JUDICIAL RESPONSIBILITIES OF THE CLERK

This Handout is a reproduction of Chapter 12 of the Clerk of Superior Court Procedures Manual.

I. Introduction

A. The clerk's judicial authority makes the office unique. Unlike clerks of other states, the clerk in North Carolina is a judge as well as a clerk.

B. Summary of clerk's jurisdiction.

1. The clerk has jurisdiction of proceedings in probate and the administration of decedent's estates. [G.S. §§ § 7A-240, -241] See section III at page 12.4.

2. The clerk conducts incompetency proceedings, which may be with or without a jury, and appoints guardians. [G.S. § 35A-1101 *et seq.*] See section IV at page 12.7.

3. The clerk conducts various special proceedings. [G.S. § 1-301.2(b)] See section V at page 12.9.

4. The clerk hears certain civil matters and matters of civil practice and procedure. See section VI at page 12.12.

5. The clerk has limited jurisdiction in criminal matters. See section VII at page 12.14.

6. The clerk has jurisdiction over proceedings concerning the internal affairs of trusts. [G.S. §36C-2-203] See Trust Proceedings, Estates, Guardianships and Trusts, Chapter 89.

7. The clerk conducts proceedings for the sterilization of mentally ill or mentally retarded wards when there is a medical necessity. [G.S. § 35A-1245]

C. Nature of the judicial proceedings conducted by the clerk.

1. There are no regular sessions of court scheduled for the clerk. "Court" as conducted by the clerk is a continuous session. There is no set term or session.

2. For convenience and because notice to parties is generally required, many matters are prescheduled.

3. The clerk is a court of very limited jurisdiction, having only such jurisdiction as is given by statute. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).]

II. The Clerk and the General Court of Justice

A. Generally.

1. The clerk is a judicial officer of the Superior Court Division when exercising matters of probate, administration of estates of decedents, minors, and incompetents, administration of trusts, special proceedings and other matters within the jurisdiction of the superior court. [G.S. § 7A-40]

2. The clerk has and exercises all the judicial powers and duties in actions and proceedings in the district court of the clerk's county that are conferred upon the clerk by law. [G.S. § 7A-180(1)]

3. The acts of the clerk are taken of the clerk's own authority and in the clerk's name.

   a) Acts of the clerk stand as final acts of superior [or district] court, unless modified or vacated on appeal. [*Jones v. Desern*, 94 N.C. 32 (1886).]

   b) In all matters heard originally before the clerk, appeals lie to a judge of superior court when the matter is properly within the jurisdiction of the superior court division and to a judge of district court when the matter is properly within the jurisdiction of the district court division. [G.S. § 7A-251; *see also* G.S. §§ 1-301.1(b) for appeal of a clerk's decision in a civil action, 1-301.2(e) for appeal of special proceedings, and 1-301.3(c) for appeal of estate matters.]

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

B. Clerk's jurisdiction with respect to superior and district court varies.

1. In certain matters, the clerk has exclusive, original jurisdiction.

   a) This means that the proceeding **must** begin with the clerk.

   b) The clerk cannot transfer the matter to the superior court judge without first hearing the matter.

   c) Examples of matters over which the clerk has exclusive, original jurisdiction include the administration of decedent's estates, guardianships, and most proceedings concerning the internal affairs of trusts.

2. In certain other matters, the clerk has original jurisdiction.

   a) This means that the proceeding must be filed originally with the clerk.

   b) The clerk may, on the clerk's own motion, determine that the proceeding for which the clerk has only original jurisdiction should be originally heard by a superior court judge and transfer the matter to superior court.

c) Examples of matters over which the clerk has original jurisdiction include cartway and partition proceedings and proceedings to ascertain beneficiaries of a trust.

3. In certain other matters, the clerk's jurisdiction is concurrent with that of the superior or district court judge.

a) In other words, a statute confers authority or imposes duties on the clerk and the judge.

b) Where the judge and the clerk have concurrent jurisdiction, a party may seek to have the judge determine the matter in controversy initially. [See G.S. § 1-301.1(d) applicable to civil matters.]

c) Examples of matters over which the clerk and judge have concurrent jurisdiction would be a proceeding supplemental to execution and orders of attachment.

C. The clerk has powers similar to a court of general jurisdiction. Pursuant to G.S. § 7A-103, the clerk is authorized to:

1. Issue subpoenas to compel the attendance of an in-state witness or compel the production of documents material to an inquiry in the superior or district court of the clerk's county. [G.S. § 7A-103(1)]

2. Administer oaths, and to take acknowledgment and proof of the execution of all instruments or writings. [G.S. § 7A-103(2)]

3. Issue commissions to take the testimony of any witness within or without the State. [G.S. § 7A-103(3)]

4. Issue citations and orders to show cause to parties in all matters within the superior or district court of the clerk's county and to compel their appearance. [G.S. § 7A-103(4)]

5. Enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply or to execute lawful process. [G.S. § 7A-103(5)]

6. Certify and exemplify, under seal, all documents, papers or records of the superior or district court of the clerk's county, which may then be received in evidence in any court in the State. [G.S. § 7A-103(6)]

7. Preserve order in the clerk's court and punish criminal contempts, and hold persons in civil contempt**, subject to the limitations set out in Chapter 5A of the General Statutes**. [G.S. § 7A-103(7)]

8. Adjourn any proceeding before the clerk from time to time. [G.S. § 7A-103(8)]

9. Open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his or her court. [G.S. § 7A-103(9)]

10. Enter default or judgment in any action or proceeding pending in the superior or district court of the clerk's county as authorized by law. [G.S. § 7A-103(10)]

11. Award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before the clerk. [G.S. § 7A-103(11)]

12. Compel an accounting by magistrates and compel the return to the clerk by the person having possession of all money, records, papers, dockets and books held by a magistrate by virtue or color of the office. [G.S. § 7A-103(12)]

13. Grant and revoke letters testamentary, letters of administration, and letters of trusteeship. [G.S. § 7A-103(13)]

14. Appoint and remove guardians and trustees, as provided by law. [G.S. § 7A-103(14)]

15. Audit the accounts of fiduciaries, as required by law. [G.S. § 7A-103(15)]

    a) This section grants the clerk jurisdiction to "audit the accounts of fiduciaries as required by law," and, by implication, to deny a request to audit such accounts as well. [*Wilson v. Watson,* 136 N.C.App. 500, 524 S.E.2d 812 (2000).]

16. Exercise jurisdiction conferred on the clerk in every other case prescribed by law. [G.S. § 7A-103(16)]

III. Clerk's Responsibilities as Ex Officio Judge of Probate

A. Jurisdiction and authority of the clerk.

1. As an ex officio judge of probate, the clerk has original, exclusive jurisdiction for probate and administration of decedent's estates, administration of guardianships and trusts, and supervision of other fiduciaries. [G.S. §§ 7A-240, -241, -247; G.S. § 36C-2-203 and following; G.S. § 7A-103(15)] "Ex officio" refers to powers that may be exercised by an officer that are not specifically conferred upon the officer but arise by virtue or because of an office. [BLACK'S LAW DICTIONARY 597 657 (9th ed. 2009)]

2. The clerk has exclusive, original jurisdiction of "the administration, settlement, and distribution of estates of decedents." [G.S. § 7A-241; G.S. § 28A-2-1 to –3]

3. When the clerk exercises probate jurisdiction, the clerk acts as a judicial officer of the superior court division and not as a separate court. [G.S. § 7A-241]

4. The special probate powers and duties of the clerk are separate and distinct from the general duties of clerk of court. [*In re Estate of Lowther,* 271 N.C. 345, 156 S.E.2d 693 (1967).]

B. Jurisdiction and authority of the superior court.

1. The superior court has no original probate jurisdiction.

2. The superior court's jurisdiction of probate matters is limited to the following:

a) When the clerk is disqualified because the clerk is a subscribing witness to the will or has an interest in the estate or trust. [G.S. § 28A-2-3]

b) When a caveat is filed. [G.S. § 31-33]

c) When claims are "justiciable matters of a civil nature" within the original jurisdiction of the trial division.

(1) Superior court, not clerk, had jurisdiction over claim against estate that personal representative had rejected. [*In re Neisen*, 114 N.C.App. 82, 440 S.E.2d 855, *cert. denied*, 336 N.C. 606, 447 S.E.2d 397 (1994).]

(2) Superior court had jurisdiction over claims of misrepresentation, undue influence, and inadequate disclosure of assets or liabilities. [*In re Estate of Wright*, 114 N.C.App. 659, 442 S.E.2d 540, *cert. denied*, 338 N.C. 516, 453 S.E.2d 172 (1994) (clerk had no jurisdiction over wife's claim that her signature on an antenuptial agreement was obtained by misrepresentation and undue influence).]

(3) Trial court, not clerk, had jurisdiction over action for damages for breach of fiduciary duties, negligence, and fraud arising from administration of the estate. [*Ingle v. Allen*, 53 N.C.App. 627, 281 S.E.2d 406 (1981), *appeal after remand*, 69 N.C.App. 192, 317 S.E.2d 1, *review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984).]

d) Upon appeal. See section III.I at page 12.7.

C. Nature of proceedings before the clerk.

1. Typically a probate proceeding is *ex parte* and nonadversary. Occasionally there may be a contest over the qualification of the personal representative.

2. Probate proceedings are heard and determined by the clerk without a jury. [*In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967).]

D. The clerk's responsibilities in overseeing the administration of estates are important and difficult.

1. A large amount of property may be involved.

2. Fiduciaries have varying abilities. Many are inexperienced although some receive advice from an attorney.

3. Questions arise that are not answered in case law or statute.

E. Clerk's general responsibilities. The clerk:

1. Is responsible for the probate of wills and oversees the administration of decedent's estates. [G.S. § 7A-241]

2. Has original jurisdiction over all proceedings concerning the internal affairs of trusts, both inter vivos and testamentary. [G.S. § 36C-2-203]

3. Appoints guardians and oversees administration of estates of minors and incompetents under guardianships. [G.S. § 35A-1 *et seq.*]

4. Appoints collectors. [G.S. § 28A-11-1]

5. Audits inventories and accounts of attorneys-in-fact subsequent to the principal's incapacity (unless waived by instrument). [G.S. § 32A-11]

6. Is responsible for the administration of funds owed to minors and incapacitated adults. [G.S. § 7A-111]

7. Administers small estates when money owed to the decedent is paid to the clerk pursuant to G.S. § 28A-25-6.

8. Oversees administration of small estates collected by affidavit pursuant to G.S. §§ 28A-25-1 to –5.

9. Audits accounts of receivers of estates of absentees in military service. [G.S. § 28B-8(c)]

10. Participates in the settlement of partnership affairs by surviving partners as provided in G.S. §§ 59-74 to –83.

F. Function of the clerk in the administration of estates.

1. The clerk has sole power to admit wills to probate.

2. The clerk appoints and qualifies fiduciaries (personal representatives), audits their returns, and removes them from office. (See Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.)

3. The clerk supervises and guides the fiduciary but should not do the fiduciary's job.

   a) It is the responsibility of the personal representative to prepare the required inventories and accounts. [G.S. §§ 28A-20-1; 28A-21-1 and -2] (See Inventories and Accounts, Estates, Guardianships and Trusts, Chapter 74.)

   b) When reviewing the account, the clerk must exercise discretion and judgment but the clerk should be alert to the admonition that clerks may not practice law. [See G.S. §§ 84-2 and –4]

4. The clerk approves and allows fiduciary commissions. (See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.)

G. Clerk's responsibilities for interpretation of a will.

1. The personal representative, not the clerk, is responsible for interpreting the will. To resolve questions or to interpret ambiguous provisions of a will, any person with an interest under a will, including the personal representative, may file a declaratory judgment action. [G.S. §§ 1-254, -255]

2. The clerk in effect approves the personal representative's interpretation of the will when the clerk reviews the report of proposed distribution and allows the personal representative to proceed. If the clerk questions how the personal representative paid out the money, the clerk does not have to approve the account.

