Winter 1995 Volume 60, Number 3

Popular Government

Institute of Government • The University of North Carolina at Chapel Hill

me·di·a·tion \ˌmēdē'āshən\ *n* -s [ME *mediacioun*, fr. ML *mediation-*, *mediatio*, fr. *mediatus* (past part. of *mediare* to mediate) + L *-ion-*, *-io* -ion — more at MEDIATE] **1** : intervention between conflicting parties or viewpoints to promote reconciliation, settlement, compromise, or understanding ⟨a code . . . would not dispense with ~ between legislature and judges —B.N.Cardozo⟩

PUTC EX PARTE

lit·i·ga·tion \ˌ--'gāshən\ *n* -s [LL *litigation-*, *litigatio*, fr. L *litigatus* (past part. of *litigare*) + *-ion-*, *-io* -ion] **1** *archaic* : DISPUTE ⟨was, after some ~, obliged to consent —Henry Fielding⟩ ⟨a matter of ~ among psychologists —William James⟩ **2 a** : the act or process of litigating ⟨losses arising from ~ in a civil antitrust suit —*Wall Street Jour.*⟩ ⟨~ over an estate⟩ **b** : the practice of taking legal action ⟨my lawyer is bound by all his affections to encourage me in ~ —G.B.Shaw⟩ ⟨he enjoyed ~ —Louis Auchincloss⟩ **3** : a controversy involving adverse parties before an executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures

In this issue:

- Mediation v. Litigation in Civil Court

Also:

- Child-custody case study
- Solid waste management
- Auto liability insurance

Institute of Government

The University of North Carolina at Chapel Hill

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Popular Government

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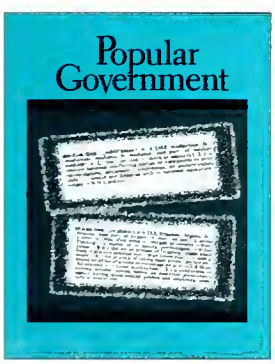
Feature Articles

Around the State



Popular Government (ISSN 0032-4515) is published four times a year (summer, fall, winter, spring) by the Institute of Government, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330. Subscription: $12.00 per year. Second-class postage paid at Chapel Hill, NC, and additional mailing offices. POSTMASTER: Please send change of address to Institute of Government, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330. ♾ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes. ♲ Printed on recycled paper with soy-based ink. Printed in the United States of America.

Popular Government is distributed without charge to city and county officials as one of the services provided by the Institute of Government in consideration of membership dues. The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 8,000 copies of this public document at a cost of $10,108, or $1.26 per copy. These figures include only the direct cost of reproduction. They do not include preparation, handling, or distribution costs.

On the cover Two articles in this issue look at programs that use mediation as an alternative to traditional litigation to resolve civil disputes. Illustration by Michael Brady. (*Webster's Third New International Dictionary* © 1986 by Merriam-Webster, Inc.)

Mediation in Civil Court

Reformers have long been searching for a better way to determine whether a driver was negligent and how badly a pedestrian was hurt . . . a better way to determine how mom and dad, if they separate, will share the joys and burdens of raising their children. There must be some alternative, they say, to the slow passage of time that is inevitable in a lawsuit, the steady accumulation of stress, and the mounting of attorney fees.

Two programs under way in North Carolina are testing that premise, replacing to some extent litigation with mediation. One is a program for court-ordered mediation in civil suits, which is currently active in twelve judicial districts affecting Bladen, Brunswick, Buncombe, Chatham, Columbus, Cumberland, Forsyth, Guilford, Halifax, Haywood, Jackson, Mecklenburg, Orange, Stokes, Surry, Wake, and Wayne counties. The other is a program for mediation in cases of child custody and visitation; it is active in eight judicial districts, affecting Buncombe, Cabarrus, Cumberland, Duplin, Gaston, Jones, Mecklenburg, Onslow, Rowan, Sampson, and Wake counties.

The 1991 legislation setting up the civil case program [N.C. Gen. Stat. § 7A-38(a)] states that its purpose is "to determine whether a system of mediated settlement conferences may make the operation of the superior courts more efficient, less costly, and more satisfying to the litigants." Among the stated purposes of the 1983 legislation setting up the custody and visitation program [N.C. Gen. Stat. § 50-13.1] is an attempt "to reduce any acrimony that exists between the parties," where possible "to give the parties the responsibility for making decisions about child custody and visitation," and "to minimize the stress and anxiety to which the parties, and especially the child, are subjected."

The two articles that follow look at these programs in detail. One describes the experience of a fictitious but representative couple who participate in mediation of a child-custody dispute. The other relates the authors' observations of court-ordered mediated settlement conferences that they observed for an Institute of Government study.

A Case Study in Child-Custody Mediation

Leslie C. Ratliff

Bob Donnan Photography

For Sarah and Rick, it seemed as if their very future had been swept away with the winds of Hurricane Andrew. Their South Miami home was left all but uninhabitable. In addition, Rick no longer had a job. The building that housed the small seafood restaurant he had managed was damaged beyond repair, and the owners, approaching retirement age, were not interested in starting over. Basic things Rick and Sarah had taken for granted disappeared—they could barely locate drinking water, food, and diapers for Philip and Dawn, their two children.

When Rick's parents called from Raleigh to offer help and the shelter of their home to the young couple until they could get back on their feet, Rick was ready to go. Sarah took a bit more convincing; although she respected Rick's parents, she knew they could be interfering and critical. Faced with the prospect of remaining indefinitely with the kids in a National Guard tent city, Sarah reluctantly agreed to the move.

Even in the relative calm of Raleigh, starting over proved

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A Pilot Program in Court-Ordered Mediation

Elizabeth D. Ellen, Kelly McCormick, and Stevens H. Clarke

Lawsuits drag on and on, a year, two years, or longer, and rarely go to trial. The end usually comes not with a trial, complete with dramatic testimony and a tortuous wait for the jury's decision, but with a steady exchange of telephone calls and documents between lawyers resulting in a negotiated settlement. The plaintiff and the defendant typically take no direct part in the negotiation; the communication all runs between lawyers.

This article describes a different—some say better—way of resolving civil disputes: court-ordered mediated settlement conferences (MSCs).

In 1990 and 1991 a planning committee made up of trial and appellate judges, members of the North Carolina Bar Association, court administrative officials, and others worked to plan a process of court-ordered mediation that would not only hasten the disposition of cases but also make the parties more satisfied with the procedure and the outcome. As a result of their efforts, in 1991 the North Carolina General Assembly enacted legislation requiring the state's court system to conduct a pilot program involving court-ordered mediation of civil cases in superior court, "to determine whether a system of mediated settlement conferences may make the operation of the superior courts more efficient, less costly, and more satisfying to the litigants."[1] The

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A Pilot Program in Court-Ordered Mediation

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legislation defines mediation as "an informal process conducted by a mediator with the objective of helping parties voluntarily reach a mutually acceptable settlement of their dispute" and a mediator as "a neutral person who acts to encourage and facilitate a resolution of a pending civil action" but "does not render a judgment as to the merit of the action."

The state Administrative Office of the Courts (AOC) originally chose eight judicial districts across the state to participate in the program.[2] In any civil case the North Carolina Supreme Court's Rules of Mediated Settlement Conferences (hereinafter referred to as "the rules") allow the senior resident superior court judge in each pilot district to order the parties, their attorneys, and the representatives of any insurance companies involved to participate in a pretrial mediated settlement conference. In practice the senior judges order a mediated settlement conference in almost every civil case in which the defendant contests the claim. The parties may or may not reach a mediated agreement, but they must attend the conference and may be held in contempt of court if they do not.

Institute of Government Study

The AOC asked the Institute of Government to carry out a study evaluating the MSC program. The evaluation is expected to be completed early in 1995; its results will be reported in this magazine. This article is based on the authors' observations of thirty-five conferences between June 1993 and December 1994. (As observers, with the parties' permission, the authors were allowed to follow the mediators throughout the conferences.) The article deals with how mediated settlement works: an overview, the setting of mediated settlement conferences, typical negotiating behavior, mediators' tactics, and common problems in reaching a settlement. The accompanying sidebar describes the typical, but hypothetical, case of *Costanza v. Bell*, synthesized from observations of actual cases (see page 8).

Overview of Mediated Settlement

The order to mediate may be issued at any time after the defendant's time to file an "answer" (response to the plaintiff's claim) has expired (ordinarily 30 days after the plaintiff has notified the defendant of the claim). The conference must be completed in no less than 90 days and no more than 180 days after the senior judge issues the order unless otherwise stipulated by the parties. The parties may choose their own mediator, but if they fail to agree on a choice, the senior judge will appoint one. Normally mediators in this program are certified by the AOC. To be certified an attorney must have at least five years of experience and complete at least forty hours of approved training in mediation. A nonattorney may be certified with at least twenty hours of approved training followed by five years of experience in mediation, handling at least twelve cases and twenty hours of mediation each year. (Thus far, almost all mediators in the MSC program have been attorneys.) With the judge's approval, the parties may choose a mediator who has not been formally certified.

The mediator normally charges a fee that is paid by the parties. If the parties choose the mediator, they agree on the fee among themselves; if the court appoints the mediator, the court sets the fee on the basis of a standard hourly rate for the judicial district. The standard rate for mediators is $100 per hour for time spent in the conference plus a $100 preparation charge. Typical fees range from $100 to $1,125, with a median amount of $375. The rules provide that where the court finds a party is indigent, the mediator must waive that party's portion of the fee.

Mediated settlement conferences range up to ten hours with a median time of 2.8 hours, according to mediators' reports filed in eighty-two cases. These data also indicate that most conferences (86.6 percent) are completed in one session; 12.2 percent require two sessions and 1.2 percent three sessions to complete.

The conference ends when the parties have reached a voluntary agreement settling all or part of the lawsuit, everyone has decided a recess is needed to get additional information, or the mediator has declared that there is an impasse. The mediator then reports the results to the court. If the parties have reached an agreement resolving all issues, the case ends at that point, with the plaintiff filing a voluntary dismissal "with prejudice" (so that the case cannot be reopened). Otherwise, if the parties fail to resolve the case fully at the conference, it still may be settled later in unmediated negotiations, and the experience at the conference may facilitate later settlement. If there is no settlement, the case may go on to a trial and end in a judgment for either side, or it may result in a dismissal or other court-imposed disposition.

Setting

Mediated settlement conferences are often held at lawyers' offices. Typically counsel for one of the parties hosts the conference, perhaps the attorney with the best conference facilities or location. Less frequently

conferences are held at the mediator's office, a courthouse, or some other building such as a bank. At the very least the facilities must have (1) a conference room large enough to accommodate the mediator, the litigants, and all the attorneys; (2) a table that everyone can sit around; and (3) at least one other separate meeting room that can be used for caucuses.

Opening

As the conference begins, all participants are present. The mediator opens the conference with introductions and an explanation of the mediation ahead, and the lawyers present their versions of the events leading to the case. Parties may produce evidence such as photographs, medical records, and depositions. In some cases at this opening stage, the litigants may describe their situation in their own words. The mediator asks questions of the attorneys and litigants to clarify what is in dispute and then verbally summarizes the parties' initial positions.

Negotiation

During the negotiation phase the mediator compares the advantages and disadvantages of trial and settlement. Mediators often ask attorneys to estimate their side's risk should the case go to trial, an important consideration, as most settlements are based upon compromise. Typically the mediator will discuss a range of reasonable jury verdicts with each party, and if parties agree to settle, the settlement figure is usually within that range but is neither the maximum nor the minimum. Without consideration of risk, parties would be less likely to take a suboptimal settlement. Making parties aware of the monetary and emotional costs associated with trials is important in making settlement more attractive. The mediator often points out to litigants that a trial will run up their legal expenses and may require them to lose time at work. Also, going to trial will prolong the unpleasantness of a lawsuit and may require parties to testify, and the outcome of a trial is unpredictable. In contrast, settlement produces a known, agreed-upon result, enabling the litigants to put the case behind them and get on with their lives.

Many other topics may be discussed in negotiation, depending on the case. In cases where liability is disputed, parties may spend a lot of time discussing facts, the events leading up to the case, and the strength of evidence on each side. If liability has already been established, negotiations may be solely about the amount of damages. If the cause of a personal injury is disputed, the discussion will focus on medical records and the credibility of expert medical witnesses. In some cases legal discussions about precedent and the intricacies of specific laws are key to the negotiations.

In most of the mediations we observed, the attorneys did most of the negotiating. Much of their communication with each other was through the mediator in separate caucuses (discussed later), rather than directly to the other side. The mediator might then present the information to the other side in a way most conducive to reaching settlement. However, it was not uncommon for the mediator to meet with both opposing attorneys without their clients present to try to work out something without the emotional input of the litigants. We also saw a conference in which the opposing attorneys went off alone, while the mediator, the plaintiffs, the insurance representative, and the observers waited. When the attorneys had come to a possible settlement, each got approval from his client, and then they let the mediator know the settlement figure.

According to our observations, litigants do little direct negotiating. Instead, the attorneys negotiate and submit possible settlement offers or demands to the litigants for approval. The litigants can also provide specific information about the events leading up to the case, and the mediator will often ask them directly for clarification of facts. Litigants rarely suggest possible solutions, speak to each other, or speak to opposing counsel. Even though attorneys generally direct their clients' participation in MSCs, we observed a case where the client (a very young man) basically ignored his attorney, who had just taken on the case a few days before the conference. The attorney, who was relatively quiet and passive, let the client do and say whatever he wanted. The mediator, in fact, stepped in and told the litigant that he did not really understand what he was talking about and that he needed to consult his attorney about procedures and rules associated with his civil suit.

Litigants can benefit greatly from interacting with the mediator as an impartial, but knowledgeable and sympathetic, participant. One benefit is that mediators can point out weaknesses in a litigant's case—weaknesses that their own attorneys may have been reluctant to emphasize. Or the attorney may already have tried to explain the weaknesses to the litigant, but the litigant may listen better when the mediator explains.

