it "need not even address this issue until the defendant has asserted a fair and just reason why he should be permitted to withdraw." *Meyer,* 330 N.C. at 744; *see also Ager,* 152 N.C. App. at 584. Examples of concrete prejudice include:

- destruction of important physical evidence;
- death of an important witness; and
- that the defendant's codefendant has already been tried in a lengthy trial.

See Marshburn, 109 N.C. App. at 108. North Carolina appellate cases applying the fair and just standard are summarized below.

Fair and Just Reason

State v. Handy, 326 N.C. 532, 539-42 (1990) (the defendant asserted innocence, tried to withdraw within 24 hours and said he felt pressured to plead guilty; the State did not argue substantial prejudice).

State v. Deal, 99 N.C. App. 456, 461-64 (1990) (the defendant had a basic misunderstanding of the implications of his guilty plea and had low intellectual abilities; although the withdrawal motion was not made for over 4 months the delay appears to have resulted from his problems with his attorney; the State did not argue prejudice).

No Fair and Just Reason

State v. Meyer, 330 N.C. 738, 743-45 (1992) (only reason offered for withdrawal motion made 3½ months after plea was changed circumstances due to extensive media coverage generated by the defendant's escape from custody; the State's case was strong; the defendant did not assert legal innocence or argue lack of competent counsel, that he misunderstood the consequences of the plea, that it was entered in haste or that he was confused or coerced).

State v. Chery, 203 N.C. App. 310, 313-19 (2010) (that plea was a no contest or *Alford* plea did not establish an assertion of legal innocence for purposes of the analysis; although the defendant testified at a co-defendant's trial that he did not agree to take part in the crime, his testimony was negated by his stipulation to the factual basis for his plea and argument for a mitigated sentence based on acceptance of

responsibility; the State's proffered factual basis was strong and the fact that a co-defendant was acquitted at trial was irrelevant to the analysis; the plea was knowing and voluntary; any alleged misrepresentation by the defendant's original retained counsel could not have affected the plea where the defendant was represented by new counsel at the time of the plea; although the defendant sought to withdraw his plea 9 days after its entry, he executed the plea transcript approximately 3½ months before the plea was entered and never wavered in this decision).

State v. Watkins, 195 N.C. App. 215, 225-28 (2009) (the defendant "waffled" about his plea after entering it but did not file a withdrawal motion for nearly 2 years; the defendant's equivocal statements regarding guilt were insufficient assertions of innocence; the State's forecast of evidence was not weak; the defendant had competent representation; there was no indication that the defendant misunderstood the consequences of his plea; there was no haste or coercion; and the State demonstrated that withdrawal would prejudice its case because all co-defendants had been sentenced and could not be relied upon to testify against the defendant).

State v. Ager, 152 N.C. App. 577, 582-85 (2002) (in a motion to withdraw made 20 months after entry of the plea, the defendant did not assert legal innocence; there was no ineffective assistance of counsel and the defendant was competent at the time of the plea; the plea was not made hastily; although the State indicated that withdrawal would cause no prejudice, the defendant failed to show a fair and just reason for withdrawal), *aff'd per curiam*, 357 N.C. 154 (2003).

State v. Davis, 150 N.C. App. 205, 206-08 (2002) (in a motion to withdraw filed 7 days after the plea, the defendant asserted that he thought he was pleading to driving while impaired, not second-degree murder; however, the record showed that the defendant was not confused, he was represented by counsel and there was no haste or coercion; the defendant's response "No, sir" to his attorney's question "Do you feel like you're guilty of second degree murder?" was not a concrete assertion of innocence; State's proffer of evidence was "significant").

State v. Graham, 122 N.C. App. 635, 636-38 (1996) (in a withdrawal motion made almost 5 weeks after the plea, the defendant's statement that he "always felt that he was not guilty" was not a concrete assertion of innocence; lawyer's notes reflected no conversation in which he coerced or persuaded the defendant to accept the guilty plea and at the motion hearing, the defendant indicated that he was satisfied with his lawyer; the evidence against the defendant was "strong").

State v. Marshburn, 109 N.C. App. 105, 108-09 (1993) (the defendant argued that when he entered his plea, he did not know whether he was guilty or not and that he thought that it would not count as a conviction in a pending federal case when in fact it was so considered; motion to withdraw was made some 8 months after the plea and the defendant did not claim that he lacked the full benefit of counsel; the defendant did not

assert innocence and the asserted misunderstanding related only to the effects of his plea on an unrelated case).

B. After Sentencing. As discussed in Section III.F.5. above, if at the time of sentencing the judge decides to impose a sentence other than that provided for in a negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea. *See also* State v. Russell, 153 N.C. App. 508, 509 (2002) ("[I]f a trial court enters a sentence inconsistent with the agreed plea, the defendant is entitled to withdraw his guilty plea as a matter of right."). Although that scenario is the only one that creates a right to withdraw a plea after sentencing, the trial court may allow the defendant to withdraw a guilty plea after sentencing upon a showing of manifest injustice. State v. Shropshire, 210 N.C. App. 478, 481 (2011); *Russell*, 153 N.C. App. at 509; State v. Suites, 109 N.C. App. 373, 375 (1993). Several reasons explain the stricter standard for post-sentencing motions to withdraw than to similar pre-sentencing motions. First, once the sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and wish to have it set aside. *Handy,* 326 N.C. at 537. Second, by the time of sentencing, the prosecutor likely will have followed through on his or her promises, such as dismissing other charges, and it may be difficult to undo these actions. *Id.* And finally, the higher standard is supported by the policy of giving finality to criminal sentences which result from voluntary and properly counseled guilty pleas. *Id.*

Only a few North Carolina appellate cases have had occasion to apply this standard. *Compare Suites,* 109 N.C. App. at 376-79 (manifest injustice existed to allow withdrawal of guilty plea to accessory before the fact to second-degree murder when named principal was later acquitted of first-degree murder), *with Shropshire*, 210 N.C. App. at 481 (trial court did not err by denying the defendant's motion to withdraw his guilty plea made after sentencing; the defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement); State v. Salvetti, 202 N.C. App. 18, 34-35 (2010) (trial court did not err in denying the defendant's motion to withdraw, made after sentencing; the court reasoned, among other things, that the trial court had determined that counsel was not ineffective and that the State's evidence was sufficient to support the conviction); *Russell,* 153 N.C. App. at 510 (rejecting the defendant's argument that manifest injustice existed because he was not fully informed of the sentencing consequences; the trial court was not required to inform the defendant that the sentence could be made to run at the expiration of sentences he was serving for unrelated convictions; the record showed that the plea was knowing and voluntary where the defendant signed a Transcript of Plea form and the trial court made a careful inquiry). Most of those cases indicate that the factors considered in connection with a motion to withdraw made prior to sentencing apply equally to a motion to withdraw made after sentencing. *Shropshire*, 210 N.C. App. at 481; *Russell,* 153 N.C. App. at 509; State v. Salvetti, 202 N.C. App. 18, 34 (2010).