H. No transfer of an estate matter except upon the filing of a caveat.

1. The clerk must determine all issues of fact and law in matters arising in the administration of trusts or of estates of decedents, incompetents and minors. [G.S. § 1-301.3(a) and (b)]

2. When a caveat is filed, the clerk must transfer the cause to superior court for jury trial. [G.S. § 31-33(a)] The caveat suspends all further proceedings before the clerk under the will, except for the order required by G.S. § 31-36.

I. Appeal of an estate matter.

1. A party aggrieved by an order or judgment of the clerk may appeal to the appropriate court for a hearing. [G.S. § 1-301.3(c)]

2. Duty of the judge on appeal. The superior court judge reviews the clerk's order or judgment for the purpose of determining only whether:

a) The findings of fact are supported by the evidence.

b) The conclusions of law are supported by the evidence.

c) Whether the order or judgment is consistent with the conclusions of law and applicable law. [G.S. § 1-301.3(d)]

3. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate subject to any order entered by a superior court judge limiting that authority. [G.S. § 1-301.3(c)]

IV. Clerk's Responsibilities In Incompetency Proceedings and Guardianships

A. Jurisdiction and authority of the clerk.

1. The clerk in each county has original jurisdiction over incompetency proceedings. [G.S. § 35A-1103(a)]

2. An incompetency proceeding is the only instance in which the clerk may preside over a jury trial.

3. If the clerk has an interest in the proceeding, direct or indirect, the superior court judge residing or presiding in the district is vested with jurisdiction. [G.S. § 35A-1103(d)]

B. Proceedings that must be distinguished from an incompetency determination.

1. Civil commitment proceedings under G.S. Chapter 122C. This proceeding is for persons who are allegedly mentally ill or are substance abusers and is entirely different from, and in no way has an effect on, incompetency proceedings under Chapter 35A. [G.S. § 122C-203]

2. Protection of disabled adults under G.S. Chapter 108A. These provisions are for the protection of abused, neglected, or exploited disabled adults. [G.S. § 108A-99 *et seq.*]

3. Powers of attorney under G.S. Chapter 32A. Chapter 32A provides for a general power of attorney, a durable power of attorney and a health care power of attorney. [G.S. §§ 32A-1; 32A-8; 32A-15]

4. Administration of funds owed to an incapacitated adult under G.S. § 7A-111. The determination of incapacity in G.S. § 7A-111 is separate and distinct from the procedure for the determination of incompetency provided in Chapter 35A. [G.S. § 7A-111(d)]

C. Overview of proceedings for guardianship of an incompetent adult.

1. In an incompetency proceeding, a person called a petitioner seeks to have another adult, called a respondent, declared incompetent so that a guardian may be appointed to look after the respondent's property or personal affairs or both.

2. The clerk or jury must determine whether there is clear, cogent and convincing evidence that respondent lacks sufficient capacity to manage his or her affairs or communicate important decisions concerning his or her person, family, or property.

3. Chapter 35A only requires proof of respondent's inability to do or communicate certain things and does **not** require proof that such lack of capacity is caused by any particular cause or condition.

a) Although the definition of "incompetent adult" refers to certain medical conditions, lack of capacity may be shown without evidence that respondent suffers from any of those conditions.

b) Evidence that respondent suffers from any of those conditions does not, by itself, prove incompetency.

4. Following an adjudication of incompetence, the clerk must appoint a guardian for the respondent. (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

D. Appointment of a guardian for a minor.

1. The clerk is authorized to appoint a guardian of the estate of any minor and to appoint a guardian of the person or general guardian for

any minor who has no natural guardian (parent). [G.S. § 35A-1203(a)] (The procedure for appointing a guardian for a minor who is **not** incompetent is discussed in Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

2. The clerk is authorized to appoint a guardian for a minor who is incompetent. An incompetent child is defined as a minor who is at least 17 ½ years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. [G.S. § 35A-1101(8)] (The procedure for appointing a guardian for an incompetent ward is discussed in Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.)

E. No transfer of an incompetency proceeding. An incompetency proceeding is not to be transferred to superior court even if an issue of fact, an equitable defense, or a request for equitable relief is raised. [G.S. § 1-301.2(g)]

F. Appeal of an incompetency proceeding. An appeal from an adjudication of incompetency is to the superior court *de novo* and does not stay the appointment of a guardian unless so ordered by the superior court or the Court of Appeals. [G.S. §§ 35A-1115; 1-302.2(g)(1)]

G. Proceedings under Veterans' Guardianship Act.

1. When a minor or incompetent beneficiary is entitled to benefits from the Veterans' Administration, the Secretary of Veterans' Affairs may require the appointment of a guardian before ordering the payment of such benefits. The appointment of the guardian must be in the manner provided by the Veterans' Guardianship Act. [Wiggins, *North Carolina Wills* § 25:3 (4th ed. 2005); G.S. § 34-4]

2. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

V. Clerk's Responsibilities in Special Proceedings

A. Definition of a special proceeding.

1. Statutory definition. All remedies in courts of justice are either "civil actions" or "special proceedings." [G.S. § 1-1]

a) An "action" is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. [G.S. § 1-2]

b) Every other remedy is a special proceeding. [G.S. § 1-3]

2. Practical definition. A special proceeding is a proceeding generally set before the clerk in which the clerk has statutory jurisdiction to

hear and determine specified proceedings that are not heard by a judge, except by transfer or appeal.

B. Nature of a typical special proceeding.

1. Frequently not contested, although can be.

2. Frequently protracted in nature. Objective often not obtainable in one session before the clerk.

3. Some proceedings require that the clerk maintain continuing supervision.

C. Special proceeding procedure.

1. Procedure is often set out in the specific statute describing the particular special proceeding.

2. In addition, procedures applicable to special proceedings are set out in G.S. §§1-393 to –408.1 and should be followed unless the procedure conflicts with the statute describing the specific proceeding.

3. The Rules of Civil Procedure are applicable to special proceedings except as otherwise provided by the statute describing a specific proceeding. [G.S. § 1-393; G.S. § 1A-1, Rule 1]

D. Types of special proceedings heard by the clerk.

1. Many of the special proceedings heard by the clerk deal with real property, for example, partition, cartway proceedings, sale of land to create assets, and condemnation by private condemnors.

2. Others deal with estate matters such as the sale, mortgage, lease or exchange of a ward's estate.

3. For a list of special proceedings by category, see this manual's table of contents. See also Introduction to Special Proceedings, Special Proceedings, Chapter 100.

E. The clerk should be aware of potential problems in conducting special proceedings.

1. In nonadversary proceedings, the clerk is forced to rely on the thoroughness and judgment of the attorney bringing the action. For this reason, the clerk should examine all materials presented to the clerk critically and carefully.

2. It is good practice to require verified pleadings, affidavits or sworn testimony to establish necessary facts.

3. Remember that the clerk is rendering a judgment. The record is very important, particularly in matters affecting title. The clerk should establish a proper record in the file.

F. Jurisdiction and authority of the clerk.

1. The superior court is the proper division, without regard to the amount in controversy, for the hearing and trial of all special proceedings except those listed in 2 below. [G.S. § 7A-246]

2. The superior court is not the proper division to hear the following special proceedings, all of which are heard in district court:

   a) Proceedings under the Protection of the Abused, Neglected or Exploited Disabled Adult Act (Chapter 108A, Article 6) (heard by a district court judge);

   b) Proceedings for involuntary commitment to treatment facilities (Chapter 122C, Article 5) (heard by a district court judge); and

   c) Adoption proceedings (Chapter 48) (heard in district court only by transfer or appeal).

G. Transfer of a special proceeding.

1. When an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk must transfer the proceeding to the appropriate court, except as noted as an exception in 2 below. [G.S. § 1-301.2(b)]

2. Exceptions to the rule requiring transfer:

   a) Adjudications of incompetency or restorations of competency under Chapter 35A are not transferred [G.S. § 1-301.2(g)(1)];

   b) Foreclosure proceedings under Chapter 45, Article 2A are not transferred [G.S. § 1-301.2(g)(2)]; and

   c) The issue whether to order the actual partition or a sale in lieu of partition of real property is not transferred. [G.S. § 1-301.2(h)] After the clerk orders partition, the matter may be transferred for a division of the sale proceeds.

3. Duty of judge on transfer. [G.S. § 1-301.2(c)]

   a) After transfer, the judge may hear and determine all matters in controversy.

   b) If it appears to the judge that justice would be more efficiently administered, the judge may dispose of only the matter leading to the transfer and remand the special proceeding to the clerk.

H. Appeal of a special proceeding.

1. A party aggrieved by a final order or judgment of the clerk may appeal to the appropriate court for a hearing de novo. [G.S. § 1-301.2(e)]

2. Special rules regarding appeals:

a) Appeals from orders entered in incompetency proceedings or in proceedings to restore competency are governed by Chapter 35A to the extent that any provisions of that Chapter conflict with G.S. § 1-301.2. [G.S. § 1-301.2(g)(1)] (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.)

b) Appeals from orders entered in foreclosure proceedings are governed by Chapter 45, Article 2A to the extent that any provisions of that Chapter conflict with G.S. § 1-301.2. [G.S. § 1-301.2(g)(2)] (See Foreclosure Under Power of Sale, Special Proceedings, Chapter 130.)

c) Appeal of the issue whether to order the actual partition or a sale in lieu of partition may be appealed even though not a final order. [G.S. § 1-301.2(h)] (See Partition, Special Proceedings, Chapter 163.)

3. Notice of appeal must be in writing and filed within 10 days of entry of the order or judgment. [G.S. § 1-301.2(e)]

4. The clerk's order remains in effect until modified or replaced by an order of a judge, unless the judge or clerk issues a stay of the clerk's order upon the appellant's posting of a bond. [G.S. § 1-301.2(e)]

VI. Clerk's Responsibilities in Civil Matters

A. The clerk has jurisdiction in certain proceedings ancillary to civil proceedings. An ancillary proceeding is one that pertains to or arises from the principle action.

1. Writs of execution. [G.S. § 1-305] (See Writs of Execution, Civil Procedures, Chapter 38.)

2. Attachment and garnishment. [G.S. § 1-440.1] (See Attachments, Civil Procedures, Chapter 34.)

3. Supplemental proceedings. [G.S. § 1-352] (See Proceedings Supplemental to Execution, Civil Procedures, Chapter 36.)

4. Claim and delivery. [G.S. § 1-472] (See Claim and Delivery, Civil Procedures, Chapter 35.)

5. Exemptions. [G.S. § 1C-1601] (See Setting Aside Exemptions, Civil Procedures, Chapter 37.)

6. Arrest and bail. [G.S. § 1-411]

B. The clerk has jurisdiction in other matters civil in nature.

1. Foreclosure under power of sale. [G.S. § § 45-4 through 45-21.33] (See Foreclosure Under Power of Sale, Special Proceedings, Chapter 130; matter is filed as a special proceeding for recordkeeping purposes only.)