Another benefit is that the litigants derive some satisfaction from expressing their frustration and hostility to the mediator. Whether this happens (and how it happens) depends upon the type of case and the mediator's style. We observed a wide range of mediator attitudes toward the emotional aspects of mediation, from those who are

very patient and sympathetic to those who have no interest in letting litigants express their feelings. Allowing emotions to come out in the open increases the risk of the mediator losing control over the conference, but sometimes it can effectively clear the way for settlement. To this end, a mediator might even allow a party to engage in "show and tell." In a case arising from a fatal automobile accident, the deceased victim's family showed videos of her. At another conference the plaintiff explained how she had been emotionally shaken by her automobile accident because she had lost her daughter several years before in a wreck. The mediator encouraged her to talk about her daughter and show pictures of her.

Mediators may suggest that the parties split the difference (meet in the middle) in their offers and demands. But they can be much more creative in their proposals. In one observed case the insurers were unwilling to settle because they were awaiting the outcomes of declaratory actions in court, which would determine to what extent the insurance companies were obliged to provide coverage. The mediator prepared a plan in which settlement amounts were fixed for all possible outcomes of the declaratory actions. All the parties were able to sign this agreement. In another case in which one young man had assaulted and injured another, the mediator sensed that the plaintiff really wanted to punish the defendant for assaulting him. The mediator suggested that the plaintiff demand a smaller settlement amount but insist that it come directly from the defendant's paycheck, not from his parents. In a third case involving wrongful death in an automobile accident, the parties finally signed a settlement agreement stipulating that the defendant, who was prones to seizures, would not drive again for five years. In private the defendant had already told the mediator that he did not want to drive again. In this case, the plaintiffs got more satisfaction than a purely monetary settlement could have given them.

Frequently insurance representatives are key negotiators in mediations. In motor vehicle cases the defendant (an insured driver) often is not present. Instead, a representative of the defendant's insurance company takes the role of defendant in negotiations. If the actual defendant is not present, the mediation usually is less emotionally charged. The insurance representative is simply doing his or her job and makes offers based on business considerations.

Caucuses

Most of the activity in a mediated conference occurs in caucuses—meetings between the mediator and some of the people assembled for the mediation, excluding others. Typically a mediator caucuses with a litigant and his or her counsel. The mediator also may meet separately just with one or more attorneys, or with an insurance representative.

In most of the mediations we observed, the parties separated into their own rooms after the mediator's opening remarks and each side's presentation. In caucusing, the mediator may shuttle back and forth, or the parties may come in and out of the mediator's room. Either way, this technique allows for freer expression on the parts of counsel and litigants. Parties can tell the mediator things in confidence that may influence the way the mediator directs negotiations. Caucuses also help to remove emotional impediments to settlement, creating a less charged atmosphere in which the mediator can communicate demands and offers. In one mediation we observed, the case involved complex issues of business law and contracts, but problems in the litigants' relationship were at the root of the legal conflict. The parties were very hostile toward one another, and separating them was the only way of making progress.

While the most common kind of caucus is when the mediator meets with both litigant and counsel, in some circumstances mediators leave the litigants out of it completely and speak only to attorneys. In one motor vehicle case, caucuses consisted of the mediator speaking privately to the plaintiff's attorney and to the defense attorney and insurance representative, and eventually to all three together. The mediator, instead of dealing with the litigants directly, let their attorneys go back and explain to them what was going on. We did not observe the *reverse*, however; there were no instances of a mediator meeting with a litigant without counsel present.

Caucuses can be seen as a "divide and conquer" strategy. By meeting with each side separately, showing sympathy for that side, and looking at the situation through that side's eyes, the mediator can tailor his or her presentation of a settlement option so that each side concentrates on how it benefits them. In this way a good mediator will present a settlement that both sides can accept without "losing face," which is an especially important consideration in an emotionally charged case.

Mediators' Tactics

Mediators, who often use creative thinking to push past tough spots in a mediation, employ many sorts of tactics to encourage a settlement. The following paragraphs describe some examples that we observed.

Time. Acknowledgment of either unlimited or limited time can be useful in resolving a case. For example, a

mediator might indicate a willingness to meet all night as long as progress was being made. As fatigue sets in, parties and attorneys might become more open to settlement. On the other hand, one mediator announced that he had a plane to catch and was willing to mediate up to the minute he had to leave for the airport. This presence of a hard and fast deadline imparts a feeling of urgency to the proceedings.

Hunger. Some mediators don't want to break up negotiations for lunch. As the hours stretch on without food, hunger takes its toll on the litigants' resolve.

Pressure. Mediators can enlist the aid of a party or

Costanza v. Bell: Court-Ordered Mediation of A Typical (but Fictitious) Civil Case

Lawyers, litigants, and an insurance agent are assembled just before 10:00 A.M. at the law offices of Peter Beckett. In the large conference room reserved for today's mediation, Daniel Talbott, the mediator, introduces himself and sits at the end of a long table. The parties sit on either side, facing one another. Introductions are made, going around the table. Alicia Stewart is the plaintiff's attorney. Mary Costanza is the plaintiff, and her husband, Robert, has accompanied her. Peter Beckett explains that he is an attorney for the defendant's insurance company. The defendant, Jonathan Bell, is the older gentleman sitting next to Beckett. The last participant is Joe McPherson, the insurance adjuster handling this claim. The mediator then explains the rules and process of mediation, primarily to inform the litigants.

Each side now presents its case. First, Alicia Stewart describes the Costanzas before the accident as a happy family with two young sons. Mary Costanza was driving home from her job as an office manager at a furniture factory one March evening in 1992. Heading southeast on Highway 801, she neared the flashing yellow light at the intersection with Old Pine Road. She did not see the gray Oldsmobile that had begun to cross the highway until too late. At the last moment Costanza braked and pulled hard to the right. The impact swung both cars around, and the rear end of Costanza's Ford Escort smashed into a tree. Costanza was hospitalized for a few days with a concussion, cuts, and bruises. She complains of chronic back pain. The plaintiff is asking for $80,000 to cover medical expenses, lost wages, and damages for pain and suffering. Stewart asserts that there is clear liability on the part of the defendant; he entered the road without taking adequate precautions. Talbott, taking notes, asks the Costanzas some questions about their family and how the accident has changed their lives.

Peter Beckett now explains Jonathan Bell's side of the story. Bell is a seventy-year-old widower and retiree. He was running errands when he approached the intersection with Highway 801, noticed the blinking red light, and came to a complete stop. The sun shone brightly into his eyes, but Bell felt he had a good enough view to proceed. Partway into the intersection Bell saw Costanza's car speeding toward him from the right, but he was too far out to back up safely. Hoping to get through the intersection in time, he put his foot to the gas pedal. The defense contends that Mary Costanza was recklessly speeding before she noticed the other car. Visibility was poor due to the position of the sun, they argue, and she was contributorily negligent in the way she approached the intersection. Beckett allows Bell to apologize to the Costanzas. He appears upset over the pain he has caused them. The mediator asks Bell a few questions about his family and how he spends his time. He also asks Beckett if there is an offer on the table. Consulting his files, Beckett says there was an offer made some time ago by the insurance company for $15,000.

Talbott, the mediator, summarizes the case as he understands it, listing the points made by each side and noting ones in dispute. It is time for the parties to split up, and he asks Beckett to take his party to the other room reserved for the conference. Talbott asks many questions of the plaintiff and her attorney. What are Stewart's best- and worse-case scenarios if the lawsuit goes to trial? How probable does she think a winning judgment is? Even a winning judgment could give the couple much less money than they hope for. Talbott works hard to elicit weaknesses in the case from Stewart. Talbott has Stewart itemize their demand. It turns out that approximately $30,000 of the demand is actual losses—medical expenses and wages lost. The other $50,000 is for future lost earnings and damages for pain and suffering. Talbott says it is time to go talk to the other side, but that he wants this party to start thinking about a demand that is lower than their original and that could settle the case.

In caucus with the defendant's party, the mediator starts talking about money. Talbott wants to know if the insurance adjuster has full authority to settle this case. Joe McPherson assures him that he has come with authority to cover the

attorney in convincing another party or attorney to accept a settlement. For example, in a particularly complex mediation involving four or five attorneys, the mediator got an attorney who was agreeable to the proposed settlement to speak privately with the one hold-out attorney. Then when all parties met together again, people took turns making the stubborn attorney feel guilty for blocking a reasonable settlement plan until he finally gave in.

Anger. While mediators usually try to maintain a manner of reasonable calm, anger has its place as a mediation technique. In one mediation we observed, the two sides in a personal injury case came to final positions

defendant's policy limits. Talbott shows the list of actual expenses from the plaintiff and tells the defense attorney and insurance adjuster that they're going to have to think of what will be a reasonable settlement amount. As in the first caucus, he asks the defense attorney to honestly assess their chances at trial. Naturally the defense attorney is more positive about his case. He thinks the contributory negligence claim is very strong; they have the police report of the accident stating that Mary Costanza was traveling at least five miles per hour over the speed limit before she began to brake. (In North Carolina law, the plaintiff is not entitled to damages if she is "contributorily negligent"—in other words, partly to blame for the collision.)

Bell doesn't speak for most of the caucus, but finally he points out that beyond what was said in the group session he has little to add to the conference. The mediator understands and asks if he wants to go; McPherson is the one who can settle the case, not Jonathan Bell. Bell leaves. McPherson asks if he and Beckett can consider their offer in private. Obliging them, Talbott begins a routine of shuttling between parties and goes to the other room.

Alicia Stewart discusses the plaintiff's desire for settling, on the one hand, and not giving up too much, on the other. Stewart reveals an approximate bottom line, but $75,000 will be the first demand. Talbott returns to the defendant's party. He does not relate the plaintiff's demand yet. Beckett puts $30,000 on the table. Talbott thinks the defense offer was a good sign—the other side thinks the plaintiff will win some money at trial, and they are starting to deal.

The next half hour is spent conveying offers and counteroffers. When the parties are at $45,000 and $55,000, the plaintiff balks. She has already gone below their original bottom line; her husband feels they are giving away the bank. The mediator proceeds carefully. He asks what strain the case has put on their family, what it is worth to be done with the case and walk away with money in their pockets. Also, they shouldn't forget that additional money must be spent to go to trial. Stewart is handling the case on a contingency basis; she will get 30 percent of what they win. Costs for expert witness fees and other miscellaneous items will increase significantly if the case goes to trial. Talbott lets the plaintiff's party go off to confer alone.

It is almost 1:00 P.M. Returning to Beckett and McPherson, Talbott asks how they can get the case settled. McPherson reveals that they are very close to his absolute limit. Beckett admits carefully that they might be willing to split the $10,000 difference. Talbott likes the idea, but he wants them to sweeten the deal. The attorney and the insurance adjuster look at Talbott, suspecting what he is getting at. McPherson offers to pay the cost of mediation as well, and Talbott smiles and starts to head for the door. Beckett stops him; he doesn't want this to come as an offer from the defendants, rather as a suggestion of the mediator. Talbott agrees that is the best approach and returns to the plaintiff's group once more.

Mary and Robert do not look very happy as Talbott enters the room. Stewart says they will take $52,500 and nothing less. Talbott explains that he appreciates the effort Mary and Robert have made so far; it's obvious they have made some difficult decisions to get to this point. He has a proposition, though, that will settle the case—if they will go for it. He relates the offer discussed in the other room and asks the plaintiffs what they think. They look at each other and ask Talbott to leave. He waits. It is 1:25 when Alicia Stewart motions Talbott back into their conference room. They will settle if the other side will pay court costs too. She has reduced her contingency attorney's fee to 20 percent so that the plaintiffs can afford to do this.

This is the deciding moment. The plaintiff's party has pushed a little, and if the defense thinks Stewart has pushed too far, there will be an impasse. Returning to the defendant's party, Talbott presents the plaintiff's last demand. Beckett and McPherson appear impressed at the news that Stewart is willing to reduce her fee to settle the case. McPherson says that he believes they will be able to settle.

All participants assemble as at the beginning of the conference. Talbott announces that a settlement has been agreed upon. He has to draw up an agreement for the parties to sign that will be filed with the court. "I have to thank y'all for making this a successful mediation." Talbott says, "Let's do it again real soon." Everybody laughs. The mediation has wrapped up in just over three and a half hours.

that were only $500 apart in a $10,000 case. The attorneys had already pulled out all the stops to get the parties together; the plaintiff's attorney even waived his fees completely to get the plaintiff's demand down. At the point of impasse, the mediator took the attorneys into a room and yelled at them. He pointed out how ridiculous it was to let negotiations fail because of such a small difference, a sum that was no more than his mediation fee. In the end, even anger didn't work, because the stumbling block was not an attorney but an insurance representative who wouldn't budge.

Humor. Mediators often use humor (with discretion) to break up tension and put things into perspective. One mediator brought very large chocolate chip cookies to the conference, which gave everyone something lighthearted to discuss. The mediator jokingly used the cookies as rewards and bribes as parties met in caucuses.

Results of an MSC

The main goal of a mediated settlement conference is to come to a settlement and thereby end the court action, but conferences often yield other important results. For example, information may be exchanged more quickly and efficiently during a settlement conference than in conventional settlement negotiation.

Discovery is a process of obtaining information on the case from the other side, usually in the early stages of preparing a case. This process involves considerable amounts of lawyers' time and paperwork. Attorneys conduct discovery to prepare for a mediated conference, but they tend to do less than they would do to get ready for trial, thereby reducing their clients' fees and costs. The mediated conference tends to provide some of the same information as extensive discovery would have provided. And even if the conference ends in an impasse, information discussed in the conference may lead to a subsequent settlement.