Although there is variation among jurisdictions, it is generally thought that the following types of fact patterns rise to the level of a manifest injustice:

- when the defendant was denied effective assistance of counsel

- when the plea was not entered or ratified by the defendant or a person authorized to act in his or her behalf; and
- when the plea was involuntary.

See 5 CRIMINAL PROCEDURE § 21.5(a), at 872 (listing other fact patterns).

VI. Enforcing a Plea Agreement.

A. Breach of Agreement.

Once the plea is entered, the parties are bound by the plea agreement and failure to comply with it constitutes a breach.

1. Common Types of Breaches. Common prosecutorial breaches include breaking a promise to take no position on sentencing, *see* Santobello v. New York, 404 U.S. 257, 259 (1971) (prosecutor breached by recommending a sentence); State v. Rodriguez, 111 N.C. App. 141, 146 (1993) (prosecutor breached by noting for the trial court certain available non-statutory aggravating factors), and breaking a promise to recommend a particular sentence. *See, e.g.,* United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) (prosecutor breached promise to recommend that the defendant receive a sentence of no more than 63 months and an adjustment for acceptance of responsibility). Of course, other types of prosecutorial breaches may occur. *See* State v. Blackwell, 135 N.C. App. 729, 730-32 (1999) (State breached promise not to use plead-to felony as a theory of first-degree murder under the felony-murder rule; although the State did not use the plead-to felony as the underlying felony, it used it derivatively to prove the underlying felonies).

A promise to take no position on sentencing means that the prosecutor is to make no comment to the sentencing judge, either orally or in writing, that "bears in any way upon the type or severity of the sentence to be imposed." *Rodriguez,* 111 N.C. App. at 145-46. Stated another way, "taking no position" means "making no attempt to influence the decision of the sentencing judge." *Id*. at 146. A breach of a promise to take no position on sentencing will not be excused on grounds that it was inadvertent, *see Santobello,* 404 U.S. at 262, or because it might not have influenced the sentencing judge. *Rodriguez,* 111 N.C. App. at 147 (rejecting the State's argument that no breach occurred because none of the non-statutory aggravating factors suggested by the prosecutor were found by the judge); *Santobello,* 404 U.S. at 262-63 (prosecutor breached by recommending a sentence; remand required even though trial judge stated that prosecutor's recommendation did not influence him). A promise to recommend a sentence does not require the prosecutor to advocate for the sentence or to explain the reasons for the recommendation. *See* United States v. Benchimol, 471 U.S. 453, 455-57 (1985).

Although less common, some cases deal with breach by defendants. *See* Ricketts v. Adamson, 483 U.S. 1, 4-5 (1987) (defendant breached by not testifying at his accomplices' retrial).

2. Ambiguities Construed Against the State. Occasionally, ambiguity in the plea agreement complicates the determination of whether a breach has occurred. Although a plea agreement is a contract, it is not an ordinary commercial contract. *Blackwell*, 135 N.C. App. at 731. Because a guilty plea involves a waiver of constitutional rights, including the right to a

jury trial, "due process mandates strict adherence to any plea agreement." *Id*. This strict adherence "require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." *Id.* (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)); *see also* State v. King, 218 N.C. App. 384, 388 (2012) (quoting *Blackwell*). Thus, ambiguities are construed against the State.

3. Remedies after Breach. A defendant cannot be held to a plea bargain when the prosecution breaches. Santobello v. New York, 404 U.S. 257, 262 (1971). When such a breach occurs, the defendant's remedies are either specific performance or withdrawal of the plea. *Id.* at 262-63; *Blackwell*, 135 N.C. App. at 732. The court should consider the following factors when deciding between these remedies:

- who broke the bargain;
- whether the violation was deliberate or inadvertent;
- whether circumstances have changed between entry of the plea and the present time;
- whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate; and
- the defendant's wishes.

Blackwell, 135 N.C. App. at 732-33.

Some appellate decision have ordered specific performance as a remedy for a prosecution breach. *See* State v. King, 218 N.C. App. 384, 390-98 (2012) (where the defendant pleaded guilty pursuant to a plea agreement that called for, in part, the return of over $6,000 in seized funds, the court ordered specific performance even though the exact funds at issue had been forfeited to federal authorities; rescission could not repair the harm to the defendant where he already had completed approximately nine months of probation and had complied with all the terms of the plea agreement, including payment of fines and costs); *Rodriguez,* 111 N.C. App. at 148 (where the prosecutor breached a promise to take no position on sentencing, the court ordered a new sentencing hearing at which the State was to take no position on sentencing). Others have ordered rescission. State v. Isom, 119 N.C. App. 225, 227-28 (1995) (rescission ordered where the plea agreement called for sentencing the defendant as a committed youthful offender but he did not qualify for that status based on his age). Still others, noting that trial court is in the best position to determine the appropriate remedy, have remanded for the trial court to choose between the two remedies. *Santobello,* 404 U.S. at 263; *Blackwell,* 135 N.C. App. at 732.

When specific performance requires a new sentencing hearing, a different judge should conduct that proceeding. *See Santobello,* 404 U.S. at 263; *Rodriguez,* 111 N.C. App. at 148.

A defendant is not entitled to specific performance when the plea agreement contains terms that violate statutory law; in these cases, rescission is the appropriate remedy. State v. Wall, 348 N.C. 671, 676

(1998); *Rodriguez,* 111 N.C. App. at 148. *See generally* Section III.B.6. (discussing that plea agreement terms that are contrary to law are unenforceable).

When the agreement is conditioned on some future action by the defendant—such as truthfully testifying in an accomplice's trial—it typically contains a provision indicating that the agreement is null and void upon breach. When that is the case and breach occurs, double jeopardy presents no bar to re-trying and convicting the defendant on the original greater charges. Ricketts v. Adamson, 483 U.S. 1, 11 (1987) (so holding).

B. Mutual Mistake. What if the parties enter into a plea agreement that is based on a mutual mistake of law? Where the mutual mistake improperly elevates the defendant's sentence the defendant is not entitled to repudiate only the problematic portion of the agreement. Because the "defendant cannot repudiate in part without repudiating the whole," such a scenario requires that the entire plea be set aside and the original charges be reinstated. State v. Rico, 366 N.C. 327 (2012) (for the reasons stated in the dissenting opinion below, reversing State v. Rico, 218 N.C. App. 109 (2012)). A similar result obtains when the mutual mistake illegally lessens the defendant's sentence. In such a scenario the defendant is not entitled to specific performance; rather, the defendant's remedy is to withdraw the plea and proceed to trial on the original charges. *Wall,* 348 N.C. at 676. *See generally* Section III.B.6. (discussing that plea agreement terms that are contrary to law are unenforceable).