2. Judicial sales. [G.S. § 1-339.1] (See Judicial Sales, Civil Procedures, Chapter 43.)

3. Summary remedy of surety against principal. [G.S. § 26-3]

C. The clerk has jurisdiction to enter final judgments in certain civil cases.

1. Consent judgments pursuant to G.S. § 1-209(2).

a) A consent judgment is the contract of the parties entered upon the record with the sanction of the court. Thus, it is both an order of the court and a contract between the parties. [*Potter v. Hilemn Labs.*, 150 N.C.App. 326, 564 S.E.2d 259 (2002).]

b) Power of the court to sign a consent judgment depends on the unqualified consent of the parties thereto. [*Prince v. Dobson*, 141 N.C.App. 131, 539 S.E.2d 334 (2000).]

c) Although the clerk has authority to enter consent judgments, as a practical matter usually the judge of the court in which the civil action is filed enters a consent judgment.

d) Clerk has the power to sign a consent judgment in a matter pending before a referee. [*Weaver v. Hampton*, 204 N.C. 42, 167 S.E. 484 (1933).]

2. Default judgments pursuant to G.S. § 1-209(4).

a) The clerk can enter a default judgment as set out in G.S. § 1A-1, Rule 55(b)(1).

b) See Default Judgments, Civil Procedures, Chapter 31.

3. Foreclosure of a tax lien pursuant to G.S. § 105-374.

a) In all cases in which no timely answer is filed and in cases in which answers filed do not seek to prevent the sale of property, the clerk may enter judgment of sale, subject to appeal as provided in G.S. § 1-301.1. [G.S. § 105-374(k)]

b) The clerk may also enter judgment of confirmation of sale, subject to appeal as provided in G.S. § 1-301.1. [G.S. § 105-374(p)]

4. Confession of judgment pursuant to G.S. § 1A-1, Rule 68.1.

a) The clerk can enter a confession of judgment as set out in G.S. § 1A-1, Rule 68.1.

b) See Confessions of Judgment, Civil Procedures, Chapter 30.

5. For judgments rendered by the clerk, the clerk has authority to give relief under G.S. § 1A-1, Rule 60, from clerical errors as provided in Rule 60(a) or for reasons of mistake, inadvertence, excusable neglect, fraud, newly discovered evidence, or other grounds as set out in Rule 60(b).

D. The clerk has authority to rule on civil motions as provided by the Rules of Civil Procedure, G.S. § 1A-1 *et seq*.

1. Grant an extension of time pursuant to G.S. § 1A-1, Rule 6.

2. Substitute parties upon death, incompetency, or transfer of interest pursuant to G.S. § 1A-1, Rule 25.

3. Issue an order allowing a deposition before action pursuant to G.S. § 1A-1, Rule 27(a). Note that the clerk has no authority to issue orders compelling discovery or imposing sanctions, as application must be made to a judge pursuant to G.S. § 1A-1, Rule 37.

E. Appeal of a civil matter. [G.S. § 1-301.1]

1. A party aggrieved by an order or judgment entered by the clerk may appeal to the appropriate court for a trial or hearing de novo.

2. Duty of the judge on appeal. Upon appeal, the judge may hear and determine all matters in controversy in the civil action, unless it appears to the judge that:

a) The matter is one that involves an action that can be taken only by a clerk.

b) Justice would be more efficiently administered by the judge's disposing of only the matter appealed.

VII. Clerk's Responsibilities in Criminal Matters

A. The clerk's responsibilities in criminal matters are primarily administrative, involving record keeping, filing, recording proceedings on the docket (minutes), preparing bills of costs, and entering and docketing judgments into the court's criminal system.

B. Jurisdiction and authority of the clerk. The exercise of the clerk's criminal jurisdiction represents a small portion of the clerk's responsibilities.

1. The criminal matters over which the clerk has jurisdiction include:

a) Issuing warrants of arrest valid throughout the State, and search warrants valid throughout the county of the issuing clerk. [G.S. § 7A-180(5)] Clerks generally do not exercise this authority unless no magistrate is available.

(1) Authority of superior court clerks to issue search warrants in the clerk's county encompasses matters to be tried in district and superior court. [*State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990).]

b) Authority to accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility for the offenses specified in G.S. § 7A-273(2) (the waiver list formulated annually by the Conference of District Court Judges), and in such cases, to enter judgment and collect the fine or penalty and costs. [G.S. § 7A-180(4)]

c) Authority to conduct an initial appearance and to set conditions of pretrial release. [G.S. § 7A-180(6)] Clerks generally do not exercise this authority unless no magistrate

is available. (See Initial Appearance and Setting Conditions of Pretrial Release, Criminal Procedures, Chapter 20.)

d) Authority to accept written appearances, waivers of trial and pleas of guilty for violations of G.S. § 14-107 (the worthless check statute.) [G.S. § 7A-180(8)]

e) First appearances for defendants in custody when the judge is not available. [G.S. § 15A-601] (See First Appearance When Judge Not Available, Criminal Procedures, Chapter 21.)

f) Approving surety. [G.S. § 15A-537] (See Criminal Appearance Bonds: Taking Secured Bonds, Criminal Procedures, Chapter 22.)

2. Related matters over which the clerk has jurisdiction include:

a) Determinations of indigency and appointment of counsel. [G.S. § 7A-452(a) and (c)]

b) Waiver in extradition proceedings. [G.S. § 15A-746] (See Duties of the Clerk in Extradition Cases, Criminal Procedures, Chapter 25.)

c) DWI vehicle seizure. [G.S. § 20-28.3]

VIII. Principles Applicable When Clerk Exercises Judicial Responsibilities

A. In exercising judicial responsibilities the clerk should be faithful to the law, maintain his or her professional competence and be unswayed by partisan interest, public clamor and fear of criticism. See Ethics for Clerks of Superior Court, Introduction, Chapter 11.

ETHICS FOR CLERKS OF SUPERIOR COURT

This Handout contains excerpts from Chapter 11 of the Clerk of Superior Court Procedures Manual.

I. Principles Applicable When Clerk Exercises Judicial Responsibilities

A. There is no formal code of ethics applicable to clerks.

1. The Code of Judicial Conduct does not formally apply to clerks but is the basis for much of the information contained in this chapter.

2. It is good practice to have hearing officers read the Code of Judicial Conduct. It may be found in the separate volume of the General Statutes titled "Annotated Rules of North Carolina."

B. However, several of the provisions in the State Government Ethics Act apply to the elected Clerk of Superior Court. See Chapter 11 of the Clerk's Manual.

C. The clerk must strive to possess the four attributes that Socrates is reputed to have required of a good judge:

1. To hear courteously;

2. To act wisely;

3. To consider somberly; and

4. To decide impartially.

D. In exercising judicial responsibilities the clerk (including assistant clerks) should be faithful to the law, maintain his or her professional competence and be unswayed by partisan interest, public clamor and fear of criticism.

1. The clerk should maintain order and decorum in proceedings before the clerk, conducting them with dignity and propriety.

2. The clerk should be patient, dignified and courteous toward litigants, witnesses, jurors, lawyers and others who appear before the clerk.

a) The clerk has a duty to hear proceedings fairly, patiently and deliberately.

b) The clerk also has a duty to be efficient and businesslike.

c) The clerk should promptly dispose of judicial duties as clerk without being arbitrary, securing the cooperation of lawyers, court officials and others to further this goal.

3. The clerk should accord every person who is legally interested in a proceeding, or his or her lawyer, the full right to be heard according to the law, but should not solicit or accept other communications regarding a proceeding.

   a) The clerk should not accept unsolicited communications from attorneys not involved in the proceeding.

   b) The clerk should not accept communications from other persons not legally authorized to participate in the proceedings.

   c) The clerk should be mindful of the basic principle that neither parties nor their attorneys may communicate with the judge *ex parte*.

4. The clerk should prohibit electronic media and still photography coverage of judicial proceedings held before the clerk. [Sup. and Dist. Ct. R. 15(b)(2)]

   a) "Electronic media coverage" is used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders. [Sup. and Dist. Ct. R. 15(a)]

   b) This does not prohibit the use of electronic media or still photography coverage of ceremonial proceedings before the clerk.

E. As a judicial officer, the image of the clerk is important.

1. Disqualification of the clerk should be as provided in G.S. § 7A-104.

   a) The clerk may not exercise any judicial powers in relation to any estate, proceeding, or civil action:

      (1) If the clerk has, or claims to have, an interest by distribution, by will, or as a creditor or otherwise;

      (2) If the clerk is so related to any person having or claiming such an interest that he or she would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before the clerk;

      (3) If the clerk or the clerk's spouse is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when the deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;

      (4) If the clerk or the clerk's spouse is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of superior court. The clerk may renounce the executorship and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate. [G.S. § 7A-104(a)]

   b) The clerk may disqualify himself or herself in a proceeding in circumstances justifying disqualification or recusement by a judge. [G.S.

§ 7A-104(a1)] See Canon 3 of the Code of Judicial Conduct found in the Rule volume of the General Statutes.

c) If the parties waive the clerk's disqualification in writing, the clerk is authorized to act as in other cases. [G.S. § 7A-104(a2)]

d) If the clerk is disqualified, a superior court judge must remove the proceeding to the clerk in an adjoining county in the district or the judge may act as the clerk. [G.S. § 7A-104(b)] The disqualified clerk may not assign the matter to an assistant in the office and may not bring in a clerk from another county to hear the matter.

e) An assistant clerk who has an interest as defined in the disqualification statute may not hear the matter, but the clerk or another assistant could hear it.

f) In circumstances that do not disqualify the clerk but may constitute a conflict of interest, the clerk should fully disclose the circumstances to the parties and confirm that the parties wish to proceed.

g) When the clerk is a subscribing witness to a will offered for probate in the clerk's county or has an interest, direct or indirect, in the estate or trust within the clerk's jurisdiction, the senior resident judge acts. [G.S. § 28A-2-3]

2. The clerk should not be offended if the clerk's decision is appealed.

a) It is improper for the clerk to approach the judge to whom the matter is appealed and attempt to justify the clerk's decision.

b) The clerk should never take it as a personal affront if the judge reverses the clerk's judgment.

3. The clerk should never give the appearance that the clerk is trying to "fix" an action. The clerk should not seek out the district attorney or the judge on behalf of a friend or relative who is a party in court.

4. The clerk should not approach a judge to get a prospective juror excused from jury duty for a political reason or for any other reason that does not fall within those set out in the general statutes. See G.S. § 9-3 and Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54.

II. General Principles Applicable to the Clerk

A. The clerk should regulate the clerk's non-official activities to minimize conflict with official duties.

1. The office of the clerk is a full-time job. [G.S. § 7A-101(a)] The clerk's official duties have priority over the clerk's other activities.

2. The clerk may engage in social and recreational activities if they do not interfere with the clerk's official duties.

3. The clerk's business activities should not conflict with his or her duties as clerk.

4. The clerk has the rights of an ordinary citizen to maintain the privacy of the clerk's financial circumstances and need not disclose his or her private income, debts or investments except as required by the State Government Ethics Act in

the statement of economic interest. The amount of the clerk's annual salary is public and is set out in G.S. § 7A-101(a).

B. The clerk should not engage in political activity except to the extent necessary to obtain or retain the office of the clerk through the elective process. As a candidate, the clerk should make no promises other than the faithful and impartial performance of the duties of the office.

C. The clerk should avoid impropriety and the appearance of impropriety in all of the clerk's activities.

1. The clerk should conduct himself or herself at all times in a manner that promotes public confidence in the clerk's integrity and impartiality.

a) Public confidence in a public official is eroded by irresponsible and improper conduct.

b) The clerk should not allow his or her family, social or business relations or friendships to influence the clerk's official conduct or judgment.

c) The clerk should not knowingly permit others to convey the impression that they have special influence with the clerk.

d) The clerk should exercise any power of nomination or appointment on the basis of merit, not friendship or political considerations.