In a mediated settlement conference, attorneys can evaluate the strength of their own case as well as the other side's. From the opening of the mediation, in which each attorney tells his or her client's side of the story, an attorney can assess opposing counsel's most important points and can perceive those facets of the case he or she will likely try to hide. An attorney might also get an idea of how the opposing litigant would appear on the witness stand should there be a trial.

In addition, a conference can build up goodwill between opposing attorneys, if all parties come prepared to negotiate in good faith and if attorneys make reasonable demands and offers. Even if the case is not ready to settle at conference time, having made progress in an atmosphere of reasonableness and honesty at the conference may help to settle the case in subsequent nonmediated negotiations.

Common Problems at MSCs

Insufficient Preparation by Attorneys

Sometimes attorneys do not, for whatever reason, complete adequate discovery in time for the settlement conference. Attorneys recognize that there is a certain balance to be struck in terms of depth and breadth of discovery. If there is to be fruitful negotiation at the MSC, there needs to be enough discovery to allow for reasonable assessment of risks, costs, and benefits. However, completing full discovery before the conference can run up litigants' expenses. The costs already incurred may incline parties to go to trial. After all, one of the main arguments for settlement used in MSCs is to avoid the extra costs associated with preparation for and completion of a trial. If these costs have already been incurred and much preparation work already done, this argument loses much of its persuasive force.

Attorneys who are not prepared for the MSC may cause delays in the conference. For example, we observed a conference in which a good portion of the time was consumed in doing on-the-spot discovery, namely contacting a health care provider and waiting for his staff to fax medical records to the law office where the mediation was occurring. Likewise, lack of discovery can preclude some settlement options. In one conference involving a contract dispute, the option of defendants paying damages was impossible because the plaintiffs had not completely assessed and documented damages. The only real option was to buy back the item under contract, and even that could not occur without some on-site inspection. The result of this conference was a continuance and another meeting a month later.

Not Including the Right People at an MSC

The rules require that all parties with full settlement authority be present at the conference. In practice, however, parties often come with partial authority and phone their headquarters for permission to exceed certain limits. This problem is particularly common with insurance representatives. In many cases (especially in motor vehicle negligence cases), the actual named de-

fendant is not present, and the insurance representative is the only person on the defense side who can agree to a settlement. Sometimes the insurance representative's lack of authority can bog down the negotiation process. Similarly, young people negotiating in a mediated conference might lack real settlement power if their parents have been taking charge of the case. In one observed case the litigants, two young men who had just graduated from college, attended the conference without their parents. It soon became clear that the parents needed to be there because unsuccessful negotiations had taken place between the parties' fathers before the conference. Neither litigant was comfortable settling without consulting his father, especially the defendant, whose father would have to contribute most of the money to settle the case.

Another problem concerning the group assembling for a mediated conference is that of extraneous people. Sometimes a litigant will bring along someone who is not named in the suit, or even someone not directly involved in the matter at hand. This extra person is often a relative or spouse. There are situations in which extra people are not detrimental and may help the litigant feel comfortable and confident in negotiations. In cases where the named litigant is a very young adult (who perhaps was a minor at the time of filing), parents often come along and act as major participants. Sometimes, though, extra persons interfere. For example, in one motor vehicle case the plaintiff's husband appeared to be pushing her to hold out for more money than she could reasonably have expected.

Conclusion

Watching a mediated settlement conference is a fascinating opportunity to look at negotiations rarely seen by anyone not involved in a lawsuit. Although our observations alone are insufficient for a rigorous evaluation of the MSC program, it is clear that there were instances where mediation succeeded in bringing the case to resolution, as well as instances where it brought parties closer to an eventual settlement although the mediation ended in an impasse.

These observations also indicate that mediated settlement conferences are adaptable to widely different situations. The mediator is largely responsible for this adaptability because mediators' techniques and styles reflect their personalities, even though all certified mediators receive similar training. A skillful mediator will size up the situation and the people involved and tailor the mediation to their needs. In our opinion the flexibility of the mediated settlement conference format is one of its chief strengths.

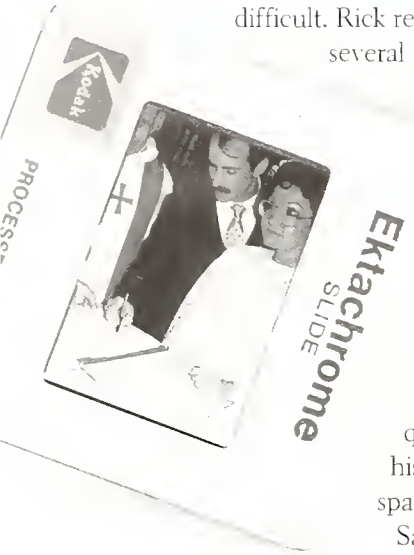
Notes

1. N.C. Gen. Stat. § 7A-38(a).

2. The eight districts were 6A (Halifax County), 12 (Cumberland County), 15B (Orange and Chatham counties), 13 (Bladen, Brunswick, and Columbus counties), 18 (Guilford County), 21 (Forsyth County), 17B (Surry and Stokes counties), and 30B (Haywood and Jackson counties). The program has since been expanded to include four additional judicial districts affecting the following counties: Mecklenburg (26), Buncombe (28), Wayne (8B), and Wake (10). ■

A Case Study in Child-Custody Mediation

Continued from page 2



difficult. Rick refused to take just any job, and after several months he still had not landed a "good" job. Sarah felt forced to leave the kids and find work as a licensed practical nurse. With the family crammed into Rick's parents' retirement home, a two-bedroom townhouse in North Raleigh, tempers frayed and the smallest infraction provoked icy stares and muffled recriminations. Rick frequently took out his frustrations with his job search on the kids, bullying and spanking them.

Sarah's resentment gnawed at her, and she soured not only on their living arrangement but on Rick and their marriage as well. Just short of a year after their move to Raleigh, she called an attorney. That same afternoon she leased a small furnished apartment not far from the hospital where she worked. Over the weekend, while Rick and his father were fishing and his mother was out, Sarah gathered up the kids, their clothes, and their toys, packed her own suitcase, and drove off. The note she left on the kitchen table was curt: "Rick, I'm moving out and taking the kids. I'll let you know where I am later." Over the next couple of days Rick did not hear from Sarah, although he left messages at the hospital. He did not push it because he thought she just needed some breathing room. When he was served with divorce papers, it was the last thing he expected.

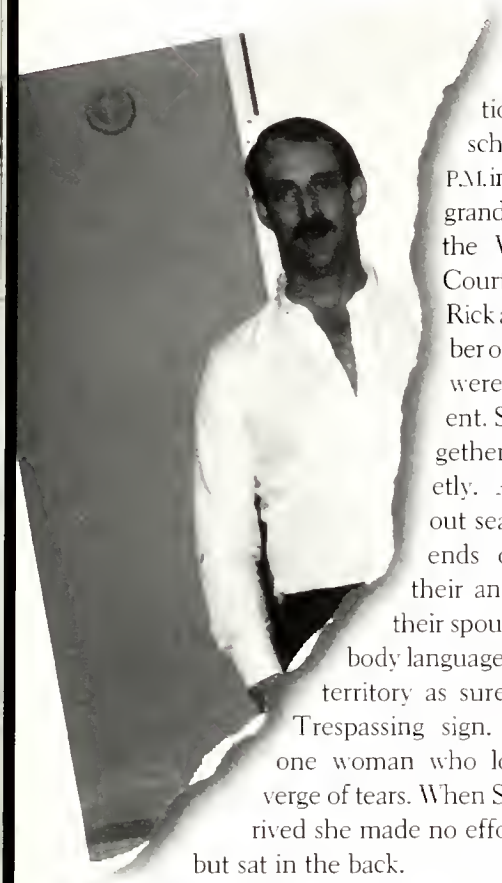
The Referral

When Sarah's attorney filed the complaint for divorce in Wake County, he was required to complete a short form with basic information about the case. The form inquired whether Sarah and Rick were the parents of any minor children and whether custody or visitation with those children would be an issue in the case. He had checked the boxes in the affirmative in each instance. Later, when Rick's lawyer filed a response to Sarah's petition, she also checked the same set of boxes. These checked boxes triggered an automatic referral of the case to the Tenth Judicial District's Custody and Visitation Mediation Program.[1]

Rick's and Sarah's lawyers had told them that the case would be referred to mediation and had encouraged them to cooperate with the mediator. Initially Rick was not interested in the process. His anger was palpable; how could Sarah just walk out the way she had with no word about the divorce? Rick told his attorney flatly that he was not interested in seeing anyone but the judge. Rick's attorney responded firmly that, whether he liked it or not, the referral was mandatory and he would have to attend.[2] Sarah, on the other hand, was more hopeful about the process, if only because her attorney had told her that there was no charge for the mediator's services and that, if successful, mediation would be a much less costly way to resolve their disputes than trial.

The Orientation

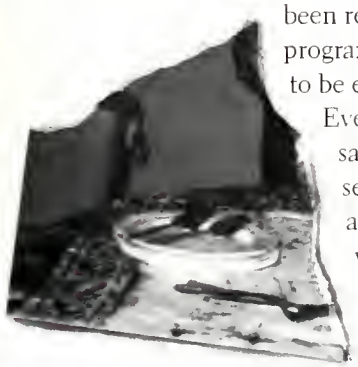
About forty-five days after Sarah's attorney filed the divorce complaint, Rick and Sarah each received a letter and accompanying Notice of Custody Mediation Orientation from the chief district court judge in the Tenth Judicial District, informing them that their case had been ordered to mediation and that they were scheduled to attend an orientation session prior to mediation. The letter indicated they should plan to be at the orientation session for two hours and that during that period the mediation process would be explained to them and they would be given an opportunity to learn about the effects of divorce on their children.[3]



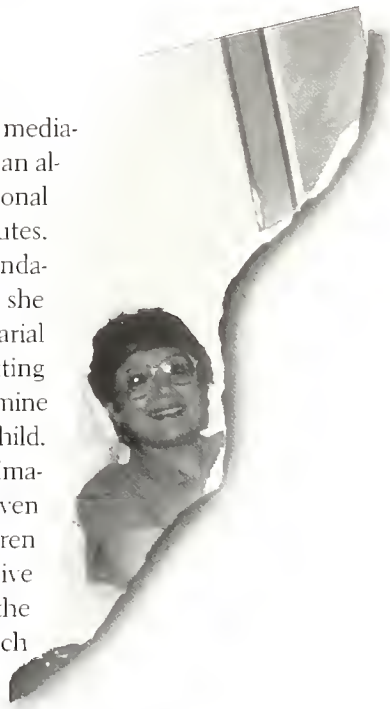
Sarah and Rick's orientation session was scheduled for 2:00 P.M. in the third-floor grand jury room of the Wake County Courthouse. When Rick arrived, a number of other couples were already present. Some stood together talking quietly. A few staked out seats at opposite ends of the room, their angry glances at their spouses and hostile body language marking their territory as surely as any No Trespassing sign. Rick noticed one woman who looked on the verge of tears. When Sarah finally arrived she made no effort to join him but sat in the back.

At 2:00 P.M. sharp, a woman who had been chatting quietly with the bailiff stationed at the door stepped to the front of the room and asked everyone to take a seat. She explained that she was one of the mediators assigned to the program and that she would be conducting the orientation session that day. She briefly ran through the agenda and explained that she would answer general questions about the process of divorce and its effects on children but that she could not respond to legal questions or inquiries about the behavior of specific children or adults.

The mediator began by telling them about the program. She explained that the Custody and Visitation Mediation Program was provided for by statute in North Carolina.[4] The Tenth District site to which they had all been referred was the newest program site and the eighth to be established in the state. Eventually, the mediator said, custody mediation services would be available to all parties involved in custody and visitation disputes in North Carolina.

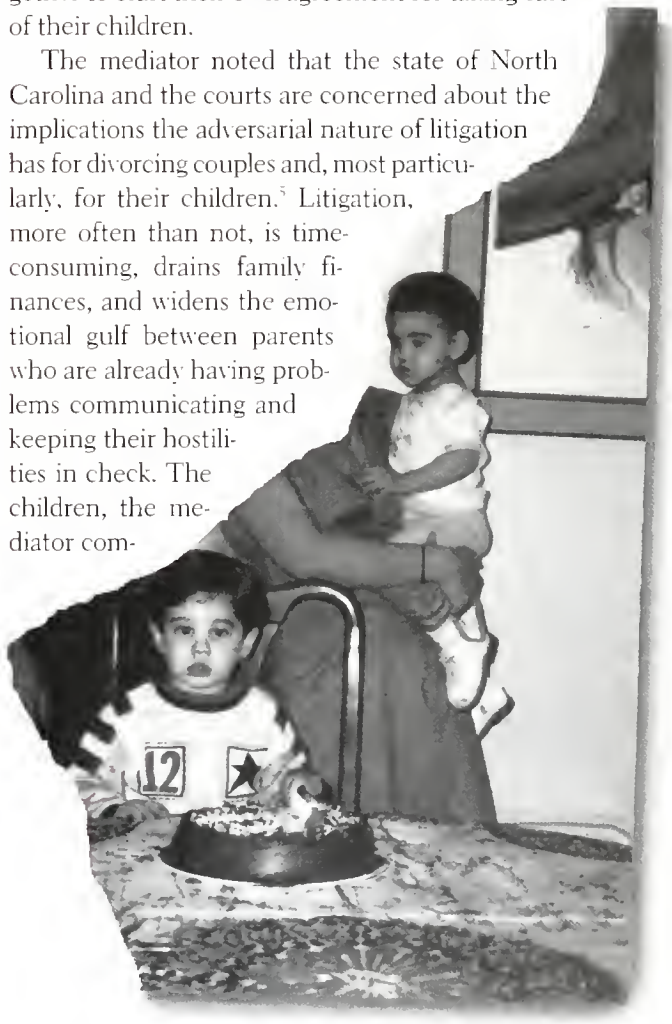


The Benefits of Mediation



The mediator explained that mediation was being offered to them as an alternative to litigation, the traditional method of resolving parents' disputes. Litigation and mediation are fundamentally different processes, she continued. Litigation is an adversarial approach to dispute resolution, pitting parents against each other to determine which wins legal control of the child. The litigation process is driven primarily by attorneys and judges even though the litigants and their children are the ones who must ultimately live with the outcome. Mediation, on the other hand, is a conciliatory approach to dispute resolution. During mediation, parents meet privately with a mediator who encourages them to work together to craft their own agreement for taking care of their children.