VII. Appeal & Post-Conviction Challenges.

A. Generally: Claims Waived By The Plea. As a general rule, a defendant who knowingly, voluntarily and intelligently enters an unconditional guilty plea waives all defects in the proceeding, including constitutional defects, that occurred before entry of the plea. *See* State v. Reynolds, 298 N.C. 380, 395 (1979) (holding that the defendant's plea waived his fourth amendment claim asserted on appeal, the court stated: "'When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea'") (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)); *see also* State v. Harwood, __ N.C. App. __, 746 S.E.2d 445, 451-52 (2013) (by pleading guilty to multiple counts of felon in possession, the defendant waived the right to challenge his convictions on double jeopardy grounds).

1. Exception: Claims Challenging Power of State to Prosecute. A guilty plea does not waive a claim challenging "the power of the State to bring the defendant into court to answer the charge." Blackledge v. Perry, 417 U.S. 21, 30 (1974); *Reynolds*, 298 N.C. at 395 (discussing *Perry*). Under this exception, a defendant who has pleaded guilty would not be barred from asserting, for example, a jurisdictional defect in the proceedings. *See, e.g.,* State v. Neville, 108 N.C. App. 330, 333 (1992) (guilty plea to uttering a forged instrument did not waive appeal where the defendant was not indicted on that charge and never signed a waiver of a bill of indictment and thus issue was jurisdictional). The full scope of the "power of the State" exception, is not entirely clear. *See* 5 CRIMINAL PROCEDURE § 21.6(a), at 909-12.

2. **Exception: Defect in the Plea Itself.** Entry of a guilty plea does not preclude a defendant from later alleging a defect in the plea—such as a claim asserting that the plea was not knowing, voluntary and intelligent. *See* State v. Tyson, 189 N.C. App. 408, 416 (2008) (rule barring attack on a plea does not preclude a defendant from asserting that he or she was induced into accepting a plea based on misrepresentations by the State); 5 CRIMINAL PROCEDURE § 21.6(a), at 920 (noting that the types of claims that survive a plea include ineffective assistance of counsel affecting the plea process and defects in the plea proceeding which make the plea "other than voluntary, knowing and intelligent"); *see generally* Section IV.D. above (discussing the requirement that a plea be knowing, voluntary and intelligent).
3. **Claim Preserved by Statute.** As discussed in the section immediately below, in North Carolina, statutory law expressly provides the defendant a right to appeal certain sentencing issues, a denial of a motion to withdraw the plea, and an adverse ruling on a motion to suppress.

B. Procedural Mechanisms For Review.

1. **Appeal.** A defendant who has entered a plea of guilty or no contest is not entitled to appellate review as a matter of right except when the appeal pertains to sentencing issues, the denial of a motion to withdraw the plea, and, in certain circumstance, an adverse ruling on a motion to suppress. G.S. 15A-1444; State v. Santos, 210 N.C. App. 448, 450 (2011). Thus, absent a motion to withdraw the plea, a defendant does not have an appeal as a matter of right to challenge a plea on grounds that it was not knowing, voluntary, and intelligent. *Santos,* 210 N.C. App. at 450. However, such a claim may be asserted in a petition for writ of certiorari, *see* Section VII.B.2. below, or in a motion for appropriate relief. *See* Section VII.B.3. below.
   a. **Sentencing Errors.** A defendant who pleads guilty or no contest has a right to appeal certain issues regarding the sentence. G.S. 15A-1444(a1)-(a2). Specifically, a defendant may appeal:

      - Whether a felony sentence is supported by the evidence. G.S. 15A-1444(a1). This issue is appealable only if the minimum term of imprisonment does not fall within the presumptive range. *Id.*
      - Whether a felony or misdemeanor sentence results from an incorrect finding of the defendant's prior record level or prior conviction level. G.S. 15A-1444(a2)(1).
      - Whether a felony or misdemeanor sentence contains an unauthorized type of sentence disposition. G.S. 15A-1444(a2)(2).
      - Whether a felony or misdemeanor sentence contains a term of imprisonment that is for an unauthorized duration. G.S. 15A-1444(a2)(3).

      Nevertheless, when the defendant enters into a plea agreement that includes an agreement as to sentencing, the defendant may be deemed to have waived the right to appeal the sentence. State v. Hamby, 129 N.C. App. 366, 369-70 (1998) (the defendant

waived her right to appeal her sentence by admitting in her plea agreement that she fell within Prior Record Level II and that the judge was authorized to sentence her to a minimum of 29 months and a maximum of 44 months and by agreeing that her sentence could be intermediate or active in the trial judge's discretion).

b. Denial of Motion to Withdraw Plea. A defendant who pleads guilty or no contest has a right to appeal from a denial of a motion to withdraw a plea of guilty or no contest. G.S. 15A-1444(e); *see, e.g.,* State v. Handy, 326 N.C. 532, 535 (1990).

c. Adverse Ruling on Suppression Motion. A defendant who pleads guilty or no contest has a right to appeal from an adverse ruling on a suppression motion, in certain circumstances. G.S. 15A-1444(e); G.S. 15A-979(b). To preserve the right to appeal such a ruling, the defendant must notify the state and the trial court that he or she intends to appeal "before plea negotiations are finalized." State v. Reynolds, 298 N.C. 380, 397 (1979); *see also* State v. McBride, 120 N.C. App. 623, 625 (1995), *aff'd per curiam*, 344 N.C. 623 (1996). This seems to mean any time before the trial court accepts the plea. *See* State v. Parker, 183 N.C. App. 1, 6 (2007) ("[D]efendant preserved his right to appeal from the trial court's denial of the motion to suppress by expressly communicating his intent to appeal the denial to the trial court at the time he pleaded guilty …."); State v. Christie, 96 N.C. App. 178, 179-80 (1989) (oral notice given in court when the plea was entered was sufficient). The notice must be "specifically given." State v. Pimental, 153 N.C. App. 69, 74-76 (2002) (statement in Transcript of Plea that "Defendant preserves his right to appeal any and all issues which are so appealable" was not specific enough); *see also* State v. Brown, 142 N.C. App. 491, 492-93 (2001) (a stipulation in the appellate record that the defendant intended to appeal the denial of a suppression motion was not sufficient to preserve the issue).

If the defendant fails to provide the required notice, the right to appeal is waived by entry of the plea. *See, e.g., Reynolds*, 298 N.C. at 397.

These rules have led to what has become known as the conditional plea: a guilty plea conditioned on the right to appeal a denial of a suppression motion pursuant to G.S. 15A- 979(b).