2. The clerk should be careful not to use the prestige of the clerk's office improperly.

a) Whenever possible the clerk should refrain from testifying as a character witness.

(1) The clerk should avoid imposing the prestige of the clerk's office into the proceedings and the possible misunderstanding that the clerk is giving an official testimonial.

(2) The clerk should not testify unless subpoenaed to do so.

b) The clerk should not use the prestige of the clerk's office to further the clerk's private or business interests.

c) The clerk should not disclose or use information acquired in the clerk's official capacity for the clerk's private financial dealings or any other purpose not related to official duties.

§ 7A-103. Authority of clerk of superior court.

The clerk of superior court is authorized to:

(1) Issue subpoenas to compel the attendance of any witness residing or being in the State, or to compel the production of any document or paper, material to any inquiry in his court.

(2) Administer oaths, and to take acknowledgment and proof of the execution of all instruments or writings.

(3) Issue commissions to take the testimony of any witness within or without the State.

(4) Issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

(5) Enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the State, and to be returned before him.

(6) Certify and exemplify, under seal of his court, all documents, papers or records therein, which shall be received in evidence in all the courts of the State.

(7) Preserve order in this court, punish criminal contempts, and hold persons in civil contempt; subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina.

(8) Adjourn any proceeding pending before him from time to time.

(9) Open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court.

(10) Enter default or judgment in any action or proceeding pending in his court as authorized by law.

(11) Award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

(12) Compel an accounting by magistrates and compel the return to the clerk of superior court by the person having possession thereof, of all money, records, papers, dockets and books held by such magistrate by virtue or color of his office.

(13) Grant and revoke letters testamentary, letters of administration, and letters of trusteeship.

(14) Appoint and remove guardians and trustees, as provided by law.

(15) Audit the accounts of fiduciaries, as required by law.

(16) Exercise jurisdiction conferred on him in every other case prescribed by law. (C.C.P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C. S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1; 1961, c. 341, s. 2; 1971, c. 363, s. 3; 1979, 2nd Sess., c. 1080, s. 5.)

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Code of Judicial Conduct

The North Carolina Code of Judicial Conduct is hereby amended to read as follows:

Preamble

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. A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

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.

Canon 2

A judge should avoid impropriety in all the judge's activities.

A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or

judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

Canon 3

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

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before the judge.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. Administrative responsibilities.

(1) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. A judge should exercise the judge's power of appointment only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Canon 4

A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

A judge, subject to the proper performance of the judge's judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge:

A. A judge may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and the judge may otherwise consult with an executive or legislative body or official.

C. A judge may serve as a member, officer or director of an organization or governmental agency concerning the activities described in Canon 4A, and may participate in its management and investment decisions. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. A judge may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization.

Canon 5

A judge should regulate the judge's extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties.

A. Avocational activities. A judge may write, lecture, teach, and speak on legal or non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of the judge's judicial duties.

B. Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge.

(2) A judge may be listed as an officer, director or trustee of

any cultural, educational, historical, religious, charitable, fraternal or civic organization. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation.

(3) A judge may serve on the board of directors or board of trustees of such an organization even though the board has the responsibility for approving investment decisions.

C. Financial activities.

(1) A judge should refrain from financial and business dealings that reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, exploit the judge's judicial position or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business.

(3) A judge should manage his/her investments and other financial interests to minimize the number of cases in which the judge is disqualified.

(4) Neither a judge nor a member of the judge's family residing in the judge's household should accept a gift from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to the judge; books supplied by publishers on a complimentary basis for official or academic use; or an invitation to the judge and the judge's spouse to attend a bar-related function, a cultural or historical activity, or an event related to the economic, educational, legal, or governmental system, or the administration of justice;

(b) A judge or a member of the judge's family residing in the judge's household may accept ordinary social hospitality; a gift, favor or loan from a friend or relative; a wedding, engagement or other special occasion gift; a loan from a lending institution in its regular course of business on the same terms generally

available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) Other than as permitted under subsection C.(4)(b) of this Canon, a judge or a member of the judge's family residing in the judge's household may accept any other gift only if the donor is not a party presently before the judge and, if its value exceeds $500, the judge reports it in the same manner as the judge reports compensation in Canon 6C.

(5) For the purposes of this section "member of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(6) A judge is not required by this Code to disclose his/her income, debts or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

D. Fiduciary activities. A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of the judge's judicial duties. "Member of the judge's family" includes a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage. As a family fiduciary a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversarial proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in his/her personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the

Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status. A judge of the Appellate Division may participate in any dispute resolution program conducted at the Court of Appeals and authorized by the Supreme Court.

F. Practice of law. A judge should not practice law.

G. Extra-judicial appointments. A judge should not accept appointment to a committee, commission, or other body concerned with issues of fact or policy on matters other than those relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. A judge may represent his/her country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Canon 6

A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

A judge may receive compensation, honoraria and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, subject to the following restrictions:

A. Compensation and honoraria. Compensation and honoraria should not exceed a reasonable amount.

B. Expense reimbursement. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge’s spouse. Any payment in excess of such an amount is compensation.

C. Public reports. A judge shall report the name and nature of any source or activity from which the judge received more than $2,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the

members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the county in which the judge resides. For each calendar year, such report shall be filed, absent good cause shown, not later than May 15th of the following year.

Canon 7

A judge may engage in political activity consistent with the judge's status as a public official.

> The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. Terminology. For the purposes of this Canon only, the following definitions apply.

(1) A "candidate" is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as the person makes a public declaration of candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term "candidate" has the same meaning when applied to a judge seeking election to a non-judicial office.

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific

individual's efforts to be elected to public office.

(3) To "endorse" means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in that person's efforts to be elected to public office.

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself/herself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he/she does not expressly endorse a candidate (other than himself/herself) for a specific office or expressly solicit funds from the audience during the event;

(2) if a judge is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself/herself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he/she may not personally make financial contributions or loans to any individual seeking election to office (other than himself/herself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his/her own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that the judge should resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political

activity.

C. Prohibited political conduct. A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself/herself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his/her identity or qualifications.

D. Political conduct of family members. The spouse or other family member of a judge or a candidate is permitted to engage in political activity.

Limitation of Proceedings

Disciplinary proceedings to redress alleged violations of Canon 7 of this Code must be commenced within three months of the act or omission allegedly giving rise to the violation. Disciplinary proceedings to redress alleged violations of all other provisions of this Code must be commenced within three years of the act or omission allegedly giving rise to the violation; provided, however, that disciplinary proceedings may be instituted at any time against a judge convicted of a felony during the judge's tenure in judicial office.

Scope and Effective Date of Compliance

The provisions of Canon 7 of this Code shall apply to judges and candidates for judicial office. The other provisions of this Code shall become effective as to a judge upon the administration of the judge's oath to the office of judge; provided, however, that it shall be permissible for a newly installed judge to facilitate or assist in the transfer of the judge's prior duties as legal counsel but the judge may not be compensated therefor.

Adopted unanimously by the Court in Conference this the ____ day

of January 2006. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

_____
For the Court

Witness my hand and the Seal of the Supreme Court of North Carolina, this the ____ day of January 2006.

_____
Christie Speir Cameron
Clerk of the Supreme Court

NCGS § 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(b) **An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk.** A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. **The clerk is responsible for the acts of his assistants and deputies.** With the consent of the clerk of superior court of each county and the consent of the presiding judge in any proceeding, an assistant or deputy clerk is authorized to perform all the duties and functions of the office of the clerk of superior court in another county in any proceeding in the district or superior court that has been transferred to that county from the county in which the assistant or deputy clerk is employed. (Emphasis added.)

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Time Limits on Trials

Michael Crowell

Federal courts impose time limits on trials—restricting the number of hours per side for all examination, cross-examination, and argument—often enough that case law has developed to guide trial judges faced with the need to set such rules. Time limits are less common in state court, however, and there are few North Carolina appellate decisions, none of which directly address time limits, that can advise superior and district court judges. Federal case law is useful in state court, though, because it is based on the same concept of inherent authority to control the court docket and manage caseflow, and on the same rules of procedure and evidence, that exists in state law.

This bulletin provides a brief review of federal case law on setting time limits and a discussion of the more general state case law on controlling the presentation of evidence at trial. It concludes with suggestions for how trial judges might apply time limits in state court so as to avoid reversal on appeal.

Time Limits in Federal Court

Source of court's authority

A federal district court's authority to set time limits is based on its "inherent power 'to control cases before it,' provided it exercises the power 'in a manner that is in harmony with the Federal Rules of Civil Procedure.'" Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609 (3rd Cir. 1995) (quoting G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989)). Federal courts also cite several rules to support the authority. Rule 1 of the Federal Rules of Civil Procedure states the rules of civil procedure are to be construed to secure the speedy and inexpensive disposition of each case. Federal Rule of Evidence 102 says the rules of evidence are to be construed to eliminate unjustifiable expense and delay, and Federal Rule of Evidence 403 allows exclusion of even relevant evidence based on undue delay or waste of time. Federal Rule of Evidence 611 directs the court to control the presentation of evidence to "avoid needless consumption of time."

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The basis for setting time limits in criminal cases is the same as in civil court. "Although it may be more common for a district court to impose time limits in a civil trial, setting time limits in a criminal trial is equally authorized." United States v. Cousar, 2007 WL 4456798 (W.D. Pa. 2007). "Modern courts recognize that the court's time is 'a public commodity which should not be squandered.'" United States v. Reaves, 636 F. Supp. 1575, 1578 (E.D. Ky. 1986) (quoting D. Louisell and C. Mueller, *2 Federal Evidence* § 128 (1985)). The balancing of interests requires consideration of additional interests in criminal cases. "Certainly, the due process concerns of defendants are paramount and the constitutional guarantees to a fair trial must be staunchly safeguarded. . . . Further, the court's management of the trial must not impinge on the prosecutorial function. . . . Practical considerations, such as the imposition of a lengthy trial upon a jury, also are relevant." *Cousar*, 2007 WL 4456798 at *2. In *Cousar*, the court rejected the estimated seven weeks for trial and limited the prosecution to forty hours of trial time and each of the three defendants to twelve hours. The court came to this decision after it reviewed the list of witnesses the government intended to call and evaluated the potential duplication of testimony on the thirty-nine counts in the indictment that arose from what amounted to only three events; it also compared the time consumed in other trials in the district.

When setting time limits, federal judges have recognized that the court has a different interest than do the lawyers.

> A court cannot rely on the attorneys to keep expenditures of time in trying a case within reasonable bounds. The perspective of the court and the attorneys in trying a case differ markedly. A judge wants to reach a just result in the case and to do so expeditiously and economically. An attorney's primary concern is to WIN the case. If he believes he can win that case by proliferating the evidence of the favorable, but relatively uncontested matters so that the weaker aspects of the case will be camouflaged, it is asking too much of our fallen nature to expect him voluntarily to do otherwise. *Reaves*, 636 F. Supp. at 1578.

Preference for time limits over other restrictions

An advantage of setting time limits, as opposed to restricting the number of witnesses or other methods of speeding up a trial, is that lawyers retain control of the case. "It is for the parties, and not the court, to make the determination about which witnesses are truly necessary and, in addition, how much of each witness' testimony is necessary." Enright v. Auto-Owners Ins. Co., 2 F.Supp.2d 1072, 1074 (N.D. Ind. 1998). "It reduces the incidence of the judge interfering in strategic decisions. It gives a cleaner, crisper, better-tried case." *Reaves*, 636 F. Supp. at 1580 (quoting Leval, *From the Bench, Litigation*, at 8 (1985)). "It is counsel rather than the court who decide what evidence is to be admitted and what is to be pruned." *Reaves*, 636 F. Supp. at 1580.