The mediator noted that the state of North Carolina and the courts are concerned about the implications the adversarial nature of litigation has for divorcing couples and, most particularly, for their children.[5] Litigation, more often than not, is time-consuming, drains family finances, and widens the emotional gulf between parents who are already having problems communicating and keeping their hostilities in check. The children, the mediator com-



mented, are batted about between the warring camps and frequently become the ultimate casualties.

While nothing can entirely eliminate the emotional pain and hostility that result when a family unravels, mediation can cushion the blow. Its emphasis on cooperative problem solving and good communication can help preserve whatever goodwill may be left between the parents. And, the mediator added, if parties are able to resolve some or all of their disputes in mediation, the win/win situation that results bodes well for their future interaction. They will have seen that they can stay focused on their children, cooperate, and work out their disputes on their own.

The Role of the Mediator

What exactly does a mediator do? A mediator, their speaker explained, is a trained, neutral third party who acts to facilitate the resolution of a dispute without prescribing what the resolution should be.[8] What that means in plain language, she said, is that the mediator is a kind of referee who will help them talk through and decide how they will take care of their children during and after their divorce. The mediator's job is to make sure their discussion stays on track. The mediator may suggest compromises when progress stalls or play devil's advocate when a position taken by a parent appears untenable. Most important, it is the mediator's responsibility to make certain that parents keep in mind how any compromise or agreement they consider will affect their children.

The mediator also noted that it was important for them to understand what a mediator is not. A mediator is not an attorney and cannot give legal advice. A mediator is not a therapist and cannot provide marriage counseling. Most importantly, a mediator is not a judge. Judges make decisions for people. Mediators do not make decisions for the couples they see and they do not tell them how to resolve their disputes. Rather, the mediator is there to help parents talk through their feelings about and plans for custody and visitation. Then, it is hoped, the parents will make their own decisions.

Participation in the Mediation Session

A woman inquired whether her attorney would be present at the mediation. The mediator responded that normally only the parents and the mediator participate in the session.[9] She reassured her, though, that it is not the intention of the program or the mediation process to deprive participants of legal representation. If an agreement is reached in mediation, she explained, the mediator puts it in writing and mails copies to the couple and to their attorneys.[9] The couple is cautioned not to sign the agreement until after it has been reviewed by and discussed with their attorneys. The mediator also noted that it is perfectly appropriate for a party to talk with his or her legal counsel between mediation sessions if a dispute cannot be worked out in a single meeting and an additional session must be scheduled. Often the information or reassurance an attorney provides between sessions can make a difference in whether the case settles.

A voice from the back of the room asked when the mediator would speak with his children. It was only fair, he felt, that his kids have a say in their living arrangements. The mediator explained that, because the mediation process was very much focused on children and their welfare, it was logical to assume that the mediator would meet with the children. However, unless the children are older teenagers, such a meeting would not be likely to occur.[10] The mediator explained that mediation operates on the principle that parents really know what is best for their children. However, during a stressful time like divorce, intense feelings of anger, guilt, or resentment can cloud judgment. The mediation process is designed to help parents get past their own feelings and refocus on their children and their needs. She continued to explain that one of the worst things parents can do to their children is to put them in a position where they feel as if they are being asked to choose one parent over the other.[11] Without doubt, she noted, decisions about custody and visitation are central to the lives of children, but they are still adult decisions.

Rick raised his hand and asked whether others who might be involved in the case, like close friends or grandparents, could attend the session. The mediator asked whether the grandparents were parties to the litigation. Rick responded that they were not, and the mediator replied that unless there are unusual circumstances only the mediator and the parents participate in the session. Rick made a note on the scratch pad he carried to be sure to tell his parents they could not attend.

The mediator indicated that there were a few more important things she wanted to tell them about the mediation process and then they would watch a twenty-minute film that would reinforce some of what she had already said.

Confidentiality and Other Issues

The mediator said she wanted to reassure them that the mediation process is confidential. One of the benefits of mediation is that sessions are held in a room behind

closed doors. Unlike a court hearing or trial, mediation sessions are not public and participants do not have to hang out their dirty linen or emotional pain for all the world to see. The mediator noted further that parties cannot be forced to testify in court about what is said at the session. And, whether an agreement is reached or not, the mediator is ethically prohibited from discussing the particulars of a case with the judge or from testifying about it in court.[12]

Even though these confidentiality protections exist, the mediator noted that sometimes one parent may want to say something but be reluctant to reveal it in the presence of the other parent. If that is the case during their session, it is acceptable to ask the mediator for a brief meeting away from the other parent (called a caucus). Usually, if such a request is made, the mediator will meet privately with both parents but will not reveal to either parent any confidential information shared with the mediator by the other parent. After these brief meetings, the parents will return to the same room and the session will continue.

The mediator also wanted to make sure that everyone was clear that the issues to be focused on in mediation were custody and visitation. By law, financial matters such as child support and alimony and issues of property division could not be considered or discussed in mediation.[13]

The mediator informed the parties that the average case can usually be mediated in one or two two-hour sessions. In no event can the mediation process extend beyond three sessions without the agreement of the parties and the chief district court judge.[14]

If Agreement Is Not Reached

Lastly the mediator wanted everyone to know that although she and the court hoped that those present would try hard to resolve their disputes in mediation, it was all right not to reach an agreement. The court, she said, recognized that not every dispute can be mediated successfully, and some must be heard and decided by a judge.

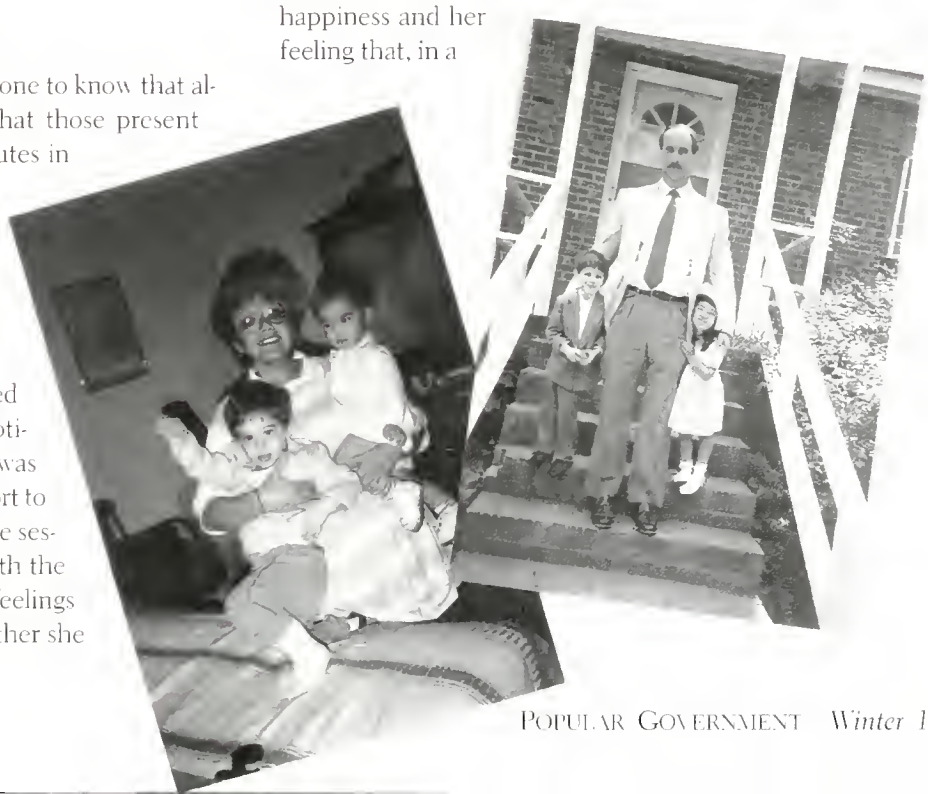
When a case cannot be resolved in mediation, the mediator simply notifies the court that no agreement was reached. The mediator does not report to the judge what the parents said at the session nor does the mediator share with the judge any personal observations or feelings about the case or the parents.[15] Further she reassured them that judges are not prejudiced against couples unable to reach an agreement in mediation. After all, it was not in the interest of the court or the parents and their children for anyone to agree to an arrangement that he or she believed was unworkable or unfair.

The mediator noted also that just because an agreement is not reached in mediation, it does not necessarily follow that a trial results. Sometimes people just need time to digest what is said at mediation and to mull over options for agreement. Often, with such reflection, participants are able to move beyond impasse and, prior to their trial date, work out matters through their attorneys.

The Effects of Divorce on Children

After the twenty-minute film, the mediator answered more questions and suggested some "homework" for the parents. She asked that over the next couple of weeks they think about what they hoped to accomplish in mediation. She suggested that they also consider creative ways to resolve their custody and visitation disputes and be prepared to bring some suggestions for compromise to the mediation table.

Next, the mediator announced, they would look at how divorce affects children. The shift in focus jarred Sarah, and she realized that she had better pay attention. Sarah had lately begun to feel a little guilty that she had not factored her children and their needs more into her decision to divorce. There were times when she had attempted to rationalize her decision to leave on the basis of Rick's treatment of the kids. In her heart, though, she knew her real motivation for bailing out of the marriage was her own unhappiness and her feeling that, in a



A Brief History of Custody Mediation in North Carolina

In 1983 the North Carolina General Assembly established and provided funding for a pilot child custody mediation project in District 26 (Mecklenburg County). The Administrative Office of the Courts (AOC) was charged with administering the effort and contracted with United Family Services, a United Way agency, to provide mediation services and on-site administration for the program. Between the project's inception in 1984 and April 1986, nearly 300 cases were mediated with agreements reached in 53 percent of cases. Four years after the establishment of the District 26 site, the General Assembly provided additional funding to expand the pilot project to another site, District 27A (Gaston County).

Because the District 26 project had been established and funded as a pilot site, the North Carolina Bar Association decided in 1985 to evaluate the project's impact on parties participating in mediation and on the legal community. Specifically the bar looked at whether mediated agreements were in the best interest of children, whether parents were satisfied with the process, how mediation affected the practice of law, how well parties complied with mediated agreements, and whether mediation was time efficient and cost effective. To answer these questions, data were collected through attorney surveys, participant surveys, interviews with judges and mediators, and site visits. The bar's report, which was released in January 1987, expressed its strong support for the project and recommended that it not only continue in District 26 but that it be expanded to other judicial districts throughout the state.

The General Assembly was also interested in the project's success. It charged the director of the AOC with reporting on the project to the 1989 session of the General Assembly and with recommending whether the project should be continued beyond the pilot phase and expanded. Based on the AOC's Custody Mediation Advisory Committee report, local court experiences in districts 26 and 27A, and the bar's study and report, the director recommended that mediation of custody and visitation disputes in domestic cases be provided statewide. Given the director's recommendation, the General Assembly enacted legislation in 1989 authorizing the establishment of the Custody and Visitation Program throughout North Carolina [Section 7A-494 of the North Carolina General Statues (G.S.)]. Statewide expansion began in 1990.

Currently eight program sites operate across North Carolina: District 4 (Onslow, Duplin, Sampson, and Jones counties), District 10 (Wake County), District 12 (Cumberland County), District 19A (Cabarrus County), District 19C (Rowan County), District 26 (Mecklenburg County), District 27A (Gaston County), and District 28 (Buncombe County). The AOC has recommended to the General Assembly that statewide expansion be completed by the year 2000. Of these eight sites, five are staffed by mediators employed by the courts. Three sites operate with staff under contract to the AOC to provide mediation services. Funding to operate the program comes from the Judicial Department's budget, and there is no charge to parties beyond the case filing fee to participate in mediation. Local districts administer the program with support from the AOC, which has developed rules governing the program ["Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes under the North Carolina Custody and Visitation Mediation Program," *Custody and Visitation Mediation Program Procedures Manual*].

Mediators for the program are required to have the following qualifications: (1) at least a master's degree in psychology, social work, family counseling, or comparable human relations discipline; (2) at least forty hours of training in mediation techniques by a qualified instructor of mediation; (3) professional training in child development, family dynamics, or comparable areas; and (4) others as specified by the AOC [G.S. 7A-494(c)]. Mediators currently providing services at program sites have varied backgrounds. Some are trained as social workers, others have advanced degrees in education and have worked as school counselors, one is a psychologist, others have training in pastoral counseling.

During fiscal year 1993–94 there were 1,958 cases referred to custody mediation. Of those cases 1,326 were mediated, and a full or partial agreement was reached in 613 (46 percent). (The District 10 program was not yet established in Wake County at this time, and no District 10 statistics are included in these totals.)

In 1994 the director of the AOC was again charged with reporting to the General Assembly on the effectiveness of the Custody and Visitation Mediation Program. In gathering information to respond to this charge, the AOC sought the input of the newly established North Carolina Supreme Court Dispute Resolution Committee chaired by Justice Henry E. Frye. In evaluating the program, the committee surveyed judges and reviewed correspondence from lawyers, litigants, and mental health professionals. In its report, submitted to Chief Justice James G. Exum, Jr., of the North Carolina Supreme Court and James C. Drennan, director of the Administrative Office of the Courts, the committee concluded that by all accounts the program was indeed effective and that statewide expansion should continue.

very real sense, she had somehow lost her emotional connection to Rick. She had thought that if she could make a new start and feel good about herself and her life again, the kids would be happy, too. After all, she had always heard that kids were resilient. How long could it possibly take for a five-year-old and a two-and-a-half-year-old to bounce back?