2. Certiorari. Defendants who are not entitled to an appeal as a matter of right may obtain review by writ of certiorari. G.S. 15A-1444(a1) (defendant who has entered a plea of guilty or no contest to a felony may petition for review by way of certiorari of whether the sentence is supported by the evidence); G.S. 14A-1444(e) (defendant who has pleaded guilty or no contest and does not have a right to review under G.S. 15A-1444(a1), (a2) or G.S. 15A-979 may petition for review by way of writ of certiorari).

a. Scope of the Appellate Division's Authority to Grant Writ. Rule 21 of the North Carolina Rules of Appellate Procedure provides that in connection with review of trial court rulings, a writ of certiorari may be issued to permit review:

- when the right to prosecute an appeal has been lost by failure to take timely action,
- when no right of appeal from an interlocutory order exists, or
- for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

Citing the limited bases for certiorari review in Rule 21, the North Carolina Court of Appeals has denied petitions for writs of certiorari challenging guilty pleas. State v. Pimental, 153 N.C. App. 69, 77 (2002) ("In the instant case, defendant has not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review of an order of the trial court denying a motion for appropriate relief. Thus, this Court does not have the authority to issue a writ of certiorari."). However, that court has interpreted state supreme court case law as allowing certiorari review of claims that the trial court improperly accepted the plea, nothwithstanding Rule 21. *See, e.g.,* State v. Demaio, 216 N.C. App. 558, 562-64 (2011). *See generally* State v. Rhodes, 163 N.C. App. 191, 193-94 (2004) (distinguishing *Pimental* and similar decisions; interpreting supreme court case law and G.S. 15A-1027 as authorizing the court "to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of Article 58 were violated"). Note that G.S. 15A-1027 provides that "[n]oncompliance with the procedures of [Article 58 (guilty plea procedures in superior court)] may not be a basis for review of a conviction after the appeal period for the conviction has expired."

b. **Transcript.** If an indigent defendant petitions the appellate division for a writ of certiorari, the trial court may, in its discretion, order the preparation of the record and transcript of the proceedings at the State's expense. G.S. 15A-1444(e).

3. **Motion for Appropriate Relief.** In certain circumstances a defendant may be able to challenge a plea through a post-conviction motion for appropriate relief. For detail on that procedure, see Motions for Appropriate Relief in this Benchbook.

Tab 15

Right to Counsel

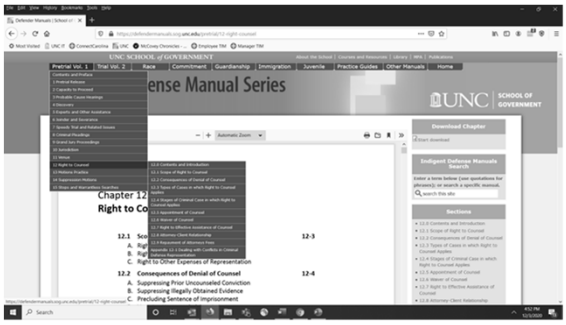
Right to Counsel in Superior Court

John Rubin
UNC School of Government
January 2023

1

http://defendermanuals.sog.unc.edu/

2



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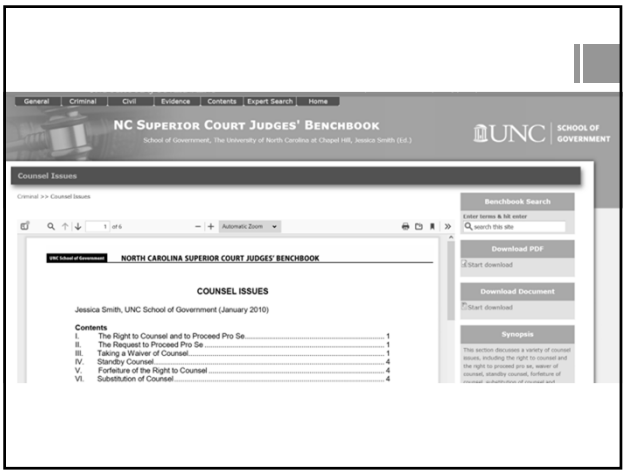

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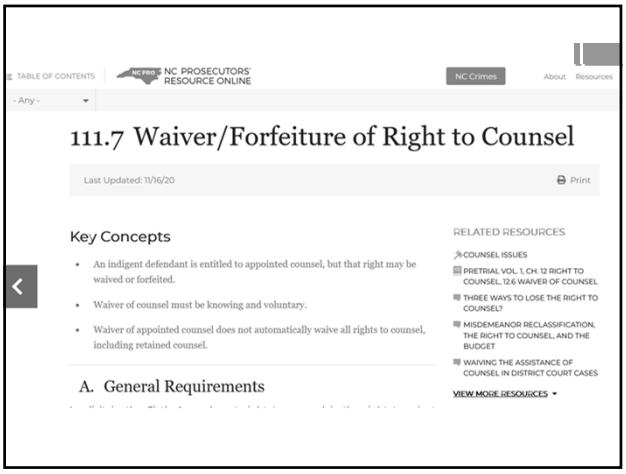


5

Agenda

Quick

- Entitlement to Counsel
- Advisement of Counsel
- Payment of Counsel

Dirty

- Attorney Client Relations
  - Decisionmaking
  - Substitutions
  - Waiver
  - Forfeiture

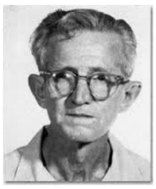
6

Entitlement to Counsel

7

In felony cases you must afford a person the opportunity to be represented by counsel . . .

In all cases



8

9

If you want to impose an active or suspended sentence of imprisonment in a misdemeanor case

You must afford a person the opportunity to be represented by counsel

10

Advisement of Counsel

11

The court should advise or inquire about counsel of an unrepresented defendant at . . .

Initial appearance, first appearance, probable cause hearing, arraignment, entry of guilty plea, and trial

12

Recovery of Attorneys' Fees

13

Before entering a judgment for attorneys' fees against an indigent defendant who has been convicted

The Court of Appeals has Repeatedly said that you Must give the defendant notice and an opportunity to be heard

14

Attorney-Client Relations

15

Who Decides

- Ms. Atwell was charged with a felony violation of a DVPO for purchasing a firearm in Tennessee. She believes that NC lacks jurisdiction to prosecute her. Counsel believes a motion to dismiss will be unsuccessful.

1. Must counsel file the motion if the defendant insists?
2. May the defendant file a "pro se" motion while represented by counsel?

16

When to Substitute

- Atwell's appointed lawyer moves to withdraw from the case over disagreements with Atwell about how to proceed with the case. Atwell agrees and asks for the court to appoint a different lawyer.

1. Does the law require that you substitute counsel?
2. Does the law allow you to substitute counsel?

17

Taking a Waiver

- Before becoming a superior court judge, you saw judges take waivers of counsel. Some would advise the defendant of their right to counsel and, if the defendant stated that he wanted to represent himself, the judge directed the defendant to see the clerk and sign a waiver form.
  - Is that legally sufficient?

18

Defendants may represent themselves in a criminal case if

(1) they have been advised of the right to counsel, (2) express the desire to proceed without counsel, and (3) waive the right to counsel

19

State v. Moore, 362 N.C. 319 (2008)

The N.C. Supreme Court has indicated that the following questions comply with the statutorily mandated inquiry:

- Are you able to hear and understand me?
- Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
- How old are you?
- Have you completed high school? College? If not, what is the last grade you completed?
- Do you know how to read? Write?
- Do you suffer from any mental handicap? Physical handicap?
- Do you understand that you have a right to be represented by a lawyer?
- Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?