Standard of review on appeal

A federal trial court's use of time limits is reviewed on appeal for abuse of discretion. Sec'y of Labor v. DeSisto, 929 F.2d 789, 795 (1st Cir. 1991) ("the practice of fixing a period of time for the trial 'is not, *per se*, an abuse of discretion'") (quoting MCI Commc'ns Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1171 (7th Cir. 1983)). Although there is "a pronounced preference to defer to the district court's discretion, particularly in this delicate area," a limit will be reversed if it "prevented both parties from presenting sufficient evidence on which to base a reliable judgment." *DeSisto*, 929 F.2d at 796 In *DeSisto*, the circuit court reversed the trial court because, in

addition to the time limit, the judge had restricted each side to one witness in a wage and hour dispute involving 244 employees. The trial judge could have divided the employees into categories and allowed one representative witness for each, but the plan he adopted, which allowed only one witness per side, elevated the desire to conserve judicial resources above the need for a full understanding of the facts.

Review of case before setting limits

For time limits to be reasonable and not arbitrary, a trial judge needs to review the case and consider the evidence each side intends to proffer. Generally time limits should be imposed only after the court has made "an informed analysis based on a review of the parties' proposed witness lists and proffered testimony, as well as their estimates of trial time." *Duquesne Light Co.*, 66 F.3d at 610. When a court sets limits on presentation of evidence, even before the listing of proposed witnesses, it will be considered "an apparently arbitrary limitation imposed in the interest of conserving judicial resources." *DeSisto*, 929 F.2d at 795.

Enforcement of limits

When time limits are set, "the court must ensure that it allocates trial time evenhandedly." *Duquesne Light Co.*, 66 F.3d at 610. That does not necessarily mean each side must receive the same amount of time. In a complicated case, for example, the "presentation of a competent defense may require more time than presentation of a plaintiff's case-in-chief." MCI Commc'ns Corp., 708 F.2d at 1172.

A judge should set and announce time limits before a trial starts, and "the time limits should be sufficiently flexible to accommodate adjustment if it appears during trial that the court's initial assessment was too restrictive." *MCI Commc'ns Corp.*, 708 F.2d at 1171. Each party should be allowed to fill its time allotment with whatever evidence it deems appropriate, subject to rules of admissibility. "As a corollary, an allocation of trial time relied upon by the parties should not be taken away easily and without warning." *Duquesne Light Co.*, 66 F.3d at 610. In *Duquesne Light Company*, a case involving a dispute over construction of a nuclear power plant, the judge told the parties at the pretrial conference that each would have 140 hours of trial time. Twelve days into the trial, however, the judge grew frustrated with duplicative evidence and thought the jury was getting confused. He then told the parties they would each have twenty-two days but that a day at which any testimony was heard would count as a full day. Duquense objected and argued that it was being prejudiced against because it had timed its presentation during the first eleven days on the premise that it would have 140 hours total. The appellate court did not reverse the decision because it was not convinced the midtrial change of rules had affected its outcome, but it did admonish the trial judge for his handling of the case.

Time limits should not be so strict and enforced so rigidly that they result in behavior that is disruptive to the judicial process. "But to impose arbitrary limitations, enforce them inflexibly, and by these means turn a federal trial into a relay race is to sacrifice too much of one good—accuracy of factual determination—to obtain another—minimization of the time and expense of litigation." McKnight v. Gen. Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990). The judge in *McKnight* counted all time spent arguing objections against the party whose evidence was being challenged, which caused a spectacle of witnesses running to and from the stand. After numerous evidentiary objections from the other side, General Motors was left with forty-nine minutes for its remaining four witnesses, "and we were told at argument without contradiction that these

witnesses *ran* to and from the stand in a desperate effort to complete their testimony before time was called." *Id.* (emphasis in original).

Guidance on setting limits

One federal court, reviewing various means of controlling trials, stated that "(1) the court must impose no restriction that causes the information presented to become incomprehensible; and (2) no restriction or limitation should be imposed arbitrarily." United States v. Hildebrand, 928 F. Supp. 841, 848 (N.D. Iowa 1996). With those general principles in mind, the court offered the following guidelines for setting time limits or otherwise restricting the presentation of evidence at trial.

> (1) [L]imitations must only be imposed when necessary to the just and efficient presentation of evidence . . . ; (2) limitations should be made on the basis of an informed analysis, including review of proposed witness lists and proffered testimony, exhibits, or estimates of trial time; (3) no limitation may be imposed without balancing probative value against issues of delay, confusion or waste . . . ; (4) the parties should be allowed to decide how best to use whatever allotment is given them; (5) any pretrial limitations must be flexibly administered during trial to prevent any sacrifice of justice to efficiency; (6) changes in allotments, either admitting additional evidence or testimony or precluding more evidence or testimony than anticipated, must only be made with notice and upon a determination of need. *United States v. Hildebrand*, 928 F. Supp. at 848–49.

Control of Evidence in State Court

Different context for time limits

In state court, time limits tend to arise in an entirely different context than they do in federal court. It appears from the appellate decisions that federal judges usually face time limit questions when they try to determine how to move along large, complicated cases or cases that have lingered because of over-lawyering during the discovery and motions phase. Although such situations arise occasionally in state court, routine district court family law cases face the time limit question much more frequently. In an effort to move the huge volume of family law disputes that easily could overwhelm the court, some districts have established local rules placing tight time limits on presentation of evidence and argument in temporary custody or child support or similar hearings—typically an hour total, or even only half an hour—for witnesses plus argument plus the judge's time to read affidavits. There are no state appellate decisions addressing time limits on trials, but the general principles and considerations that would apply are much the same as in the federal system.

Inherent authority to control trials

North Carolina law has long recognized the inherent authority of trial judges to control their courtrooms and dockets. In some instances the inherent authority is said to derive from the separation of powers. "A court's inherent authority is that belonging to it by virtue of its being one of

three separate, coordinate branches of government." *In re* Alamance County Court Facilities, 329 N.C. 84, 93 (1991). At other times inherent authority is considered to arise from necessity; it is the power essential for a court to function as a court. "Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice." Beard v. N.C. State Bar, 320 N.C. 126, 129 (1987). Regardless of the conceptual basis, the scope of the inherent authority is broad. "Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice." *Beard*, 320 N.C. at 129.

Additionally, Article I, Section 18 of the North Carolina Constitution provides: "All court shall be open; every person for injury done him in his lands, goods, person or reputation shall have remedy by due course of law; and right and justice shall be administered *without favor, denial, or delay*." A nearly identical provision in the Kentucky Constitution was cited as support for imposing time limits in the influential federal court decision in *United States v. Reaves*, 636 F. Supp. 1575 (E.D. Ky. 1986). *See also* Hicks v. Commonwealth, 805 S.W.2d 144 (Ky. 1990).

State rules of evidence and practice

North Carolina has rules of evidence that are similar to those cited by the federal courts as the authority for control of trial proceedings. Just like their federal counterparts, North Carolina Rule of Evidence 102 states the rules of evidence are to be construed to secure "elimination of unjustifiable expense and delay;" North Carolina Rule of Evidence 403 allows the exclusion of relevant evidence if its probative value is outweighed "by considerations of undue delay, waste or time, or needless presentation of cumulative evidence;" and North Carolina Rule of Evidence 611 directs the court to exercise control over the questioning of witnesses and presentation of evidence to "avoid needless consumption of time."

The General Rules of Practice for the Superior and District Courts, adopted by the North Carolina Supreme Court, provide another layer of authority, not present in the federal system, for time limits. Rule 1 states that the General Rules of Practice are to be construed and enforced "in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them [superior and district courts]." Rule 2 of the General Rules of Practice then requires the senior resident superior court judge and chief district judge to develop a case management plan for calendaring civil cases. Those plans often include goals for resolving cases within a certain number of days.

A more explicit recognition of time limits appears in Rule 23 of the General Rules of Practice. That rule allows a superior court judge, with the agreement of the parties, to order a summary jury trial with limits on the time allowed for presentation of evidence and argument. Under Rule 23.1 of the General Rules of Practice, a summary procedure also is allowed for significant commercial disputes, which includes time limits on presentation of evidence ("Absent contrary court order, the trial shall be limited to five days, which shall be allocated equitably between the parties.").

Rule 2 of the General Rules of Practice provides the authority to adopt local rules. Rule 40 of the North Carolina Rules of Civil Procedure likewise directs the senior resident superior court judge to adopt local rules for calendaring civil cases. Each district has a set of local rules, though their length varies considerably. A few districts have only a handful of rules, generally addressing only the case calendaring process, while others have dozens of pages covering everything from continuances to reimbursement for representation of indigents to adverse weather to professional courtesy. In a few instances the rules for superior court civil matters specify time limits when agreed upon by the parties. In Mecklenburg County, for example, the parties may

request to be placed on the "five-minute firecracker" motions calendar in which each side is limited to five minute arguments. Rules declaring specific time limits for cases appear most frequently in the rules adopted by district courts for family domestic cases.

Time limits in domestic cases

Some district court districts have lengthy and detailed local rules about the handling of domestic cases. In some of the districts, the rules place limits on the hearing of particular matters such as temporary custody or temporary child support. The rules might say, for example, that a hearing will be conducted solely on the basis of affidavits, and limit the number of affidavits, unless an exception is granted by the judge. In some instances the rules may be backed by other authority, such as the provision in North Carolina General Statute 50-16.8 that post-separation support hearings may be based solely on affidavits.

In some districts, especially the larger and busier urban districts, the local rules also include time limits for hearings. In Mecklenburg County, for example, the family court rules state that in hearings on post-separation support each side is limited to thirty minutes for direct and cross-examination and argument, though the parties may move for additional time in complicated cases. Mecklenburg County rules also allow parties to agree to have an equitable distribution case heard as an expedited case with each side given one hour to present its evidence and argument. In Durham County each party is limited to thirty minutes in hearings for temporary child custody, temporary child support, post-separation support, and so forth. The use of affidavits, limited to five, is encouraged, and the rules allow the judge to count the time spent reading the affidavits against a party's time limit. Wake County likewise limits each side in temporary hearings in family law cases to thirty minutes for opening statements, examination and cross-examination of witnesses, and closing arguments. The parties may request additional time for complicated cases. Evidence in temporary child support hearings is to be solely by affidavit unless good cause is shown for live testimony.

Deference given to local rules

To the extent that time limits are prescribed in local rules, or are used as a means of implementing local rules on caseflow, trial courts can expect considerable deference from the appellate courts. In *Forman & Zuckerman, P.A. v. Schupak*, 38 N.C. App. 17, 247 S.E.2d 266 (1978), the defendant's appeal in a lawyer's fee dispute was based partly on the court calendaring a motion for default judgment in violation of a local rule. The court of appeals rejected the argument, stating that because local rules "are adopted to promote the effective administration of justice by insuring efficient calendaring procedures . . . Wide discretion should be afforded in their application so long as a proper regard is given to their purpose." 38 N.C. App. at 21. *See also* Pinney v. State Farm Mutual Ins. Co., 146 N.C. App. 248, 253, 552 S.E.2d 186, 189 (2001) ("trial court has wide discretion in the application of local rules" and will be reversed only for abuse of discretion).