Sarah had been unprepared for the children's response to separation from their father. Phil missed his father desperately and asked over and over why Rick was no longer living with them. Sarah took him fishing and played catch with him, but it was not the same for him and he let her know it. Dawn could not verbalize her concerns to the degree that her big brother could, but it was obvious to Sarah that she, too, realized something was terribly wrong. The separation from Rick and his parents, their second move since leaving Florida, the time Phil and Dawn now spent in day care while Sarah worked, her shortness with them when anxiety about the divorce and her finances got the better of her—it was a lot to throw at children too young to understand what was really happening to their family.

The mediator began her discussion by reminding them that children are individuals. No two children will respond the same way to the breakup of their family. Responses, she continued, have a great deal to do with the age and gender of the child and with his or her emotional makeup.[16] Responses also have a lot to do with how the parents handle their divorce and how they deal with their children during and after their separation and the reconfiguration of their households. It is largely a myth, she noted, that children bounce back quickly and survive divorce unscathed. Some children battle the effects of divorce for years, perhaps even for a lifetime.[17]

The mediator began to speak in more detail about how divorce affects children of different ages. In the mediator's characterization of typical responses of two-and-a-half to five-year-olds, Sarah instantly recognized Dawn's behavior. It had not occurred to Sarah that Rick's absence might cause Dawn to fear that her mother would likewise disappear, but as the mediator spoke about the fear of abandonment that children in that age range are likely to experience, Sarah could see that Dawn had plainly made such a connection.[18] Her near-constant need to be held when Sarah was with her and her fierce tears and pleas for Momma to stay each time Sarah left her with her baby-sitter seemed much more understandable now within the context of what the mediator had said. Dawn and Phil, Sarah also noted, were both exhibiting what the mediator had termed "a loss of mastery of developmental tasks," another response to divorce the mediator said was typical for children in their age range.[19] Sarah thought about how close she had been to having her daughter toilet trained and the frustration she now felt in seeing Dawn back in diapers. Likewise with Phil, she thought about how he had been on the verge of learning to ride the bike his Grandpa had bought him, only to claim now that he was afraid of it. With an increased understanding of how her children were experiencing the divorce, Sarah resolved to be more patient with them and more flexible in arranging for Rick to spend time with them until an actual agreement could be crafted in mediation.

The mediator went on to say that while most children are able to cope with the stress associated with the breakup of their families, the reactions of a few are extreme and might warrant the intervention of a trained professional. She briefly described signs of deep depression, indications of drug or alcohol use in adolescents, and warnings that a teenager might be contemplating suicide. Lastly the mediator talked about how parents' behavior can serve to exacerbate the pain of divorce for their children. In particular she suggested some destructive routines that parents should avoid: (1) Do not use children to send messages between you. Children receive the anger of both parents through the messages and often are blamed if they fail to deliver a message or deliver a garbled one. (2) Do not criticize one another in front of the children. This can lead to a loss of self-esteem in children because they identify with both their parents. (3) Do not expect children to report on the activities of the other parent. It is not fair to use a child as a spy. (4) Do not deny that you and the other parent had or still have conflicts. This confuses a child about why the divorce is occurring.[20]

Psychological Tasks for Divorcing Parents

In the few minutes that were left before the orientation concluded, the mediator talked about how divorce can affect adults and recounted the psychological tasks that lay before them: ending their marriage, mourning the death of their marriage and the end of the hopes and dreams associated with it, reclaiming their individual identities apart from their spouse, resolving or containing feelings of anger or disappointment, restoring their sense of competence and self-esteem, and rebuilding their lives to allow for healthy relationships with their children and for new adult relationships.[21]

The mediator answered a few questions and told them that the session was over except for scheduling a date for each couple's first mediation session. She directed them to the two tables at the back of the room.

A number of pamphlets and booklets on mediation and divorce were displayed on one. The mediator's appointment calendar lay on the other. The mediator invited those attending the session to look through the reading materials while she completed scheduling for the group. After a few minutes Rick and Sarah stood before the mediator. They agreed to meet for their first session on a Wednesday morning at 10:00, exactly two weeks from the date of their orientation session.

The Mediation Sessions

The First Session

Rick and Sarah both arrived a few minutes before their session was scheduled to begin. Sarah's stomach was in knots. Rick also felt very ill at ease, but he was anxious to tell Sarah about the job he had landed. It was not his dream job, but the pay was better than other opportunities he had been offered and the benefits were good. Rick was still very angry with Sarah for leaving, but his sense of loss ran even deeper than his anger. He hoped that when Sarah heard about the job she would be willing to return with the kids. Now that he was working, they could look for a house of their own and begin to plan for their future.

Confronted with each other's presence in the small waiting room, they were able to muster only weak smiles and tense "hellos." After checking in with the receptionist, both were given a brief in-take form to complete. Rick took a seat. Sarah stood at the reception desk and filled out the blanks on her form. After returning the form to the receptionist, Sarah sat down near Rick and asked about the fishing trip he had taken the kids on over the weekend. Rick was relieved that she was making an effort to be sociable and talked about the trip. Just as Rick was finishing, a woman walked into the waiting area, introduced herself, and shook hands with both Rick and Sarah. She explained that she would be their mediator and asked that they follow her to her office.

They were led down a corridor to the suite of rooms used for mediation. At one end of their mediator's office sat her desk and at the other end, a table with three chairs. As had been promised at the orientation, the mediation room was lacking in the formality of a courtroom. Brightly colored, whimsical artwork hung on the walls. There were no flags, official-looking portraits, or people in uniform. The mediator asked Sarah and Rick to each take a chair. She opened the session by briefly touching on a few of the points that were made at the orientation. She reminded them that she was there to act as a neutral facilitator and that she would try to help them come to an agreement about how they would take care of their children during and after their divorce. She stressed that they should try to stay focused on what was best for their children. She asked whether they had any questions about the mediation process. Sarah asked the mediator about her qualifications. The mediator responded that she held a master's degree in social work and had been specially trained in mediation theory and techniques. She stressed that she had significant professional training and experience in child development and family dynamics.[22]

Rick said that although he understood from the orientation session that the mediator was not a marriage counselor, he wanted to know whether they could talk about reconciliation. He believed that his unemployment had been the source of much of Sarah's frustration. Now he had a job and wanted Sarah to know about it because it might make a difference in how she felt. The mediator asked whether Sarah was interested in reconciling with Rick.[23] Sarah was not interested. She explained that she was very happy that Rick had finally found work, but his employment problems were only one factor in her decision to divorce. Rick pressed Sarah for a more concrete explanation for her decision. Sarah responded that it was a matter of how she felt; she had crossed a bridge and could not go back. She added that the marriage weighed her down and she wanted to get on with her life. At this point the mediator refocused Rick and Sarah on the issues of custody and visitation.

The mediator inquired where Phil and Dawn were living now and whether there had been any discussions about where they would live after the divorce. Sarah responded that they were with her and she expected that arrangement to continue. Her position, she indicated, was not meant to imply that she felt Rick was inadequate as a parent. She considered him essentially to be a good father, but she had always been the primary caretaker of the kids and had worked at home full time, prior to the move from Florida. She believed that it was in the children's interest for her to continue to be the one primarily responsible for meeting their needs. Rick sharply rebuked Sarah's words. Perhaps, he observed, Sarah had a problem with her memory. Did she not recall how much he had done for the kids while they had lived at his parents' home and she had run off to work at the hospital? Sarah's response was equally barbed. If he had not been so choosy about taking a job, she would not have had to go to work and leave the kids. If she came back to him, Rick argued, she would not have to be away from the kids. At this point, the mediator stepped in and observed that they had already explored reconciliation and now needed to move on.

In a calm voice the mediator suggested that perhaps if they talked about the children's needs and looked at Rick's and Sarah's job situations, lifestyles, and goals, they might make more progress in their discussions. The mediator began by asking Sarah what kind of hours she worked at the hospital. Sarah replied that she worked the day shift but one week each month she was required to work some nights. The mediator asked a few more questions about Sarah's schedule and day-care arrangements and turned to Rick. She asked Rick about his new job and the demands it placed on him. Rick told her that he had accepted a position as assistant manager of an Italian restaurant that had recently opened in Cary. When the mediator asked Rick about his hours, his response was initially evasive—he had not been at the job very long and was not sure. The mediator probed a bit deeper and after some discussion, it emerged that Rick's hours were not likely to be regular, either as to the days of the week or the hours to be worked.

Reflecting on the irregularity of Rick's hours, the mediator explained that it was very important that the children have consistency in their lives. Routines needed to be established for Phil and Dawn, ones that provided for regular times for meals, naps, and bedtimes, and for consistent child-care arrangements. More discussion followed the mediator's words, and after exploring their work situations and schedules for nearly an hour, Rick conceded that Sarah's schedule would probably ensure more consistency for the kids. Nevertheless, before he agreed to any custody arrangement, he first wanted to talk about how much time Sarah would be comfortable with him having with the kids. Sarah responded that she did not want to become involved in a big legal battle with Rick. Neither of them had the money and she did not see how the fighting could do anything but harm the kids. Moreover she strongly believed that Phil and Dawn needed to spend time with their father. She was willing to be as cooperative as possible as long as his requests were reasonable.

The mediator indicated that even though some flexibility would clearly be necessary given both their schedules, it was important that they try to be as specific as possible in fleshing out the terms of their agreement for visitation. The clearer the terms of their agreement, the less the likelihood of confusion or misunderstandings occurring over time.

The mediator also noted that she was pleased that Rick and Sarah recognized the importance of both having frequent contact with the children. From a child development standpoint, she observed that it was important for young children to have frequent contact with both parents, even if only for short periods of time. As the mediator explained it, children Phil and Dawn's age do not understand the concept of time. When Daddy or Mommy go away, a child can fear that they will not return. A limited understanding of time and its passage does not permit the child to take comfort in a parent's promise to return next week or next month. As such, frequent visits with a parent can allay fears and contribute to a sense of security and well-being in younger children.

Despite their desire to be clear about their arrangement and to bring as much consistency as possible to their children's lives, it became apparent very early in their discussions that Rick's irregular schedule would make their work in mediation difficult. It took nearly an hour of give and take before they arrived at a tentative arrangement whereby Rick would have the kids for one twenty-four-hour period each week upon at least one day's notice to Sarah. In addition, if his schedule would permit it, he would pick the kids up for lunch, dinner, or ice cream once or twice a week and return them in time for bed. If he found he could take two consecutive days or even a weekend off from his new job, Sarah agreed that she would cooperate with him in seeing that he could spend that time with the kids. Rick and Sarah also agreed, at least conceptually, to share time with the children equally on holidays and birthdays. They crafted a schedule that provided for rotation of the holidays, but again, given both Sarah and Rick's work schedules, they recognized that it would not be a static arrangement. They also agreed that Rick would spend two, two-week periods with the children each summer. He would try to take as much vacation time as he could, and his parents would help him with child care for the remainder of the time he had with the children during the summer.

The mediator cautioned them that for a flexible agreement such as this one to work, Rick and Sarah would have to work hard at communicating with one another. The agreement would never work if they waited until the last minute to tell each other of their plans for the coming week. She also cautioned them that they should do everything in their power to follow through with visitation plans once they were made. On Rick's part, he should not schedule time to visit with the kids and then not show up. Children ought not be left in tears waiting by the window for a parent who never comes. And, the mediator added, there is nothing that will anger the other parent faster than watching such a scene unfold week after week. If a work emergency arises, he must remember to call. On Sarah's part, she should have the kids dressed and ready to go when Rick arrives. Parents who already feel their time with their children is limited will be easily angered by a parent who chronically forgets to note visitation times

and dates on the calendar and is off somewhere else with the kids when the appointed hour arrives.

At this point in the discussions, Rick broached the subject of his parents. His mom and dad desperately wanted to see more of the kids. Would Sarah be willing to permit them some visitation time independent of his own? The mediator looked at her watch and noted that Rick and Sarah's two-hour session was rapidly drawing to a close. Although Rick and Sarah had essentially agreed on custody and a time-sharing arrangement for purposes of visitation, there were still important matters that she needed to discuss with them. She suggested that they meet again to look at some other issues that might impact on the success of their agreement, including Rick's parents' expectations. She asked whether they would be willing to come in for a second session. Rick and Sarah agreed to the additional meeting and an appointment was scheduled for three weeks later.

As the mediator walked them out to the waiting room, she suggested that the three-week period between now and their second appointment could serve as a trial run. If things went well, she would put their agreement in writing after the next session. If not, they could make whatever changes they needed during the second session. She encouraged Rick and Sarah to meet with their attorneys and talk with them about the agreement before their next session. The mediator also suggested that Rick might want to share the agreement with his boss. Perhaps if his boss understood Rick's situation, he might be willing to be more cooperative in scheduling his time off. Rick said he would think about it but he was reluctant to share family problems with a new employer.

As they arrived at the door to the waiting room the mediator congratulated Rick and Sarah on the work they had done in their session and suggested that their children would be the ultimate beneficiaries of their cooperation and willingness to resolve their disputes themselves.

The Second Session

Three weeks later when Rick and Sarah met with the mediator for the second time, she asked them how the trial run had gone. Both Rick and Sarah were pleased. Both had made an effort to be courteous to the other, and Rick had promptly called Sarah each Monday when he found out what his schedule would be for the week. So far, each had been able to keep the commitments they had made to the children. Both said they had discussed the agreement with their attorneys and that, while both lawyers would have preferred a more concrete arrangement, they recognized that Rick's work schedule precluded the crafting of anything more definite.