20

Waiving Appointed Counsel

- Atwell says she has had enough of appointed counsel who do not do what she asks. She says she wants to hire a lawyer and waives her right to appointed counsel. At the next proceeding, she appears without a lawyer.

1. Can you proceed without inquiring about counsel?
2. If the defendant says I want an appointed lawyer, what do you do?

21

STATE OF NORTH CAROLINA

File No.

County

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

STATE VERSUS

Name Of Defendant

WAIVER OF COUNSEL

G.S. 7A-457; 15A-1242

Additional File no.(s) And/Or Offense(s)

ACKNOWLEDGMENT OF RIGHTS AND WAIVER

As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

I freely, voluntarily and knowingly declare that: *(check only one)*

☐ 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.

☐ 2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date

Date

Signature

Signature Of Defendant

☐ Judge ☐ Clerk Of Superior Court ☐ Asst. CSC ☐ Deputy CSC ☐ Magistrate

CERTIFICATE OF JUDICIAL OFFICIAL

I certify that the above named defendant has been fully informed of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceeding against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly and intelligently elected in open court to be tried in this action:

(check only one)

☐ 1. without the assignment of counsel.

☐ 2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

NOTE: For a waiver of assigned counsel only, both blocks numbered "1" must be checked. For a waiver of all assistance of counsel, both blocks numbered "2" must be checked.

Date

Name Of Judicial Official (type or print)

Signature Of Judicial Official

NOTE: A magistrate may accept waivers of counsel if designated to do so by the Chief District Court Judge. See G.S. 7A-146(11) and G.S. 7A-292(18).

AOC-CR-227, Rev. 2/21
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22

I freely, voluntarily and knowingly declare that: *(check only one)*

☐ 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.

☐ 2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

23

(check only one)

☐ 1. without the assignment of counsel.

☐ 2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

NOTE: For a waiver of assigned counsel only, both blocks numbered "1" must be checked. For a waiver of all assistance of counsel, both blocks numbered "2" must be checked.

24

What Constitutes Forfeiture

- Atwell tells the court shortly before trial that she cannot find a lawyer that she can afford and asks for her fifth appointed attorney. The previous attorneys asked to withdraw for their own reasons or at Atwell's request. Atwell signed previous waivers of appointed counsel when she wanted to hire a lawyer but withdrew them when she couldn't hire one.

1. Has Atwell forfeited the right to be represented by counsel?
2. If not, what should you do now?

25

Recap

- You may be asked to address decision making by counsel and client
- You may and sometimes must appoint new counsel
- You must take a waiver of all counsel for it to be effective
- You must find that client's conduct was egregious for a forfeiture to occur

26

Make a record!

27

Tab 16

Self-Represented Litigants

NORTH CAROLINA Judicial COLLEGE

Self-Represented Litigants

Allen Baddour
Senior Resident Superior Court Judge
District 15B
January 2023: New Judges School

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

1

Self-Represented?

Yes, Self-Represented Litigants…
instead of pro se litigants

Best practices

UNC

2

UNC

3

4

Best practices:

1. Have a process for handling SRLs in the pre-trial phase

- **Notice/communication**
- **TCA/TCC**
- **Visiting judge hearing motions**
- **Senior resident**

5

6

Best practices:

2. Provide transparency

(or what I used to call… *a roadmap for trial*)

(jury selection, openings, evidence, objections, charge conference, closings)

UNC SCHOOL OF GOVERNMENT

7

Best practices:

Helpful techniques in providing transparency:

- Frame subject matter of hearing
- Explain process
- Elicit needed info from litigants
- Articulate decision from bench if able
- Provide written order
- Set expectations for next steps

UNC SCHOOL OF GOVERNMENT

8

Best practices:

3. Ensure procedural fairness

Be fair

***Appear* fair**

UNC SCHOOL OF GOVERNMENT

9

Best practices:

4. Listen actively

Validate

10

Best practices:

5. Reset

11

Best practices:

6. Tour your own courthouse

Front door
Signage
Website

12

Best practices:

7. Consider self-help materials

13

Best practices:

8. Remote proceedings

14

15

Civil Self-Represented Litigants
New Superior Court Judges School

Allen Baddour
Resident Superior Court Judge, District 15B
January 2023

Top 10 Rules for Successfully Managing Self-Represented Litigation

1. Read the file. Self-represented litigants may miss something critical in the file. Does the file contain proof of service on the defendant? Did the defendant file something that should be treated as an Answer, even if not served on plaintiff?

- *Judicial Canon 3(A)(1): "A judge should be faithful to the law…"*

2. Be patient. These cases will often take longer, whether you are dealing with a pre-trial motion or with the trial itself.

- *Judicial Canon 3(A)(3): "A judge should be patient, dignified, and courteous to litigants…"*
- *Judicial Canon 3(A)(4): "A judge should afford every person who is legally interested in a proceeding, or his lawyer, full right to be heard…"*
- *Judicial Canon 1: "A judge should … ensure that the integrity and independence of the judiciary shall be preserved."*

3. Be nice. There is nothing to gain from being aggressive with a self-represented litigant.

- *Judicial Canon 3(A)(3): "A judge should be patient, dignified, and courteous to litigants…"*
- *Judicial Canon 2A: "A judge should … conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."*

4. Have no ex parte communications. Do not accept phone calls, emails, tweets, smoke signals, or any other communication from a self-represented litigant. Don't

find yourself talking with a winning lawyer who you have asked to draft an order. Better yet, don't ask the winning lawyer to draft the order: prepare your own. A corollary: don't have off the record bench conferences or meetings in chambers, even with both sides present.

- *Judicial Canon 3(A)(4): "A judge should … neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding."*

5. Stay safe. There can be security issues with self-represented litigants. While many simply can't afford counsel, some may be combative or even unstable. Alert bailiffs and clerks if you anticipate an issue. Be open to the advice and counsel of court staff who may have had previous experiences with the individual.

6. Be fair. Your actions and statements can reward or harm one side or the other.

- *Judicial Canon 1: "A judge should… ensure that the integrity and independence of the judiciary shall be preserved."*
- *Judicial Canon 2(A): "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and fairness of the judiciary."*

7. Remember the General Rules of Practice. These rules apply to lawyers and therefore to self-represented litigants when in court.

- Counsel are at all times to conduct themselves with dignity and propriety.
- All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to.
- Abusive language or offensive personal references are prohibited.

From Rule 12, North Carolina General Rules of Practice.

8. Explain things… Providing a roadmap to a self-represented litigant can take time, but so can cleaning up unintentional messes made by the self-represented.