The extent of a trial court's discretion to control court time was emphasized in *Roberson v. Roberson*, 40 N.C. App. 193, 252 S.E.2d 237 (1979), when the defendant in a civil contempt proceeding objected to being denied the opportunity to make a closing argument to the court. After finding that "the power of the trial judge to maintain absolute control of his courtroom is essential to the maintenance of proper decorum and the effective administration of justice," the court of appeals found it wholly within the discretion of the trial judge whether to allow argument in a nonjury trial (a statute provided a right to counsel to argue to the jury). In *Keene v.*

Wake County Hosp. Systems, 74 N.C. App. 523, 328 S.E.2d 883 (1985), the court found no abuse of discretion in the trial judge limiting lawyers' opening statements to five minutes each in a medical malpractice case in light of the provision in Rule 9 of the General Rules of Practice, which states, "Opening statements shall be subject to such time and scope limitations as may be imposed by the court." Given the inherent authority of the trial judge to control courtroom proceedings, as demonstrated by *Roberson*, the five-minute time limit certainly would have been upheld even if there were no Rule 9.

Appellate cases on restricting trial evidence

Few cases involving a trial judge's restrictions on presentation of evidence have reached the appellate courts in North Carolina, and their guidance is mixed. On the one hand, the panel in *Ange v. Ange*, 54 N.C. App. 686, 284 S.E.2d 187 (1981), easily affirmed the trial court's decision to limit the number of witnesses to testify about the plaintiff's mental ability to make a deed. Five witnesses testified, but another thirteen were excluded because they were going to say essentially the same thing. The decision in *Ange* seems simple enough because of the repetitive and cumulative nature of the testimony. The court stated, "It is clear that a trial judge, in his discretion, may limit the number of witnesses that a party may call so as to prevent needless waste of time." *Id.* at 687. As discussed above, the current North Carolina Rules of Evidence support that authority.

On the other hand, in *Murrow v. Murrow*, 87 N.C. App. 174, 359 S.E.2d 811 (1987), the court of appeals reversed a trial judge who allowed evidence to be presented only by affidavit in an equitable distribution case. The appellate court cited Rule 43(a) of the Rules of Civil Procedure which states, "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules." In the court's view that meant the trial judge could not exclude oral testimony altogether, but the court did not address whether the judge could limit the testimony in other ways.

One appellate decision, *Woody v. Woody*, 127 N.C. App. 626, 492 S.E.2d 382 (1997), speaks more directly to a party's right to present evidence. As was his standard procedure in child custody cases, the trial judge had informed the parties that each side would be limited to four witnesses. When three of the father's witnesses unexpectedly emphasized the child's lack of cleanliness while in the mother's care, the mother asked to call an additional rebuttal witness. The trial judge refused because she already had called her four witnesses to present her case in chief. The court of appeals reversed the decision, holding that the trial judge had abused his discretion. Agreeing with the general proposition that a trial judge may limit witnesses who will be offering cumulative testimony, the court of appeals found that the judge went too far in sticking to the four-witness limit when the cleanliness issue became more significant than it originally appeared. The best interest of the child is the "polar star" in a custody dispute, and the trial judge should not have shut off important evidence on that issue.

The important point of *Woody*, although not explained at any length by the court, is that a party has a right to make its own case. Although a trial judge may bar repetitive testimony and otherwise control the presentation of evidence to keep the case moving, efficiency cannot override the need for a full and fair presentation of the case.

Guidance on Time Limits in State Court

Superior and district court judges may set time limits on trials and hearings, but they must be careful in how they do so. The authority comes from the inherent authority of trial judges in North Carolina to control the flow of a case, the state constitutional provision promising justice "without delay," the state rules of evidence and practice stressing the importance of efficiency, the case management responsibility given to senior resident superior court judges and chief district judges, and the deference afforded local rules by the appellate courts. Based on the general state law on management of cases, and the federal case law on time limits, the following advice is offered.

- A trial judge has the authority to control the presentation of evidence to crisply move a case along, whether it be by forbidding duplicative evidence, limiting lawyers' arguments, or setting reasonable time limits.
- When imposing any restriction on the presentation of evidence, whether it be limiting witnesses or setting time limits, a trial judge must balance the need for efficiency and preservation of limited court resources against the need for a full presentation of the case.
- When setting time limits for a specific case, a judge should first learn enough about the case to be sure that the limits are appropriate and then be flexible when implementing them.
- Local courts have broad discretion to set rules, including time limits, on case management and can expect considerable deference from the appellate courts.
- Time limits set by local rules for particular categories of domestic cases seem to be a reasonable response to the large volume of cases in need of processing and quick resolution.
- Local time-limit rules should be applied flexibly to accommodate the circumstances of individual cases that may make the time allotment inappropriate.
- The overriding concern in each case is for a judge to hear all the evidence necessary to make a fully informed decision, and time limits should never be applied so as to exclude critical information.

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Rule 102. Purpose and construction.

(a) In general. – 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.

(b) Subordinate divisions. – For the purpose of these rules only, the subordinate division of any rule which is labeled with a lower case letter shall be a subdivision. (1983, c. 701, s. 1.)

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. (1983, c. 701, s. 1.)

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. (1983, c. 701, s. 1.)

§ 7A-104. Disqualification; waiver; removal; when judge acts.

(a) The clerk shall not exercise any judicial powers in relation to any estate, proceeding, or civil action:

(1) If he has, or claims to have, an interest by distribution, by will, or as creditor or otherwise;

(2) If he is so related to any person having or claiming such an interest that he would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him;

(3) If clerk or the clerk's spouse is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;

(4) If clerk or the clerk's spouse is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of the superior court. The clerk may renounce the executorship and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate.

(a1) The clerk may disqualify himself in a proceeding in circumstances justifying disqualification or recusement by a judge.

(a2) The parties may waive the disqualification specified in this section, and upon the filing of such written waiver, the clerk shall act as in other cases.

(b) When any of the disqualifications specified in this section exist, and there is no waiver thereof, or when there is no renunciation under subdivision (a)(4) of this section, any party in interest may apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county, for an order to remove the proceedings to the clerk of superior court of an adjoining county in the district or set of districts; or he may apply to the judge to make either in vacation or during a session of court all necessary orders and judgments in any proceeding in which the clerk is disqualified, and the judge in such cases is hereby authorized to make any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceedings.

(c) In any case in which the clerk of the superior court is executor, administrator, collector, or guardian of an estate at the time of his election or appointment to office, in order to enable him to settle such estate, a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county may make such orders as may be necessary in the settlement of the estate; and he may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to him for his approval, and when the accounts are so approved, the judge shall order the proper records to be made by the clerk. (C.C.P., ss. 419-421; 1871-72, cc. 196, 197; Code, ss. 104-107; Rev., ss. 902-905; 1913, c. 70, s. 1; C.S., ss. 939-942; 1935, c. 110, s. 1; 1971, c. 363, s. 4; 1977, c. 546; 1987 (Reg. Sess., 1988), c. 1037, s. 15; 1989, c. 493, s. 1.)

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Recusal

Michael Crowell

Disqualification and recusal of a judge is governed by Canon 3 of the Code of Judicial Conduct and, in criminal cases, by North Carolina General Statutes (hereinafter G.S.) § 15A-1223. In some exceptional circumstances the due process clause of the federal and state constitutions may be implicated as well.

Canon 3C

Section C of Canon 3 of the Code of Judicial Conduct states that a judge should recuse upon motion of a party, or on the judge's own initiative, whenever "the judge's impartiality may reasonably be questioned." The canon then lists specific instances when recusal is appropriate. The list is not intended to be exhaustive.

The specific instances in which a judge should disqualify, as identified in the canon, are:

1. The judge has a personal bias or prejudice concerning a party.
2. The judge has personal knowledge of disputed evidentiary facts.
3. While in law practice, the judge, or someone with whom the judge practiced, served as a lawyer in the matter in controversy or is a material witness about it.
4. The judge or judge's spouse or minor child has a financial interest in the matter or another interest that could be substantially affected.
5. The judge or judge's spouse, or someone within the third degree of relationship to either of them, or the spouse of such a person, is (a) a party or officer, etc., of a party, (b) a lawyer in the case, (c) known by the judge to have an interest that could be substantially affected, or (d) known by the judge to likely be a material witness.

The canon states that a judge should be informed about the judge's own financial interests and should make a reasonable effort to be informed about financial interests of the judge's spouse and minor children.

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G.S. 15A-1223

G.S. 15A-1223, applicable to all criminal proceedings, allows a judge to recuse on the judge's own motion, requires a judge to be disqualified if the judge is a witness in the case, and requires disqualification upon the motion of the state or of a defendant when a judge is:

- Prejudiced against the moving party or in favor of the other side.
- Closely related to the defendant.
- Otherwise unable to perform the duties of a judge in an impartial manner.

Constitutional Due Process

In limited circumstances a judge's failure to recuse may deny a party's constitutional right to due process. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 6 (U.S. June 8, 2009) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)). It is an unusual case, however, when due process is implicated, and "only in the most extreme of cases would disqualification on this basis be constitutionally required . . . ." Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986).

Caperton was one of those most extreme of cases. A West Virginia supreme court justice refused to recuse from an appeal concerning a dispute between coal mining companies even though the president of one of the companies had just spent several millions of dollars waging an independent campaign to have the justice elected. The justice did not recuse, and the West Virginia Supreme Court, of which he was a part, narrowly reversed a $50 million judgment against his supporter's company. The United States Supreme Court found a violation of due process in the justice's refusal to disqualify himself.

As the *Caperton* opinion emphasizes, a due process violation based on a judge's failure to recuse is unusual. For a long time the due process clause was held to require disqualification only when a judge had "a direct, personal, substantial, pecuniary interest" in a case. Tumey v. Ohio, 273 U.S. 510, 523 (1927). Disqualification because of a more remote financial interest, kinship, personal bias, or other similar circumstance was not considered a matter of constitutional due process; instead, it was left to the discretion of state policymakers. In *Tumey*, though, the defendant was held to have been denied due process when the town mayor who heard a liquor violation in his dual role as judge was paid a salary supplement from the fines he imposed. That situation gave the mayor a direct, personal financial interest in the outcome, but the Supreme Court's due process concern arose also from the mayor's motive "to convict and to graduate the fine to help the financial needs of the village." *Tumey*, 273 U.S. at 535.

Later, in *Ward v. Monroeville*, 409 U.S. 57 (1972), the court confirmed that a due process violation could occur even when the judge did not have a personal financial interest, reversing a conviction because the fines assessed by the mayor–judge went to the town coffers although the judge himself did not receive any of the money. Of course, recusal is not really the solution for the due process problems raised in *Tumey* and in *Ward*. The issue is the structure of the court itself, depending on the revenue from fines, and the solution is to not have a court in which a judge has such an interest in the outcome of a case.

In re Murchison, 349 U.S. 133 (1955), extended due process rights to require a judge to recuse in some situations in which there is no financial interest at stake. In *Murchison*, the court held that the judge should have disqualified himself from a trial for perjury and contempt when he

had presided at a previous proceeding at which he examined the defendants and charged them with the perjury and contempt.

Likewise, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), a due process violation was found when a judge refused to disqualify himself from deciding criminal contempt charges against a defendant who had repeatedly insulted and cursed the judge throughout a three-week trial. An important factor in the court's decision was that the judge sentenced the defendant to eleven to twenty-two years in prison for the contempt, an indication that the judge's personal feeling may have influenced his decision.

The Supreme Court in *Caperton* stressed, repeatedly, that each of these cases was exceptional and that it was only in such extreme circumstances that due process would require a judge to recuse. The court also emphasized that it was applying an objective standard. The test is not whether a judge is actually biased; it is whether, in light of normal human tendencies and weaknesses, there would be an unacceptable risk that the average judge would be tempted "not to hold the balance nice, clear and true." Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 15 (U.S. June 8, 2009) (quoting *Tumey*, 273 U.S. at 532).