The mediator told Rick and Sarah that they now needed to discuss how they would share information and share in making the major decisions affecting their children's lives, in the coming weeks and in the coming years. For example, how would they decide where Dawn would attend preschool? Who would decide whether Phil needs braces? The mediator noted that in addition to developing a plan for sharing information and making decisions, her notes from the first session also reflected that Rick wanted to talk about his parents' request to see their grandchildren more often. She asked whether there were any other issues that they should place on the agenda. Neither Rick nor Sarah said anything, so the mediator suggested that they begin by discussing how they might go about sharing decision-making responsibilities in the future.

When it came to making decisions about their children, both Rick and Sarah expressed their desire to participate fully. Neither was willing to take a backseat to the other. Rick observed how painful it had been for him when Sarah had placed Dawn with a family day-care provider without allowing him to take part in that decision. His baby was spending nearly nine hours a day in a home he had never entered in the care of a woman he had never met. Rick asked Sarah how she would have felt had the shoe been on the other foot.

The mediator affirmed that it was important that both parents know their children's whereabouts and be comfortable with their caretakers. She asked Rick whether he had by now met Dawn's baby-sitter and visited Phil's preschool? Rick said that he had and that, admittedly, both situations were satisfactory. Sarah had made responsible choices. The mediator suggested that perhaps now they should start looking toward the future. From this point forward, what steps could they take to ensure that both parents' opinions were factored into major decisions? What steps could they take to make sure their decisions were sound?

After considerable discussion, Sarah and Rick agreed that neither would, outside emergency situations, make any major decisions affecting the kids without first conferring with the other. Nonroutine decisions relating to the children's health care, dental care, child care, education, and religious instruction would be made jointly following a sharing of information and a nonjudgmental exchange of opinions. If they could not agree, they resolved to seek appropriate professional input from the children's teachers, day-care providers, school counselors, and pediatrician. If they still were not successful, they agreed to return to mediation.[24]

For the foreseeable future, Sarah promised that when Phil started kindergarten, she would make certain that Rick received copies of all progress reports and notices of school functions. Rick promised, in turn, that he would make sure that Sarah had a practice and game schedule for the soccer team they had agreed Phil would play on later that year.

Next the mediator asked Rick to tell her and Sarah about his parents' expectations for spending time with the children. Rick began by explaining how hurt his parents had been by Sarah's departure and how much they missed their grandchildren. He talked about how they wanted to pick the kids up and have them for one evening each week. Perhaps the kids could even spend the night with them. Sarah crossed her arms across her chest and said flatly that that would not be possible. Rick was guaranteed one twenty-four-hour period each week, and he had the option of having them two more evenings per week if his work schedule permitted. If his parents took them another evening, Sarah lamented, it would be too much back and forth. Besides, she added, if the idea is to have consistency for kids and a solid home base, how could such an arrangement be in their best interest? Rick shot back that he felt that Sarah was trying to punish his parents. The truth, he believed, was that she was angry that her own parents lived out of state, far from her and the children. She had never wanted to move to North Carolina in the first place, and if her parents could not be near the kids, then she would make sure that Phil and Dawn were not available to his parents either.

The mediator stood up and walked over to her desk. Rick and Sarah stopped arguing and followed her with their eyes. In a soft voice the mediator said that maybe she was misremembering, but she thought Sarah had mentioned at their first session that she sometimes had trouble finding someone to watch the kids that one week per month when she had to work evenings or nights. Had she considered whether Rick's parents could help out during that period? Perhaps between Rick and his parents, those weeks could be covered and Sarah could be saved child-care expenses and the headaches involved in arranging for that care. And Rick's parents should be able to provide at least as much consistency for the kids as would different baby-sitters.

The mediator walked back to the table. How would Sarah feel about that? Sarah hesitated for a moment and then said that she would be willing to consider such a plan, if Rick could get his mother to stop belittling her in front of the kids. Rick responded that he was not aware that his mother was saying negative things about Sarah. Sarah quickly offered some concrete examples to bolster her charge. Rick said that if his mother had indeed said such things to the kids, that he was sorry. He reminded Sarah again of how painful this whole experience had been for his parents and pointed out to her that, until attending the orientation session, he had not understood that it was the children who really suffered when the other parent was criticized in their presence. He promised to speak with his parents and share some of the literature he had picked up at the orientation with them. For her part, Sarah admitted she could use help with her child care during those weeks that she worked evenings or nights. But that help could not come at the expense of the kids' self-esteem or her own anger at being unfairly scapegoated. If her in-laws were willing to keep their feelings about her to themselves, she was willing to give them that time with Phil and Dawn. But the arrangement would be an informal one only; she would not agree in writing to any sharing of time with the kids beyond that to which she had already agreed. Rick was willing to accept that.

The mediator asked whether Sarah and Rick had any other issues to discuss that afternoon. They did not, and the mediator went on to tell them what would occur next. The mediator explained that she would put their agreement in writing and mail copies to them and to their attorneys. She cautioned them not to sign the agreement until they had discussed it with their attorneys. The agreement would, the mediator noted, be written in plain language and not legalese, but still, plain language could have important legal consequences and it was essential that they obtain their attorneys' advice before signing.

If after reviewing the agreement, Rick and Sarah were comfortable that it represented what they had agreed to in mediation, and their attorneys had no concerns, the

mediator asked that they return to her office for one last, brief visit during which they would both sign the document. Once she had received the signed agreement, she would, in turn, forward it to the court where it would be incorporated into a court order and made enforceable by the court.[25] What that means, the mediator said, is that the court can order you to comply with the terms of the agreement. The mediator said that she would get the agreement typed and mailed out as soon as possible. They would be asked to return to sign the agreement approximately ten days after it arrived in the mail.[26]

Looking toward the future, the mediator cautioned them not to think of their children, their relationship as coparents, or the agreement itself as static. The passage of time is bound to change things, she noted, and as provisions of their agreement became outdated or as disagreements or misunderstandings arose they might want to return to mediation.[27] In their specific instance, she noted, Phil would be starting school in another year. With earlier bedtimes, homework, and after-school activities, the midweek visitation they had agreed to might become difficult and they would need to make adjustments. She hoped that by that time Rick would have become the restaurant manager and could set his own hours. The important thing, she added, is to come back to mediation before the situation gets out of control.

As she had done at the last session, the mediator complimented Rick and Sarah. She told them they had acted responsibly and crafted an agreement that set a healthy precedent for their future interaction as parents. If the two of them could get along and learn to raise their children cooperatively, it would be one of the most important contributions they would ever make toward ensuring the well-being of their children. They had gotten off to a good start; she hoped they would go forward from there.

At that point the mediator stood up to signal that the session was over. Rick and Sarah followed suit. As he stood, Rick reached back and pulled his wallet from his pocket and asked whether the mediator would like to see some pictures of the kids she had heard so much about during the last two sessions. The mediator complimented the photos of the two handsome children, and as they left her office, she listened to Rick and Sarah describe their kids as exceptionally bright, talented, and capable, destined to be future presidents of the United States.

Notes

1. Local program rules differ from site to site. The referral process described here is established by local rule in District 10. In District 10 cases are targeted for mediation and referred early in the divorce process. As a prelude to mediation, an orientation session is usually scheduled for the parties approximately forty-five days after their divorce complaint is filed. This period prior to the orientation affords parties and their attorneys an opportunity to settle disputes with no intervention by the court. In other districts, cases are not referred to mediation as early in the litigation process. Referral to a program is not limited to divorcing couples. Nonmarried individuals with a dispute over the custody of, or visitation with, their minor children are also eligible for referral, as are parents who experience custody or visitation problems postdivorce.

2. *See* Section 50-13.1(b) of the North Carolina General Statutes (G.S.), which provides for mandatory referral of contested custody and visitation cases to mediation where a mediation program has been established pursuant to G.S. 7A-494. *See also* G.S. 50-13.1(c), which provides for waiver of the mandatory referral for good cause shown, on motion of either party or on the court's own motion. Good cause is described as including but not being limited to the following: a showing of undue hardship to a party; an agreement for voluntary mediation subject to court approval; allegations of abuse or neglect of a minor child; allegations of alcoholism, drug abuse, or spouse abuse; or allegations of severe psychological, psychiatric, or emotional problems. A showing that either party resides more than fifty miles from the court is also considered good cause.

3. Orientation sessions differ from program site to program site. They typically run between one and two hours in length and generally provide an explanation of mediation and information on the effects of divorce on children. Other topics such as the immediate and long-term effects of divorce on the spouses themselves may also be covered. District 27A does not provide an orientation session, but some of the materials typically covered in orientation sessions are presented during the actual mediation sessions. Rick and Sarah's orientation session as described here is meant to be illustrative only and is not an exact representation of what occurs in a District 10 session.

4. *See* G.S. 7A-494.

5. *See* G.S. 50-13.1, which sets forth the purposes the mediation program established by G.S. 7A-494 was designed to serve. *See also* Rule 1 of the "Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes under the North Carolina Custody and Visitation Mediation Program," *Custody and Visitation Mediation Program Procedures Manual* (Administrative Office of the Courts, 1994), 3–8 (hereinafter "Uniform Rules Regulating Mediation").

6. *See* Rule 3.01 of "Uniform Rules Regulating Mediation."

7. *See* rules 11 and 12 of "Uniform Rules Regulating Mediation."

8. *See* Rule 10 of "Uniform Rules Regulating Mediation," which provides that the mediator is to be in control of the session and may invite counsel to participate. The comment to Rule 10 states: "Experience in the pilot mediation districts has shown that counsel are not needed in the mediation sessions and seldom choose to participate."

9. *See* Rule 12.03 of "Uniform Rules Regulating Mediation."

10. Rule 12.05 of "Uniform Rules Regulating Mediation" authorizes the mediator to interview children or other appropriate parties to determine and assess the needs and interests of the child. However, unless children are older or there is

some compelling reason to do so, mediators do not normally meet with the children of divorcing couples.

11. *See A Booklet for Separating or Divorced Parents*, a handout for mediation participants (Asheville, N.C.: The Mediation Center, n.d.), 7 (hereinafter *Booklet for Separating or Divorced Parents*). The center is under contract with the Administrative Office of the Courts to provide custody and visitation mediation services in District 28.

12. *See* G.S. 50-13.1(e) and (f). *See also* Rule 12.02 of "Uniform Rules Regulating Mediation." There is an exception to confidentiality in instances where mediators have reason to believe that a child is being abused or neglected. Such information must be reported to the Department of Social Services.

13. G.S. 7A-494 speaks only to disputes about custody and visitation.

14. *See* Rule 10 of "Uniform Rules Regulating Mediation."

15. *See* note 12, above. *See also* "Order to Calendar Custody or Visitation Dispute," Administrative Office of the Courts Form #AOC-CV-914M.

16. Judith S. Wallerstein and Joan Berlin Kelly, *Surviving the Breakup* (New York: Basic Books, 1980), 51 (hereinafter *Surviving the Breakup*).

17. *See* Judith S. Wallerstein and Sandra Blakeslee, *Second Chances: Men, Women and Children a Decade after Divorce* (New York: Ticknor and Fields, 1989) (hereinafter *Second Chances*), a longitudinal study that followed sixty families over a course of time. The study concluded that the effects of divorce are long lasting and that children are especially affected when divorce occurs in the formative years (297–99).

18. *See Surviving the Breakup*, 57. *See also Booklet for Separating or Divorced Parents*, 13.

19. *See Surviving the Breakup*, 57–58. *See also Booklet for Separating or Divorced Parents*, 13.

20. *See Booklet for Separating or Divorced Parents*, 6.

21. *See Booklet for Separating or Divorced Parents*, 17–18. *See also Second Chances*, 277–88.

22. *See* G.S.7A-494(c). *See also* rules 6.01, 6.02, and 6.03 of "Uniform Rules Regulating Mediation."

23. The mediator would explore reconciliation only to the extent of determining whether there was mutual interest on the part of both Rick and Sarah in trying to salvage the marriage. If there was, she might suggest that they make a commitment to see a marriage counselor. The mediator would not seek to counsel them herself, as that would be outside the purview of her role as mediator.

24. In some cases mediators have helped parents discuss and resolve difficult issues such as whether children would attend public or private schools or be raised in the faith of their mother or father.

25. *See* Rule 12.08 of "Uniform Rules Regulating Mediation."

26. Nearly all program sites request that parties return to sign their agreement in person, but in instances where an additional visit would create a hardship, parties may return their signed copy by mail.

27. *See* Rule 12.07 of "Uniform Rules Regulating Mediation." Frequently mediation agreements will include specific language providing for the parents to return to mediation as their agreement becomes outdated or as conflicts arise over time. ■

Implementing the Solid Waste Management Act of 1989

Stephen S. Jenks

The Solid Waste Management Act of 1989 is a good example of an intergovernmental mandate that involves actions on all three levels of government: national, state, and local. The state of North Carolina in effect anticipated federal regulations on solid waste landfills when it passed the act in 1989. Though states nationwide are expected to carry out federal requirements concerning landfills, individual states have a range of options for dealing with the generation, collection, and disposal of solid waste. Some states have taken strong actions, including bans on beverage containers, mandatory recycling, and source reduction. At the other end there are states that have basically left these issues to local governments to handle. North Carolina chose a middle ground in its Solid Waste Management Act of 1989.

The Solid Waste Management Act includes some elements that are typical of intergovernmental mandates, such as requirements for reports and plans and a system for measuring the volume of waste disposed of at landfills. The law also set a very ambitious goal of a 25 percent reduction in per capita solid waste volume going into landfills by June 30, 1993. However, the law did not tell local governments *how* to achieve the reduction, but instead gave them considerable flexibility and discretion for selecting their own approaches for achieving the goal. Now that the 1993 date has passed, there is an opportunity to assess the degree of success achieved in the state through its solid waste mandate. This article discusses the events leading up to the passage of the Solid Waste Management Act and the issues that local governments had to face in preparing to implement the act. It then discusses the findings of a study conducted to determine the success of the first years of implementation.