9. … But do not give advice. Clearly. In case you want a rule to cite…

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

N.C. Prof. Cond. Rule 4.3 (2010)

10. Have a plan. Give meaningful thought to how you want to handle self-represented litigants. Find your balance between treating the self-represented "like a lawyer" and being so involved that you become an advocate. Ensure that justice is obtained, as you see it. The line is different for every judge, but be cognizant of where *your* line is *before* engagement with a self-represented litigant.

And a free bonus suggestion:

Take a moment to re-read the North Carolina Code of Judicial Conduct at the start of every new term (not session!). Think of it as equivalent to changing the battery in the smoke alarm when daylight savings starts.

Self-represented Litigants: Some Recent Civil Case Summaries

Self-Represented Litigant: A person, either a plaintiff or defendant, who appears in a civil action without an attorney or a person who seeks to sue as an indigent.

There are few North Carolina appellate decisions on civil self-represented litigants, and most of them are unpublished, but it is clear that the appellate courts equally apply the rules of civil procedure to all parties whether they are represented by counsel. One reason there is so little case law of civil self-represented litigants in the appellate cases is that the North Carolina courts have consistently held that the constitutional right to counsel applies only to criminal cases and that the right to counsel does not extend to civil proceedings. Additionally, since the litigants are self-represented and typically fail to properly preserve issues for appeal, their case generally gets dismissed on procedural grounds.

The reported decisions make it clear that self-represented litigants themselves are held to certain minimum requirements.

A recent North Carolina Supreme Court discussion of civil self-represented litigants can be found in Brown v. Kindred Nursing Centers East, L.L.C., 364 N.C. 76, 692 S.E.2d 87 (15 April 2010). The question in this case is whether a self-represented complaint alleging medical malpractice may be amended, through later acquired counsel, after the expiration of the two-year statute of limitations to include an expert certification as required by N.C.G.S. § 1A-1, Rule 9(j). The plaintiff, as administrator of his father's estate, filed a self-represented action alleging negligence, wrongful death, and medical malpractice against defendants, health care providers, five days before the expiration of the applicable two-year statute of limitations, N.C.G.S. § 1-53(4). The NC Supreme Court held that plaintiff's self-represented complaint, which did not follow the special pleading requirements of Rule 9(j), was properly dismissed by the trial court, because plaintiff filed a complaint five days before the statute of limitations was to run and then moved for an extension to file the 9(j) statement. Furthermore, even though the limitations period can be extended for 120 days under Rule 9(j), this extension is for the limited purpose of filing a complaint; there is no language indicating that the time period can also be used to locate a certifying expert, add new defendants, and amend a defective pleading, as plaintiff attempted here. Although the Court recognized plaintiff initiated this medical malpractice action as a self-represented litigant, it is well settled that the rules of civil procedure must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.

The Court of Appeals considered self-represented litigants and Gatekeeper Orders in Estate of Dalenko v. Monroe, N.C. Ct. of App., No. COA08-844 (19 May 2009), an unpublished opinion. This appeal is the most recent of a series of lawsuits instituted by Ms. Dalenko, as a self-represented litigant, against various defendants, including numerous judges, on behalf of herself, her father, or the Dalenko Estate. Ms. Dalenko, representing herself, appealed the dismissals of claims she filed in her capacity as executrix of the Dalenko Estate. These dismissals were in part based on Ms. Dalenko's failure to comply with a Gatekeeper Order entered in 2001, which prohibited her from filing any document with the Wake County clerk's office without a certificate by a lawyer that the lawyer had read the document, that the document complied with Rule 11, and that the lawyer had read the Gatekeeper Order. In the instant case, Ms. Dalenko argued that the Gatekeeper Order should not apply here because it was not intended to apply outside the case in which it was entered and that, if so applied, the order would violate Rule 65(d) of the North Carolina Rules of Civil Procedure, which states that injunctions are binding only on parties, their lawyers and others in active concert or participation with them. The Court of Appeals, however, disagreed. Rejecting her arguments, the Court stated, among other things, that there was no violation of Rule 65(d) since Ms. Dalenko was a party to the action in which the Gatekeeper Order was entered even if the defendants in her newest lawsuit were not. Therefore, Ms. Dalenko was required to follow the Gatekeeper Order which required her to obtain a Rule 11 certification from an attorney before filing a self-represented complaint or any other pleading.

Wade v. Carolina Brush Manufacturing Co., 187 N.C. App. 245, 652 S.E.2d 713 (2007)

The claimant injured her hand while working for the defendant, employer. She later filed a claim for workers' compensation benefits. After a chief deputy commissioner found that she was not entitled to such benefits, her attorney thereafter moved to withdraw from representation, and she filed on her own a notice of appeal with the North Carolina Industrial Commission (Commission). Despite being advised to do so, she filed neither the proper form for appealing nor a brief with the Commission. The employer and insurer requested dismissal because of her failure to file the proper form, a brief, or for an extension of time, but the Commission denied the request. The Commission found that the claimant's failure to comply with the particularity requirement, which requires appellants to state with particularity the grounds for appeal, could be excused in the 'interest of justice' since she lacked representation. It then entered an opinion and award in her favor. The Court of Appeals held that the Commission's invocation of the 'interest of justice' provision in the context of the

claimant's total failure to comply with the particularity requirement was an abuse of discretion. Therefore, in light of claimant's self-represented status, the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned. The Court of Appeals distinguished between this complete failure to comply with the rules, indicating that self-represented litigants who failed to strictly comply with the particularity requirement may be granted 'interest of justice' relief.

Harrison v. Harrison, 180 N.C. App. 452 (2006) – while recognizing the difficulties faced by a self-represented litigant, the Court held that self-represented litigants are required to meet minimal standards of compliance with the Rules of Civil Procedure in fairness to opposing parties. Though not unsympathetic to the difficulties faced by a self-represented litigant, the Court recognized that fairness to opposing parties requires holding self-represented litigants to minimal standards of compliance with the Rules of Civil Procedure.

In Shwe v. Jaber, 147 N.C. App. 148, 555 S.E.2d 300 (6 November 2001), the buyer of restaurant business brought action against the seller (self-represented litigant) for fraud, conversion, unfair practices, and breach of contract arising out of the sale of a restaurant business and sublease of the premises. The buyer attempted to serve the seller with process at several locations before personally serving at the seller's employer's address. The buyer also served his requests for admissions at the same address via mail. After the seller failed to answer the complaint and discovery requests, the buyer filed a motion for summary judgment. The seller appeared self-represented for the summary judgment hearing. The trial court granted partial summary judgment for conversion, unfair practices, and breach of contract and awarded damages in the buyer's favor based on seller's failure to answer buyer's discovery requests. After the trial court's order for partial summary judgment, the self-represented seller filed motions for relief under Rules 59 and 60 of the North Carolina Rules of Civil Procedure, in which he denied that he had been served with discovery requests or the motion for summary judgment. The seller's motions for relief were denied. On appeal, the seller argued various grounds, including that the trial court should have taken into account that defendant was acting self-represented at the time the partial summary judgment was entered and therefore should have been more inclined to allow defendant to withdraw his admissions. The Court of Appeals, however, rejected his arguments, saying, among other things, that our Supreme Court has stated that the rules of civil procedure must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.