Due process, then, can require a judge to recuse when, even though there is no evidence of actual bias by that particular judge, the circumstances are such that it is likely an average judge would be tempted to favor one side or the other. However, as discussed above, the Supreme Court stated that due process requires disqualification "only in the most extreme of cases."

The circumstances in which the due process clause thus far has been applied to require disqualification are:

1. Cases in which the judge has a direct, personal, substantial pecuniary interest in the outcome, such as in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), where a state supreme court justice had a pending lawsuit which turned on the same legal issue as the case before him on appeal;
2. Cases before a court which is structured so that the judge will be tempted to impose a fine because the judge or the judge's governmental entity benefits financially from the revenue;
3. Cases in which the judge who is trying a criminal case is responsible for bringing the charges in the first place or, when contempt is involved, otherwise has a strong personal interest in the outcome; and
4. Cases in which one party has made a financial expenditure to the judge's election campaign large enough to have likely affected the outcome of the election, knowing that the party's case would be coming before that judge.

Procedure for Raising Disqualification

For criminal cases, G.S. 15A-1223 provides that a party's motion to disqualify a judge must be submitted in writing, must have supporting affidavits, and must be filed at least five days before the trial unless there is good cause for delay. The failure to follow those rules can be the basis for denying the motion. State v. Poole, 305 N.C. 308 (1982). When the basis for disqualification is not known until after the statutory deadline for filing the motion has passed, the motion should be filed as soon as reasonably possible.

For civil cases, neither Canon 3C nor any statute specifies when or how a party's motion to disqualify a judge should be made. Although there is no statutory deadline for a recusal motion in a civil case, a party may waive any right to object by waiting too long. Delay was a factor in denying the motion for recusal in *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005), when a motion for the judge's disqualification was not filed until months after the judge's disclosure of his daughter's summer employment with the opposing law firm. In *State v. Pakulski*, 106 N.C. App. 444, 417 S.E.2d 515 (1992), one of several grounds for rejecting the defendant's appeal on recusal was that the issue had not been raised any time soon after the judge's alleged prejudicial statement ("Why don't you just plead the slimy sons-of-bitches guilty?"); indeed, the issue was only raised after the case was appealed and remanded. *Pakulski* was a criminal case, but the guiding principle would seem applicable to any case: "A defendant cannot choose to wait and seek a trial judge's recusal until after the judge rules unfavorably to the defendant on some other grounds." 106 N.C. App. at 450.

Disclosure and Waiver of Disqualification

Canon 3C allows a judge to disclose a potential reason for disqualification and then continue to hear the matter if the parties and lawyers all agree in writing that the potential reason for disqualification is immaterial or insubstantial. The judge's disclosure and the parties' agreement must be placed in the record.

Who Decides Recusal Motion

The first question facing a judge who has received a recusal motion is whether to hear the motion oneself or refer it to another judge. If the allegations made about the judge's bias or other potential disqualification are made with sufficient support to require findings of fact, the motion to recuse should be referred to another judge. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951). The judge whose impartiality is being questioned then may respond by affidavit or testimony to rebut the allegations.

> We are, however, constrained to observe that when the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony. Obviously it was not proper for this trial judge to find fact so as to rule on his own qualification to preside when the record contained no evidence to support his findings. Bank v. Gillespie, 291 N.C. 303, 311 , 230 S.E.2d 375, 380 (1976) (citing Ponder v. Davis).

In *Ponder*, the court was hearing an election dispute, and the defendants moved to disqualify the judge because he had campaigned for the other candidate. The judge called the motion "scurrilous and untrue" and ordered it stricken from the record. The North Carolina Supreme Court held that he should have referred the motion to recuse to another judge.

In *Bank v. Gillespie*, the defendant Gillespie sought to disqualify the judge on three fronts:

1. There had been an unfriendly termination of the judge's representation of the Gillespie family when the judge was in private practice.

2. The judge had prosecuted Gillespie when the judge was a prosecutor.
3. The judge had money in the plaintiff bank at the time of the trial.

As in *Ponder*, the Supreme Court stated that because the judge's denial of the defendant's motion for disqualification required findings of fact, the judge should have referred the motion to another judge.

If a party's motion to recuse is not supported by sufficient evidence to require findings of fact, or if the allegations would not require recusal even if true, a judge need not refer the recusal motion to another judge. Another way to look at the question is that if the decision on the motion to recuse does not require the judge to offer evidence then it need not be referred to another judge. Cases that demonstrate this include:

> State v. Poole
> 305 N.C. 308, 289 S.E.2d 335 (1982)
> The motion for recusal did not have to be referred to another judge in this criminal case when, right after the judge denied the defendant's motion to substitute counsel, the defendant moved for recusal. He said that the judge was biased because the judge had made remarks against the defendant outside of the defendant's presence. The judge said he had made no such remarks, then denied the motion. There was no need to refer the disqualification issue to another judge because the defendant had produced no evidence to support his allegation: The record showed no remarks made by the judge about the defendant outside of his presence, and the judge had stated he made no such remarks. Circumstances also indicated the recusal motion was the defendant's hasty response to the denial of his motion to substitute counsel.

> State v. Scott
> 343 N.C. 313, 471 S.E.2d 605 (1996)
> No referral to another judge was required when the criminal defendant offered no evidence to support his claim of bias based on the fact that the judge's son worked in the district attorney's office and on the judge's comments in an earlier trial about the credibility of one of defendant's witnesses. Simply being familiar with a case or witnesses from earlier proceedings is not grounds for disqualification, and the defendant had not offered any evidence to support his contention that the judge's experience or his son's employment biased him against the defendant.

Actual versus Perceived Partiality

Canon 3C states that a judge should recuse when "the judge's impartiality may reasonably be questioned." Case law states a judge should be disqualified when "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule . . . in an impartial manner." McClendon v. Clinard, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978). In *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987), the supreme court stated that a judge should recuse in a criminal case not only when the disqualifications in G.S. 15A-1223 exist but whenever the judge's "objectivity may reasonably be questioned." In that case, the court held that the trial judge should have recused because "a perception could be created in the mind of a reasonable person that [the judge] thought the defendants were guilty of the crimes . . . and that it would be difficult for the defendants to receive a fair and impartial trial . . . ." Does that mean a

judge should recuse whenever there might be an appearance of partiality? The answer appears to be no, because of a 2003 revision to the Code of Judicial Conduct and a subsequent North Carolina Supreme Court decision.

In April 2003 the state supreme court amended the Code of Judicial Conduct to eliminate the phrase "appearance of impropriety" from the canons. Before the 2003 amendment Canon 2 stated, as does the Model Code of Judicial Conduct promulgated by the American Bar Association and used by most states, "A judge should avoid impropriety and the appearance of impropriety in all his activities." As rewritten, North Carolina's Canon 2 says only, "A judge should avoid impropriety in all his activities." Canon 3C still states that a judge should disqualify in any proceeding "in which the judge's impartiality may reasonably be questioned," but the elimination of the "appearance of impropriety" language from Canon 2 seems to be a better barometer of the North Carolina Supreme Court's current view of recusal.

Following the April 2003 revision of Canon 2, the court in December 2003 decided *Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003). In *Lange*, the plaintiff's motion to disqualify a district judge was referred to a second judge. The second judge found that there was no violation of the Code of Judicial Conduct but decided that the first judge still should recuse because the relationship at issue "would cause a reasonable person to question whether [the judge] could rule impartially." The North Carolina Supreme Court held that conclusion was wrong. Emphasizing that "the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist," and that such showing "must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially," the supreme court said that the judge should not be disqualified if there was no actual violation of the Code of Judicial Conduct. "Thus, the standard is whether 'grounds for disqualification actually exist.'" *Id*. 357 N.C. at 649 (quoting State v. Scott, 343 N.C. at 325). Another way of saying it, perhaps, is that if there is no actual evidence of bias then a reasonable person would not question the judge's ability to rule impartially.

The *Lange* opinion does not discuss the revision of Canon 2. Still, when the two are considered together, it seems less likely now than before that a judge would be expected to recuse if there is an appearance of partiality but no evidence of an actual personal bias, prejudice, or interest.

As discussed above, however—just to complicate matters—when a claim is made that constitutional due process requires a judge to step down from a case, the test is not whether actual bias exists, it is whether the circumstances are such that, given normal human tendencies and weaknesses, the average judge would be tempted to favor one side or the other. "Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 16 (U.S. June 8, 2009) (quoting *In re* Murchison, 349 U.S. at 136

Meaning of Bias or Prejudice

Disqualification of a judge requires a showing of personal bias or prejudice against or in favor of one side. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243 (2006); State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 374 (1977); *In re* Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976). Generalized allegations forecasting a likely prejudice based on the history of the case, a judge's prior involvement with the parties, a judge's general view of

the law, or similar considerations are not sufficient to necessitate recusal. "The bias, prejudice or interest which requires a trial judge to be recused from a trial has a reference to the *personal disposition or mental attitude of the trial judge*, either favorable or unfavorable, toward a party to the action before him." State v. Scott, 343 N.C. at 325 (emphasis added). The cases discussed below include numerous examples in which the allegations were not considered sufficient to show a personal bias or prejudice directed toward the party seeking the judge's disqualification.

Disqualification Based on Party Ties

As would seem self-evident, a judge is disqualified from hearing a case when one of the parties has a pending lawsuit against the judge. *In re* Braswell, 358 N.C. 721, 600 S.E.2d 849 (2004). Likewise, a judge may not preside at a session of court in which a traffic charge against the judge is on the docket. *In re* Martin, 302 N.C. 299, 275 S.E.2d 412 (1981). In both of those examples the judge was sanctioned by the North Carolina Supreme Court.

No Disqualification for Prior Involvement with Case

In a number of cases, the appellate courts have stated that a judge is not disqualified from hearing a case just because the judge is aware of evidentiary facts from a previous involvement with the case or because the judge ruled against one of the parties in an earlier phase of the case. Some of the cases explicitly state the value of judicial efficiency in having the same judge preside over subsequent hearings in the same case. Cases addressing a judge's previous involvement with a matter include:

Love v. Pressley
34 N.C. App. 503, 239 S.E.2d 574 (1977)
The judge was not disqualified from hearing a landlord–tenant dispute when the judge had ruled against the defendant in an earlier case involving similar allegations. The entry of findings of fact adverse to the defendant in the previous case was not evidence of a personal bias or prejudice.

In re Faircloth
153 N.C. App. 565, 571 S.E.2d 65 (2002)
The judge was not disqualified from hearing an action for termination of parental rights against the defendant although the judge presided at an earlier trial in which the defendant was found guilty of abuse and neglect. Knowledge of evidentiary facts obtained in an earlier proceeding is not grounds for disqualification.

State v. Vega
40 N.C. App. 326, 253 S.E.2d 94 (1979)
The judge was not disqualified on the ground that he presided at an earlier murder trial for the defendant at which the judge had to declare a mistrial when the victim's mother made an emotional outburst. Although the mistrial was declared because the

outburst might have unduly influenced jurors, there was no evidence that the judge was influenced or was biased against the defendant.

Savani v. Savani
102 N.C. App. 496, 403 S.E.2d 900 (1991)
The judge was not disqualified from hearing a child support case against the defendant even though the judge had earlier ordered transfer of child custody from the defendant to the plaintiff.