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Background

Legislative History

Historically solid waste management has been seen as a policy area that falls primarily under the jurisdiction of local governments. Consequently the collection and disposal of solid (nonhazardous) waste have been activities largely carried out by county and municipal governments, private contractors, and individual businesses and citizens. Until relatively recent times, the national and state governments had taken little action that would affect how these activities were conducted.

Within the past two decades both national and state levels of government have gradually given solid waste management increased attention. At the national level the Resource Conservation and Recovery Act (RCRA) of 1976 set the stage for federal regulation of solid waste disposal facilities. The United States Environmental Protection Agency (EPA) was assigned responsibility for administering RCRA and, through its regulations implementing the law (known as "Subtitle D" for that section of the law pertaining to nonhazardous wastes), established minimum national performance standards regarding the siting, design, and operation of all solid waste disposal facilities.[1]

The Hazardous and Solid Waste Amendments of 1984 extended the national government's role by requiring the EPA to reexamine and revise the regulations to ensure they adequately protected human health and the environment from groundwater contamination. Of particular relevance were requirements that the EPA develop a more specific system for groundwater monitoring

and develop stricter criteria for the siting of facilities. The EPA also decided to incorporate such issues as landfill design, restrictions on various types of waste, financial responsibility, and requirements for closure of landfills into the regulations covering solid waste disposal facilities. In its "Agenda for Action" the EPA initiated a national recycling goal of 25 percent of the waste stream, to be achieved by 1992. In addition, the EPA proposed a hierarchy of preferred methods for managing an integrated solid waste management program, beginning with reuse, reduction, and recycling of solid wastes; incineration and landfilling were at the bottom of the hierarchy.[2]

In 1988 the EPA proposed new rules for landfills to carry out the 1984 amendments. While the EPA had intended to complete work on the regulations by 1989, officials did not issue the final regulations until October 1991. The final regulations established more comprehensive standards for designing and monitoring disposal facilities. These standards are of significant consequence to jurisdictions with landfills. In essence these requirements substantially increase the cost of building and maintaining landfills that are developed in the future, starting within two years from the date the final regulations were issued.

Because of the extended process of completing the regulations at the federal level, officials at the state level as well as in many local governments were aware that they would need to begin preparing for the day when existing landfills would have to be replaced by disposal facilities that must meet more stringent and expensive requirements. In North Carolina early initiatives included a statement of a goal to reduce the volume of solid waste going into landfills (by the Department of Human Resources and the Department of Natural Resources and Community Development in June 1987) and the strengthening of state agencies' policies governing the siting, design, and operation of landfills in the state.

In 1987 North Carolina's General Assembly authorized the Legislative Research Commission (LRC) to study the management of solid waste. Based on the initial study performed by the LRC, a Committee on Solid Waste Management was created to expand the study and to hold public meetings. During a series of ten meetings between November 1987 and December 1988, the committee heard from state agency staff, representatives of state-level associations and organizations such as the North Carolina Association of County Commissioners and the Sierra Club, officials from county governments, technical and policy experts, persons involved in commercial recycling, and businesses that would be affected by legislation on solid waste.

The Committee on Solid Waste Management submitted its report on December 14, 1988, to the General Assembly and included a number of recommendations and legislative proposals. The first recommendation of the committee was that the General Assembly should establish a state policy regarding solid waste management. This recommendation included the following statement of findings:

> North Carolina faces a crisis in the near future in solid waste management due to a shortage of landfill space, an increased risk of contamination of the groundwater, and stricter federal regulations, which will be much more expensive for counties to comply with. More effective management of solid waste is necessary to protect the public health and safety, to protect the environment, and to protect the long term economic well-being of the State. The interests of the State are served by the proper voluntary management of solid waste by units of local government; therefore, it is in the best interests of the State and its citizens to develop a State solid waste management policy that will provide guidance to units of local government and assist them in developing their own comprehensive solid waste management programs.
>
> It should be the policy of the State to promote methods of solid waste management that are alternatives to landfilling and to assist units of local government with solid waste management. The following hierarchy of methods of solid waste management should be established, in descending order of preference:
>
> (1) Waste volume reduction at the source;
> (2) Recycling and reuse;
> (3) Composting;
> (4) Incineration with energy production;
> (5) Incineration for volume reduction;
> (6) Disposal in landfills.[3]

The recommendation also proposed that the state establish a minimum 25 percent recycling goal for the state to attempt to accomplish by January 1, 1993, as well as other milestones for state agencies and counties to develop plans and programs in support of this goal.

During the 1989 session of the General Assembly, both the Senate and House considered and eventually approved legislation on solid waste management. The Senate version (Senate Bill 111) was a brief proposal that essentially incorporated the Committee on Solid Waste Management's statement of findings, the hierarchy of methods, and the 25 percent recycling goal. (The Solid Waste Management Act of 1989 set a state goal that by January 1, 1993, 25 percent of solid waste should be recycled. In 1991 the General Assembly passed House Bill 1109, which amended the act and changed the recycling goal to a *reduction* goal of 25 percent to be achieved by June 30, 1993.)

In contrast to the six-page Senate bill, Rep. Joe Hackney's bill, House Bill 1225, was a comprehensive approach encompassing expectations and requirements for both state agencies and local governments. In its original form the seventy-four-page bill largely followed a Florida law and incorporated such elements as a state program of planning, technical assistance, and financial assistance; local government plans and programs, including recycling and public education; development of markets for recycled materials; preference in state government procurement for products with recycled content; bans on certain types of products from landfills; advance disposal fees for containers; and container deposits.

In large measure, Senate Bill 111 as approved by both houses of the General Assembly was actually House Bill 1225 as revised to remove or modify those sections that received the most strenuous objections. It was enacted on August 12, 1989, and became effective as of October 1 of that year.[4]

The Situation in the Counties as of 1989

In the area of solid waste, counties in the state have historically been responsible primarily for the disposal of solid waste while municipalities provided solid waste collection services. However, by the 1980s the nature of the task for counties shifted from "maintaining garbage dumps" to "solid waste management," and consequently solid waste for county governments came to involve a more complicated series of policy decisions than counties had previously dealt with.

Though North Carolina's Solid Waste Management Act was enacted by the General Assembly in August of 1989, it is highly likely that county officials were aware of this potential legislation well before that formal action was taken. For example, numerous articles on pending legislation appeared in *County Lines*, the biweekly newsletter of the North Carolina Association of County Commissioners (NCACC), during 1987 and 1988.

In addition, there was considerable substantive information that would have indicated the level of importance of the issue to counties. In the December 16, 1987, issue of *County Lines*, Ed Regan of NCACC noted that "many counties are running out of space at existing permitted landfills. We believe that this problem may soon become a crisis of statewide proportions."[5] He also noted concerns about the increasing costs of landfills, especially those that would be lined, and offered recommendations on who should be responsible for solid waste management to the Committee on Solid Waste Management.[6]

Thus, in the period nearing the passage of the Solid Waste Management Act, county officials who had been reading the information provided by their association must certainly have been aware that state and federal actions were very likely to have a major impact on their solid waste practices and policies. But being aware of the new requirements does not necessarily mean that all counties would be ready to respond to them.

With the passage of the 1989 state legislation on solid waste, many counties faced a situation for which they were not well prepared. As Mike McLaughlin of the North Carolina Center for Public Policy Research assessed the situation in 1989, the legislation addressed only a portion of the scope of the problem:

> [T]he legislation establishes lofty goals but does not chart a clear course for reaching them. Indeed, the new law raises troubling questions. How will the counties reach the 25 percent waste diversion goal? And what will become of the waste that is diverted? Will it be recycled and put to productive use? Or will it simply be warehoused, with no market for a huge influx of would-be raw materials that used to be rubbish? Policymakers readily conceded they do not have all the answers, but they say the counties--facing huge increases in the cost of landfilling waste--are ready to face the questions.[7]

McLaughlin further noted that "the clear omission in the bill, and the issue that needs immediate attention, is money. Implementing a statewide solid waste management strategy, and recycling 25 percent of the state's waste stream, cannot be accomplished on good intentions alone. Somebody has to pay the bill."[8]

The Solid Waste Management Act of 1989, as is the case with intergovernmental mandates in general, structured the nature of the relationship between the state and local governments and provided a basic delineation of responsibilities. Terry Henderson of the North Carolina League of Municipalities interpreted the law as suggesting a four-tiered partnership, where "the state must find and create markets for recyclable materials, multi-county regions get the role of implementing expensive waste management options that require a pooling of local resources, counties claim responsibility for disposing of waste and getting recyclables to market, and cities collect solid waste and recyclables." Henderson further noted that "this is truly one area where we are going to have to be intergovernmental and interdependent."[9]

When the Solid Waste Management Act was enacted in the late summer of 1989, counties in North Carolina

varied greatly in their degree of readiness to meet the challenges of recycling and reducing their volumes of solid waste. A study on recycling conducted in 1989 by the North Carolina Center for Public Policy Research found the following:

- Ninety of one hundred counties operated a landfill.
- Nineteen counties had a paid recycling coordinator.
- Forty-four counties had at least one of three types of recycling collection: buy-back centers, curbside collection, and drop-off centers.
- Forty-three counties reported "none" as their current recycling activities, and four counties indicated they were "planning" to implement recycling activities.
- Twenty-three counties had a program for the collection and diversion of yard waste from their sanitary landfill.[9]

One thing that was apparent from the Center for Public Policy Research study was that counties across the state faced very different types of situations in trying to formulate and adopt policies to respond to the state mandate on recycling. The most common factor cited by respondents in the study was the difference between rural and urban counties. This was a significant factor, given that a majority of counties in the state are classified as rural.[11] In describing the relatively successful efforts of one rural county in the state to implement a recycling program, it was noted that recycling represented only 2 percent of that county's waste stream. As a consequence,

> despite these efforts, Chatham and other rural counties have a long way to go before reaching the state's 25 percent recycling goal. Officials in rural counties say they have neither the money nor the personnel to operate extensive recycling programs. Since Chatham is sparsely populated, curbside collection of trash and recyclables would be cost-effective only in the towns and larger subdivisions in the county.[12]

This introduces a second issue that is important in understanding the situation of counties in North Carolina in 1989. There is a distinction to be made between counties that are well-off and those that might be considered relatively poor. While financial capacity may be measured in different ways, a common approach is to look at the tax base as reflected in per capita property valuation for tax purposes. In North Carolina there is a large spread in the per capita property valuations, ranging from thirty-six counties with less than $20,000 to seventeen counties with more than $35,000.[13] In addition, most though not all counties with low property tax bases are also rural in nature, further complicating their problem in dealing with the mandate to reduce solid waste.

A third factor that may serve to differentiate counties is the volume and composition of their waste stream. According to the State Data Center of North Carolina, counties in the state vary in the per capita waste tonnage by a significant degree, with eight counties with less than half a ton per capita and fifteen counties with more than one and a quarter. In general the difference comes from two sources: (1) the number of part-time residents and tourists in the county (who are not counted in the population base, but who produce solid waste) and (2) the volume of waste produced by business and industry. Because there is some relationship between part-timers and tourists to per capita property valuations, counties with high per capita tonnage also tend to be those with higher tax bases, providing them with the potential financial capacity to handle their higher volumes of waste.

Counties with large industrial or commercial producers of solid waste have not only the advantage of their property valuations, but also the potential advantage of being able to target a relatively small number of businesses to produce a large reduction in solid waste.

A related factor is the composition of the waste stream, which can vary greatly across counties. In counties with a higher proportion of residences, there are higher volumes of household waste such as food waste, mixed paper, and yard waste. But in counties with more commercial and industrial firms, the waste stream may be higher in corrugated cardboard, wood products, and other materials that have value in the recyclable materials market. Again, counties with different waste streams would need to take different approaches to achieve reductions in their volumes of solid waste, and not all approaches take the same level of resources, effort, or educational outreach.

Early Period of Implementation by the Counties

Subsequent to the enactment of Senate Bill 111, the Association of County Commissioners engaged in a major campaign to inform county officials about the content and implications of the legislation. On September 11, 1989, an "Information Alert" was sent to all county managers, which provided a thorough summary of the law and its requirements for local governments. It also listed the major duties of state agencies, including assistance to and

Table 1
Summary of Requirements for Counties from the Solid Waste Management Act of 1989

Milestone	Deadline Date
Submit first annual report on solid waste management and recycling activities	October 1, 1990
Develop analysis of all costs incurred in solid waste management over a one-year period	October 1, 1990
Initiate a recycling program, requiring the separation of recyclables and construction/demolition debris	July 1, 1991
Weigh all solid waste received at a landfill	July 1, 1991
Develop a countywide solid waste management plan	March 1, 1992
Ban certain materials from the landfills	
Used oil	October 1, 1990
White goods and lead-acid batteries	January 1, 1991
Yard waste	January 1, 1993
Achieve a goal of 25 percent recycling of solid waste	July 1, 1993
Completion of training course for operators of solid waste facilities	January 1, 1996

Source: N.C. Association of County Commissioners, "North Carolina Solid Waste Law Revised," *County Lines* 15 (Oct. 11, 1989): 1.

promotion of the recycling industry, performance of market analyses, and a role for the Department of Public Instruction in the promotion of recycling in the public school system and development of curriculum materials for a recycling awareness program through all grade levels.

The October 11 issue of *County Lines* presented a list of requirements that counties were to meet and the key dates associated with the requirements and new reports, as indicated in Table 1.

At this point it should be evident that county officials faced a daunting situation. A complex state law had established a series of requirements that counties must meet over the next few years. The counties would need to formulate and implement new policies that were likely to change substantially not only county policies and programs for solid waste management, but also the behaviors of county residents and businesses. In addition, each county faced the same set of statewide requirements and expectations, while trying to assess its own unique situation. Individual county considerations included the composition of the waste stream as well as a series of relatively unknown financial and political factors that would affect each county's ability to meet the state and federal requirements.