A sample "gatekeeper" order

NORTH CAROLINA CHATHAM		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
GERRY THOMAS PEEK, Plaintiff, v. STATE OF NORTH CAROLINA, G.K. HARRIS, and JEANETTE EMERICK, Magistrates, JAMES MICHAEL WATSON, KELLY WATSON, SERGEANT DANIEL TILLEY, CHATHAM COUNTY SHERIFF'S OFFICE, CHATHAM COUNTY SHERIFF RICHARD WEBSTER, and PROSECUTOR KAYLEY TABER, Defendants.	)	09 CVS 14

THIS MATTER came before the Court on March 27, 2009 at a mixed session of Superior Court in Chatham County upon defendants' Motions and Amended Motions for Sanctions. The plaintiff appeared *pro se*, and appearing on behalf of defendants State of North Carolina, G.K. Harris and Jeanette Emerick, Magistrates, and Prosecutor Kayley Taber was David J. Adinolfi, II, Special Deputy Attorney General; appearing on behalf of defendants Chatham County Sheriff's Office, Sheriff Richard Webster, and Sgt. Daniel Tilley was James D. Secor, III; and appearing on behalf of defendants James M. Watson and Kelly Watson was Robert Gunn.

The Court has considered the full record in this case, including a review of the pleadings and other documents filed in this case and the arguments and submissions of all parties. Both sides were given an opportunity to be heard on the issues of sanctions, specifically defendants' request for a pre-filing injunction and for attorneys fees. Based on its consideration of the matters noted above, the Court concludes that it has the requisite jurisdiction to address the matters presented in the Motions. Prior

to the entry of this Order, the Court considered and rejected alternative, lesser sanctions. The Court relies on the North Carolina Rules of Civil Procedure and the inherent authority and power of the Court reasonably necessary to assure the proper administration of justice.

Based on consideration of the record proper, the Court makes the following FINDINGS OF FACT:

1. On December 8, 2008, the plaintiff filed a document titled "Specific Affidavit of Negative Averment, Opportunity to Cure and Counterclaim" in an unrelated Chatham County Estates case (07 E 466).

2. On January 7, 2009, the Chatham County Clerk of Superior Court established a Civil Superior Court file for plaintiff's filing, which began the above captioned matter.

3. Also on January 7, 2009, at least some defendants filed a motion to dismiss and answer in response to plaintiff's filing.

4. On January 23, 2009, plaintiff filed a document titled, "Demand for Payment."

5. On February 3, 2009, plaintiff filed a document titled, "Second Demand for Payment."

6. None of the plaintiff's filings complied with the North Carolina Rules of Civil Procedure, in that none of the filings contained a claim upon which relief could be granted, and none were properly served upon the defendants.

7. On February 26, 2009, all named defendants put forth motions to dismiss and motions for sanctions.

8. The undersigned granted the motions to dismiss, but declined to sanction plaintiff for his filings to that point. In open court, with plaintiff present, the undersigned did indicate to plaintiff that any further documents filed that were not legally or factually sufficient, or that were filed for an improper purpose, may subject plaintiff to sanctions, including a pre-filing injunction and attorneys fees.

9. In early March, 2009, plaintiff attempted to serve upon the defendants another document, this one titled "Final Demand for Payment."

10. All four of plaintiff's documents described above were signed by plaintiff.

11. The claims contained in the plaintiff's documents were frivolous, not well-grounded in fact, and were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

12. Plaintiff's documents and filings were served or filed for the improper purposes of harassing defendants and unnecessarily increased the cost of litigation.

13. James D. Secor III, has been a licensed practicing attorney in the State of North Carolina for more that eighteen years. His billable hourly rate is $120.00, which the court finds is reasonable and in accordance with customary practice of other North Carolina attorneys with similar experience. Mr. Secor spent 2.5 hours preparing for and arguing this motion, which the Court finds to be a reasonable amount of time.

14. Robert Gunn has been a licensed practicing attorney in the State of North Carolina for over thirty years. Paul Messick has been a licensed practicing attorney in the State of North Carolina for at least twenty years. They are partners in a law firm, and the billable hourly rate is $200.00, which the court finds is reasonable and in accordance with customary practice of other North Carolina attorneys with similar experience. Mr. Gunn and Mr. Messick spent 5 hours preparing for and arguing this motion, which the Court finds to be a reasonable amount of time.

15. David J. Adinolfini II, on behalf of his clients, did not seek recovery of attorneys fees as part of their motion for sanctions.

Based on the above findings of fact, the Court makes the following CONCLUSIONS OF LAW:

1. The claims contained in the plaintiff's documents are frivolous, are not well-grounded in fact, and are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

2. Plaintiff's documents and filings were served or filed for the improper purposes of harassing defendants and unnecessarily increased the cost of litigation.

3. Plaintiff's filings or service upon defendants of signed documents violate the provisions of Rule 11 of the North Carolina Rules of Civil Procedure.

4. The attorneys' hourly billable rate, and time spent on this case, were reasonable, and in accordance with customary practice of other North Carolina attorneys with similar experience.

NOW, IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED that these Motions for Sanctions be ALLOWED. The Court FURTHER ORDERS THAT:

1. As it relates to the above named defendants, plaintiff is hereby enjoined from filing, or causing to be filed, any document with any Clerk of Superior Court in the State of North Carolina, without first obtaining leave of a Resident Superior Court Judge in the County where the plaintiff wishes to file the document.

2. As it relates to the above named defendants, plaintiff is hereby enjoined from serving, attempting to serve, or causing to be served on any defendant named above any unfiled document in any county or jurisdiction within the State of North Carolina, without first obtaining leave of a Resident Superior Court Judge in the County where the plaintiff wishes to serve one of the above named defendants.

3. Plaintiff shall seek leave of a Resident Superior Court Judge by mailing or delivering the document, with this ORDER attached, to the Superior Court Judges' Office.

4. Upon receipt of any document sent by or on behalf of plaintiff to the office of a Resident Superior Court Judge, the Judge shall determine if the plaintiff establishes that the proposed filing:

    a. Is in compliance with Rule 11 of the N.C. Rules of Civil Procedure;
    b. Can survive a challenge under Rule 12 of the N.C. Rules of Civil Procedure;
    c. Is not barred by principles of issue or claim preclusion; or
    d. Is not repetitive or violative of this or any other Court ORDER.

5. If the Court determines the plaintiff has failed to establish that the filing meets the requirements in Paragraph 4, the Court shall discard the filing without further notification to plaintiff or any other party.