State v. McRae
163 N.C. App. 359, 594 S.E.2d 71 (2004)
The judge was not disqualified from presiding over a competency hearing for a defendant in this murder case even though the judge had presided at a previous trial at which the defendant was convicted. That conviction was reversed on appeal because the judge improperly failed to provide to the defendant a competency hearing on the day of trial. The same judge hearing the matter again serves judicial efficiency. There was no showing of personal bias.

State v. Moffitt
185 N.C. App. 308, 648 S.E.2d 272 (2007)
The judge was not disqualified to preside over the resentencing of the defendant after appeal even though the judge was aware of the plea bargain the defendant had rejected at the original trial. Bias or prejudice, as stated above, refers to the personal disposition or mental attitude of the judge toward the party.

State v. Monserrate
125 N.C. App. 22, 479 S.E.2d 494 (1997)
The judge who issued a search warrant was not disqualified to hear a motion to suppress the evidence, but the better practice is for another judge to hear the suppression motion. When issuing a search warrant, a judge is not vouching for the veracity of the affidavit supporting the warrant; the judge is only deciding that the information in the affidavit is sufficient to establish probable cause the informant is telling the truth.

In re LaRue
113 N.C. App. 807, 440 S.E.2d 301 (1994)
The judge was not disqualified from hearing an action for termination of parental rights based on the parents' mental disability, even though the judge had presided over an earlier custody proceeding, had decided that the department of social services should retain custody of the child, and had recommended that social services proceed to termination. The knowledge of evidentiary facts from the previous hearing did not disqualify the judge. The judge's recommendation about proceeding with termination did not demonstrate disqualifying bias because the judge was required by statute to evaluate as part of the custody proceeding whether termination of parental rights should be considered.

Recusal in Contempt Cases

Cases of direct criminal contempt—willful behavior occurring in the court's presence that interrupts the proceedings or impairs the respect due to the court—can present situations in which it is difficult for a judge to remain impartial. If the contempt arises from personal insults spoken to the judge, perhaps containing foul language, it will be a challenge for the judge to not feel a personal repulsion. For that reason, G.S. 5A-15(a), the statute on plenary proceedings for criminal contempt (i.e., when the contempt is not dealt with summarily by the judge but is the subject of a separate hearing following issuance of a show cause order) states, "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." Although the statute does not cover summary proceedings for direct criminal contempt, the same principles should apply. When the events leading up to the summary proceeding show an ongoing conflict between a judge and a defendant that would make it difficult for the judge to put personal feelings aside, the judge should consider recusal.

The provision on recusal in the contempt statute tracks case law on the issue.

> Due process standards require that where the trial judge is so embroiled in a controversy with the defendant that there is a likelihood of bias or an appearance of bias, the judge may be 'unable to hold the balance between vindicating the interests of the court and the interests of the accused,' and should recuse himself from the proceedings. *In re* Nakell, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991), *disc. review denied*, 330 N.C. 851 (1992) (quoting *In re* Paul, 28 N.C. App. at 618).

In *Nakell*, Judge Lake, who later became a justice and the chief justice, refused to disqualify himself. His decision was upheld on appeal when the trial transcript showed that his responses to the lawyer's persistent interruptions were calm, deliberate, and unemotional. Lake's findings of fact for the contempt likewise demonstrated a professional objectivity. Also, in stark contrast to *Mayberry v. Pennsylvania*, discussed above in the section on constitutional due process, the contempt in *Nakell* was punished by only a $500 fine and ten days' imprisonment, not by an unusually severe sentence like the sentence of eleven to twenty-two years in *Mayberry*.

The United States Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, No. 08-22, slip op. at 6 (U.S. June 8, 2009), affects the analysis for contempt cases like *Nakell*. The standard for constitutional due process articulated in *Caperton* is not whether a judge should recuse because of actual bias but whether, given normal human tendencies and weaknesses, the average judge would be tempted to favor one side. Thus, even an exemplary judge, when faced with a belligerent defendant, should consider recusal if the direct criminal contempt is so abusive that the average judge would find it difficult to rule in a disinterested way.

Judge Not Disqualified for Efforts to Settle Case

A judge's efforts to get parties to settle a case, even if accompanied by some expression of dissatisfaction at the parties, does not establish a disqualification by itself. Examples of such cases include:

Dunn v. Canoy
180 N.C. App. 30, 636 S.E.2d 243 (2006)
The judge's efforts to persuade the parties to settle in this case was not a basis for disqualification, even when the judge became angry at the failure to settle. For disqualification, there still needs to be a showing of personal bias or prejudice.

State v. Kantsiklis
94 N.C. App. 250, 380 S.E.2d 400 (1989)
The judge was not disqualified from presiding over this criminal trial when the judge expressed anger in chambers about the failure to reach a plea agreement. The judge was expressing frustration at the way in which the jury's time was being wasted while the negotiations dragged on. The incident may have demonstrated impatience but not personal bias or prejudice.

In re Pedestrian Walkway Failure
173 N.C. App. 237, 618 S.E.2d 819 (2005)
The judge's efforts to get the parties to settle this negligence case did not disqualify him from presiding over further proceedings in the case.

Judge Not Disqualified for Views on Law

In *State v. Kennedy*, 110 N.C. App. 302, 429 S.E.2d 449 (1993), the judge was not disqualified from hearing a drunk driving case because the judge's wife had been injured in an accident caused by a drunk driver. The fact that a judge may view one kind of crime as more serious than another is not a basis for disqualification. In this case, no evidence was presented of a personal bias toward the defendant.

Resident Judge Not Disqualified from Case in Which County Is a Party

Case law from *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 525 S.E.2d 826 (2000) directs that a resident superior court judge should not be disqualified from hearing a condemnation case just because the judge's home county is the defendant. The plaintiff suing the county in this case did not provide an affidavit or offer other evidence to support a claim of personal bias.

Senior Resident Not Disqualified to Hear Magistrate Removal

The senior resident superior court judge in *In re* Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994), was not disqualified to hear a removal proceeding for a magistrate even though the judge appointed the magistrate. The magistrate did not offer evidence of personal bias or prejudice.

Judge's Relationship with Lawyers

Canon 3C includes clear rules on a judge's recusal because of a family relationship with a lawyer in the case or previous ties to one of the lawyers while in practice. The case law, therefore, tends to deal with more remote relationships. Examples include:

> Lange v. Lange
> 357 N.C. 645, 588 S.E.2d 877 (2003)
> The judge's joint ownership of mountain vacation property with several others, one of whom was one of the parties' lawyer, was not sufficient basis for disqualification in the absence of any other evidence of bias or prejudice.
>
> *In re* Pedestrian Walkway Failure
> 173 N.C. App. 237, 618 S.E.2d 819 (2005)
> The judge was not disqualified by the fact that his daughter, a law student, had a summer clerkship with one of the firms in the case. The daughter was working in a separate part of a large firm; she had no involvement in the case; and when the judge had informed the lawyers in the case about the summer job offer, none had objected.
>
> Savani v. Savani
> 102 N.C. App. 496, 403 S.E.2d 900 (1991)
> The judge was not disqualified from hearing a child support case because of an office-sharing arrangement with one of the parties' lawyers when the judge was in private practice. The lawyer in question did not enter the case until after the earlier custody hearing in which the judge had transferred custody of the child and found the child in need of support.

Judge Must Recuse, Not Bar Lawyer

A judge cannot avoid a disqualification by barring a lawyer from cases heard by the judge. In *In re* Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993), it was improper for a judge to bar a lawyer from sessions of court in which she was presiding because the lawyer had initiated an ethics investigation of her. The effect was to hamper the lawyer's practice. The judge should have recused herself, not put the burden on the lawyer to avoid her.

Judge Disqualified for Expressing Opinion about Case

A judge should recuse when the judge previously has expressed, directly or indirectly, an opinion as to the merits of the case, casting doubt on the ability to be impartial. To disqualify a judge the expression must have been such as to indicate that the judge already had formed a firm opinion about the outcome. Some cases that demonstrate this include:

State v. Hill
45 N.C. App. 136, 263 S.E.2d 14 (1980)
The judge should have disqualified himself from this criminal fraud trial when he had heard the defendant testify in an earlier trial of another defendant; had stated after the testimony that the defendant had implicated himself; and had, on his own motion, raised the defendant's bond.

In re Dale
37 N.C. App. 680, 247 S.E.2d 246 (1978)
The judge should have disqualified himself from hearing a disciplinary matter against a lawyer when the judge sent a notice of hearing stating in conclusory language that "you negligently failed to . . . ." The use of such language would have created an impression that the judge already had decided the matter.

State v. Fie
320 N.C. 626, 359 S.E.2d 774 (1987)
The judge should have disqualified himself from defendants' breaking-and-entering trial where he had written to the district attorney to request that the grand jury consider charges against them based on testimony he had heard in another trial. The judge's letter demonstrated his disbelief of witnesses that were likely to be called again in defendants' trial.

McClendon v. Clinard
38 N.C. App. 353, 247 S.E.2d 783 (1978)
The plaintiffs' lawsuit was dismissed when plaintiffs and their counsel failed to appear in court. When plaintiffs moved to set aside the judgment, the judge should have disqualified himself because he had reported the plaintiff's lawyer to the local bar for contact with a member of the jury venire and then had notified a newspaper reporter of the incident and given an interview about it. The judge was properly concerned about the lawyer's contact with the jury venire member, but his subsequent discussions with the press raised questions about his impartiality.

In re LaRue
113 N.C. App. 807, 440 S.E.2d 301 (1994)
The judge was *not* disqualified from hearing an action for termination of parental rights based on the parents' mental disability, even though the judge had presided over an earlier custody proceeding and recommended that social services proceed to termination. The recommendation did not show bias or prejudice against the parents because the judge was required by statute as part of the custody proceeding to evaluate whether termination of parental rights should be considered.

Recusal Related to Election

On March 13, 1998, Judge John B. Lewis Jr., the chair of the Judicial Standards Commission at the time, issued a memorandum expressing the commission view on recusal related to elections. The memo states that a judge should recuse from any trial or appellate proceeding in which the opponent, the opponent's campaign manager or treasurer, or the judge's campaign manager or treasurer appears. For a nontrial proceeding at which one of those individuals appears, the judge should disclose the basis for disqualification and recuse unless the parties and lawyer sign a waiver. If another member of the law firm appears rather than one of the named individuals, the judge need not recuse unless the law firm's appearance would bias or prejudice the judge.

The effect of election support or opposition on recusal was the subject of the United States Supreme Court's June 2009 decision in *Caperton v. A.T. Massey Coal Co.*, discussed above. The court in *Caperton*, emphasizing the unusual and extreme circumstances of the case, found a denial of due process when a state appellate judge failed to disqualify himself from a case involving someone who had bankrolled a $3 million independent campaign for the judge's election. The court said that the factors which should be taken into account in deciding whether campaign financial support requires a judge to disqualify are "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." No. 08-22, slip op. at 14 (U.S. June 8, 2009). "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." No. 08-22, slip op. at 15 (U.S. June 8, 2009).

In *Caperton*, the litigant made only a $1,000 contribution to the judge's campaign committee; the $3 million went to an independent campaign waged outside the judge's control. In considering recusal, thus, it is important to take into account not only direct campaign contributions but other support as well. If the expenditures for or against a judge are out of balance with other contributions, it is known or seems likely at the time of the campaign that the case will come before the judge, and the expenditures are large enough to have made a difference in the outcome, the judge should recuse. The test in this situation is not whether the expenditures create actual bias in the judge but whether, given that level of political support and normal human tendencies and weaknesses, the average judge would be tempted to tip the scales of justice toward one side.

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