6. The CLERK OF SUPERIOR COURT OF CHATHAM COUNTY is hereby ORDERED not to accept any document for filing or any other purpose from plaintiff as it relates to the named defendants unless it complies with this ORDER.

7. As it relates to the above named defendants, the Clerk of Superior Court of every other County in the State of North Carolina is hereby ORDERED not to accept any document for filing or any other purpose from plaintiff, unless it complies with this ORDER.

8. In the event that plaintiff succeeds in filing papers in violation of this Order, upon such notice, the Clerk of Court shall, under authority of this Order, immediately and summarily strike the pleadings or filings.

9. The Court in its discretion further sanctions plaintiff for violations of Rule 11 by awarding attorneys fees in this matter in the amount of $1300.00, which shall be divided as follows:

    a. $300.00 to defendants Chatham County Sheriff's Office, Sheriff Webster, and Sgt. Daniel Tilley
    b. $1000.00 to defendants James M. Watson and Kelly Watson

10. Plaintiff shall have 90 days from the date of this Order to comply with the monetary sanction.

11. Plaintiff shall not be in violation of this Order (and need not seek prior approval from the Court) if he mails a check or money order *directly to* the attorneys for the defendants listed in paragraph 7 above.

Entered in open court on the 27th day of March, 2009,
and signed this the ___ day of April, 2009.

Allen Baddour
Superior Court Judge Presiding

Tab 17

Research Assistant: Pattern Jury Instruction

Pattern Jury Instruction

Tab 18

Search Warrants

SEARCH WARRANTS FOR SUPERIOR COURT JUDGES

Jeff Welty
UNC School of Government
January 2023

1

Search Warrant Basics

- A warrant is a court order authorizing the search of a person, vehicle, premises, or other place
- Requires probable cause to believe that evidence of a crime will be found therein
- Usually sought by a LEO
- Always executed by a LEO
- Principal sources of law
  - Fourth Amendment
  - Article I, section 20 of the state constitution
  - G.S. 15A-241 *et seq.*

2

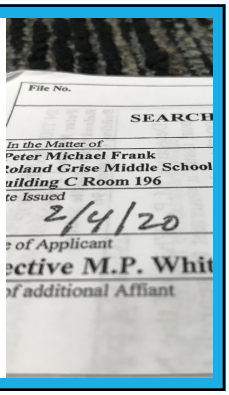
Search Warrants and SCJs

- SCJs may issue search warrants valid statewide, G.S. 15A-243(a)(3)
- SCJs may issue search warrants for "electronic communication services" under the federal Stored Communications Act, 18 U.S.C. § 2703(a), 2711(3)(B)
  - Magistrates may not, and it is unclear whether DCJs may
- Some LEOs prefer to seek warrants from SCJs in serious cases
- What types of warrant applications do you see? How often?

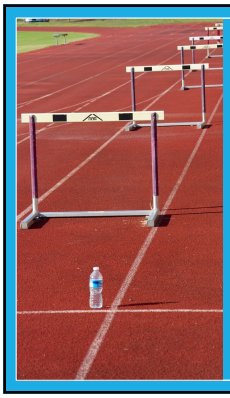
3

How to Review an Application

- The application may be on AOC-CR-119, typically with attachments, but it doesn't need to be
- You may examine the applicant under oath, G.S. 15A-245(a), but I don't recommend it
- You must make a record of any testimony that goes beyond the written application, id.
- Be alert for things the officer knows but failed to include



4



Probable Cause

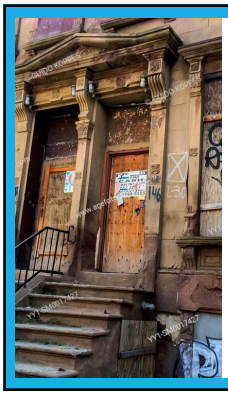
- How high a hurdle is probable cause?
- Does the height of the hurdle vary with the severity of the crime?
- Staleness
  - Two months is "a general rule," State v. Lindsey, 58 N.C. App. 564 (1982), but how long depends on the facts.
  - What if the affidavit doesn't specify recency? See State v. Kochetkov, 280 N.C. App. 351 (2021).

5

Informants and Probable Cause

Citizen witnesses	• Most reliable • Information may provide probable cause by itself, if sufficiently detailed and there's no reason to disbelieve it
Confidential informants	• Less reliable • Information may provide probable cause only if bolstered in some way, such as (1) past reliability or (2) corroboration
Anonymous tipsters	• Least reliable • Generally requires corroboration • Classifying people who put their "anonymity at risk"

6



Broad Requests

- "Any and all evidence of [the crime that is the focus of the investigation]"
- "All persons on the premises," e.g., in a drug case
- Digital devices pertaining to the suspect(s) in cases that are not obviously digital

7

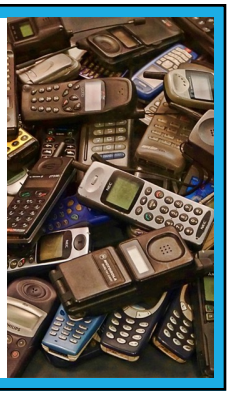
Addressing Deficiencies

- How much should you "coach" applicants about defects?
- Amending the application
- Editing the warrant

8

Technology Warrants

- Common
- Warrants for **devices**
  - Limits on scope?
  - Connected cloud services?
  - Can you order a suspect to provide a passcode or a biometric identifier?
- Getting information from **service providers** like Verizon or Facebook
  - Warrants for location data and communication content
  - Orders for most other data
  - Wiretap orders for future content
- Hybrid and Frankenstein orders
- Peer and social pressure vs. knowing what you're signing



9

Suicide and Overdose Warrants

- Is there probable cause to believe that evidence of a crime will be found?
  - Suicide isn't a crime, G.S. 14-17.1 ("The common-law crime of suicide is hereby abolished.")
  - Overdosing isn't a crime, but overdose scenes may contain evidence of drug offenses or death by distribution

10

Copies and Recordkeeping

- Need at least three copies
  - Original, to be executed and returned
  - Service copy
  - Clerk's copy
- G.S. 15A-245(b) ("The issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk.")
  - Can you rely on the LEO do this for you?
  - What about other kinds of orders, e.g., pen register orders?

11

Special Issues with Remote Applications

- Remote applications are generally authorized by G.S. 7A-49.6
- But:
  - Can you "notarize" the written application remotely?
  - Can you sign the warrant using an electronic signature?
- Suggested practice:
  - Applicant swears to the accuracy of the affidavit before a notary, perhaps one in his or her agency
  - Applicant scans the application and emails it to you
  - You print the search warrant out and sign it with a pen
  - You scan the search warrant and email it to the applicant
  - You provide the original search warrant and a copy of the application to the clerk

12

QUESTIONS?

13

SEARCH WARRANTS FOR SUPERIOR COURT JUDGES

Jeff Welty
UNC School of Government
January 2023

14

Tab 19

Scheduling, Commissions, Calendar

Scheduling & Commissions