Assessing the Success of Implementation

Study Design

A comprehensive study of the implementation of the Solid Waste Management Act was conducted by the author over a period of approximately eighteen months in 1992 and 1993. The study used a mixed-method approach for data collection and analysis. This approach enables the researcher to draw on the strengths of multiple methods, in part to compensate for the weaknesses of any single method of data collection or data analysis. This study incorporated a large-scale survey of county officials, personal interviews with state officials, and multiple county case studies.

At the state level, personal interviews were conducted with two senior administrators in the Department of Environment, Health, and Natural Resources, a lobbyist for two statewide environmental groups, two staff members of committees of the General Assembly responsible for solid waste legislation, and the state representative who sponsored the bill that became the foundation for the law adopted by the legislature.

The survey of North Carolina's 100 counties, conducted in the fall of 1992 in conjunction with the North Carolina Association of County Commissioners, was designed to obtain a broad base of information on the attitudes and views of county officials. Responses were received from fifty-five commission chairs, eighty-three county managers, and sixty-four solid waste managers, for an overall response rate of 202 out of 300, or 67 percent.[14]

Six counties were selected for in-depth case studies. A total of twenty county officials were interviewed, eighteen through personal interviews and two by telephone. In addition, telephone interviews were conducted with sources knowledgeable about solid waste issues in each county, including city officials, representatives of the business and environmental communities, and newspaper reporters. County documents and records and newspaper articles were collected and analyzed to complement information obtained through the interviews.

Findings

In the early period of implementing the state mandate on solid waste, local government officials faced varied situations in counties across the state in terms of potential support for the types of actions that might be needed to carry out the mandate. In the 1992 survey county of-

ficials were asked to think back to that early period, with their responses presented in Table 2. Clearly, county officials had been expecting some resistance from citizens and industry in particular, with a number of survey respondents indicating that one or both groups would oppose the needed solid waste programs.

The ability of county governments to implement the solid waste mandate is not solely a function of their ability to gather local political support and financial resources. County officials also need a good working relationship with the state officials responsible for providing technical assistance as well as monitoring county efforts. Table 3 reveals the views of county officials as to the nature of their relationship with state officials. Overall the survey results present a positive picture of the relationship between state and county officials, though there is a sizable minority reporting some difficulties. In addition, within types of county officials there were further differences, as solid waste managers generally tended to be more positive in their assessment of relations with state officials than either county managers or county commissioners.

In general county officials did agree that there is a necessary role for the state to play in the management of solid waste. However, there was less agreement on the nature of that role. Some respondents found that the legislation was unnecessarily restrictive and failed to take into account sufficiently the differences across the counties of the state. This comment by a manager from a county with a very small population is representative of this perspective:

> Most will agree with the premise that this is a statewide problem. The regulations do not and cannot take into account the size and other differences of the many counties involved. There should be policies based on parameters of county size, region, population, economic base, etc., plus a good portion of common sense. We need a statewide umbrella policy with rational (not necessarily minimum) standards.

On the other hand, a contrasting perspective on the state mandate is represented by this thoughtful comment by a manager from a rural county with a below-average per capita tax base:

> Senate Bill 111 is a good piece of legislation. It is viewed in this county more as an establishment of goals that are needed as opposed to a state mandate. Senate Bill 111 has assisted this county in establishing needed recycling programs, tipping fees, etc. We have used [it] as a means to accomplish needed priorities. However, the legislation does not establish fines or penalties. To my mind, it struck a balance between state priorities and the need for local considerations.

Table 2
Responses to Survey Question on Community Support or Opposition in Early Period

	Strongly Supported (%)				Strongly Opposed (%)
Citizens in our county	7	23	39	21	10
Industry in our county	5	25	52	16	3
Environmental groups in our county	42	34	18	4	2
Board of county commissioners	26	31	33	9	3

The survey question: "Indicate the degree to which you think each of the following groups supported or opposed the implementation of solid waste programs when county officials were first considering how to respond to the state mandate."

Note: Totals may not add to 100 percent due to rounding.

Table 3
Responses to Survey Question on State-County Relations

	Strongly Agree (%)				Strongly Disagree (%)
State officials have been very willing to work with county officials.	21	30	27	14	9
State officials have been very firm in their expectations that we meet the requirements of the mandate.	10	34	39	13	3
State officials have provided assistance on a timely basis.	15	28	33	14	10
County officials have been receptive to state assistance.	22	45	26	7	1

The survey question: "Please indicate the extent to which you would agree or disagree with the following statements regarding your county's experience with state solid waste officials over the past several years."

Thus, for another group of officials, Senate Bill 111 provided a mechanism for counties to use to take actions that they may have found difficult on their own. This rationale for state action was among the questions asked on the survey, as indicated in the second question in Table 4. A clear majority of respondents agreed that it would be difficult for individual counties to put policies in place that might be costly for businesses, with a potential consequence of losing those businesses to other counties.

It seems evident that most county officials in 1992 recognized that one role for the state to play in solid waste management was to set the general rules so as to not leave

Table 4
Responses to Survey Question on the Role of State in Solid Waste Policy

	Strongly Agree (%)				Strongly Disagree (%)
It is in the best interests of the citizens of the state that North Carolina has a comprehensive, statewide policy for improving the management of solid waste.	47	29	15	5	2
It is difficult for *individual* counties to put in place policies that might be costly for businesses and thus possibly lose businesses to other counties.	37	39	12	10	3

The survey question: "The solid waste mandate assumes that there is a need for the state to regulate the activities of the counties. Please indicate the degree to which you agree or disagree with each of the following statements."

Table 5
Responses to Survey Question on the Importance of Solid Waste Management Issues

	Not Important (%)				Very Important (%)
Reducing the amount of solid waste produced in our county	0	4	16	32	49
Complying with the state mandate to reduce solid waste by 25 percent	1	11	24	36	29
Keeping landfill tipping fees and other solid waste fees at their current level	5	16	30	23	25
Keeping tax rates at their current level	2	2	17	29	50

The survey question: "County governments have to decide what priority to give to the implementation of policies and programs for issues that are important to its citizens. For each of the following, please indicate how important you think the issue is in your county."

individual counties vulnerable if they attempted to institute measures that would leave them in a noncompetitive position relative to other counties. On the other hand, the Solid Waste Management Act of 1989 left enough room for individual decisions so that counties may have found themselves being compared, favorably or unfavorably, to other counties in the state for the types of policies they chose to adopt and implement.

As noted previously, different counties face different circumstances in terms of the degree to which solid waste may be a problem in their area. The need to meet the state requirements may need to be balanced off against local considerations. Table 5 presents several issues that county officials had to address as they considered their options.

It is evident from these results that most county officials believed that solid waste was an important issue and that 25 percent reduction was an important goal. However, these results also indicate that the majority of county officials felt the goal of reducing solid waste would have to take into account the importance of maintaining tax rates or solid waste fees at their current levels. There was also a significant minority of county officials who did not feel that keeping solid waste or tipping fees at their current levels was important, which may very well represent those counties with low or no fees at the time of the survey.

The capacity for implementing solid waste reduction programs varies greatly across counties in the state. At the time of the survey some counties already had substantial budgets and staffs for programs such as recycling, while others either lacked the capacity or did not find this to be a priority in their county. Thus different counties had very different starting points when trying to meet state expectations for improved solid waste management practices. As Table 6 shows, a large portion of county officials felt their counties would have to increase substantially the size of their budgets as well as tax rates or fees (or the costs incurred by business and industry) to meet the state goal.

Faced with the likelihood of having to increase budgets, taxes, fees, or other costs to carry out the necessary changes in solid waste management in their county, officials had to gauge if they had the financial and political resources to do the job. A series of survey questions provides a good indication of the range of circumstances in the counties across the state. In Table 7 the first question demonstrates the range of financial capacities in counties in the state, while the second question shows that political support also varied widely. Given the results of this and prior survey questions, it is not surprising to see in the third question that there was substantial agreement among county officials that the state should provide financial assistance to counties to defray the costs of implementing solid waste reduction programs. Interestingly, based on further analysis of the survey results, the county officials that indicated they had a sufficient tax base were also well represented among those advocating state assistance.

Based on the interviews conducted with state-level actors, there is substantial evidence that state officials saw the mandate as establishing an overall goal for coun-

ties to shoot for, while recognizing there are valid reasons for variations in results across the counties. However, state officials also realized that they needed to present a fairly strong and united front, so that counties would take the mandate seriously. Several state-level actors specifically mentioned the importance of the 25 percent reduction goal and that the state should not waiver from that level. A goal of 25 percent was seen as significant and important in itself—that it was an ambitious but realistic goal that would represent real accomplishments. Two state actors involved in the formulation of the legislation noted that the date for accomplishing the reduction could be shifted if necessary, but the goal itself should not be diluted.

In terms of their expectations of outcomes to be achieved, state-level actors seemed to take a realistic view of the situation. Each study participant at the state level said something similar to this comment by a staff person for the General Assembly:

> I think the state is very aware that the conditions and situations vary drastically from one county to another; they know when they are talking to a little rural county that has no money, that that is a different situation from a Mecklenburg or a Buncombe County that is on the leading edge.

Thus state expectations did vary across the counties, though state officials were reluctant to say so without also giving out a message that some counties with higher capabilities would interpret as an opportunity to reduce their level of effort. This resulted in a situation where official state policy stipulated that all counties are to follow the same requirements and be evaluated in the same manner, even though state officials planned to take local factors and constraints into account when assessing individual counties. This latter attitude was indicated by these comments from Mary Beth Powell of the Office of Waste Reduction in the Department of Environment, Health, and Natural Resources:

> Our role is to help counties look at their options . . . look at their unique situations and look at the waste generated in their own locality. . . . A single strategy won't fit every county.[15]

Though state policy makers may have felt that state policy objectives were at stake, that did not necessarily mean they felt that state resources would have to be expended in the form of incentives to local governments to get them to institute needed policies. A General Assembly committee staff member directly involved in the drafting of the law conveyed this perspective: "I've tended to view success as its own reward. This [solid waste] is a problem for local governments, and the more they succeed, the better off they'll be."

Based on the information obtained through the state-level interviews, plus review of state documents, a conclusion can be drawn that state officials did not view the situation as "either/or" or as "zero sum." Rather, state officials recognized that an ambitious goal had been set and that many counties would struggle to meet that goal.

Table 6
Responses to Survey Question on County Capacity for Implementing Solid Waste Reduction Programs

	Little or No Increase (%)				Substantial Increase (%)
Size of our county staff responsible for solid waste reduction programs	19	24	24	28	6
Size of our county budget for solid waste reduction programs	5	10	17	38	31
Tax rates or fees needed to cover the costs of solid waste reduction programs	3	9	17	39	34
Costs incurred by business and industry to comply with policies to reduce solid waste	1	12	26	42	20

The survey question: "Indicate the extent to which you think an increase will be incurred in each of the following to meet the goal of a 25 percent reduction in solid waste."

Table 7
Responses to Survey Question on Sufficiency of County's Tax Base and Political Support

	Strongly Agree (%)				Strongly Disagree (%)
Our county has a sufficient tax base to be able to afford the budget and staff for the needed solid waste reduction programs.	10	15	20	25	32
Our county government will be able to gain sufficient political support within the county to carry out the needed programs.	5	22	43	19	12
The state should provide financial assistance to counties to help support the implementation of solid waste reduction programs.	65	16	9	3	7

The survey question: "In order to reduce solid waste, the county government must be able to carry out certain programs. For each of the following statements, please indicate the degree to which you agree or disagree."

Table 8
Change in Solid Waste Per Capita from 1991–92 to 1992–93

Percent Change	Number of Counties
Increase	32
Decrease of less than 5%	20
Decrease of 5% to less than 10%	18
Decrease of 10% to less than 15%	12
Decrease of 15% to less than 20%	4
Decrease of 20% to less than 25%	5
Decrease of 25% or more	9

Note: The nine counties with a reduction of more than 25 percent from 1991–92 to 1992–93 were Avery, Alleghany, Transylvania, Tyrrell, Yancey, Jones, Mitchell, Montgomery, and Northampton.

However, state officials were willing to work with individual counties and take their circumstances into account when evaluating the effort made by the counties. State officials just did not want to give out signals that they had low expectations, because of the likelihood that lowered expectations would produce lowered outcomes. The situation facing the state is summarized by this statement by a state agency official:

> I don't think the state is worried about one county or a few counties, it is more or less when you have a large percentage of the counties that are breathing down your back or saying that the law was not right in this or that aspect, then we have to go with the majority opinion. And there is no way we can keep 100 counties and 600 municipalities happy; you'll hear complaints from different ones at the same time you'll get accolades from the other ones saying this is the greatest thing that ever happened. I think maybe the state is more concerned about doing what is right and what is good for the majority of the local governments, realizing there will always be some that are unhappy with the decisions that are made.

Implementation Results

Subsequent to completing the initial survey study, the Department of Environment, Health, and Natural Resources published a special report on the results of county efforts to meet the reduction goal by June 30, 1993.[16] One important caution needs to be made concerning these results. Due to the fact that relatively few counties had the scales and record-keeping systems in place to begin tracking their tonnage of solid waste in 1989 when the law was passed, most counties were unable to document their solid waste for the initial fiscal year of 1989–90. Consequently the state decided to use 1991–92 as the base year, unless a county requested an earlier year for which it could document its record-keeping methods. Despite the fact that we have only a comparison of 1991–92 to the target year of 1992–93, North Carolina counties were still able to show an average decrease in per capita solid waste tonnage of 6.4 percent. Table 8 presents the range of results over this one-year period.

When attempting to assess the degree of success of North Carolina counties in meeting the state requirements and expectations, the varying circumstances of those counties need to be taken into account. One might expect to find that the counties that were the most successful also had the most financial capacity, the most political support, or the highest population densities that enabled them to implement cost-effective recycling programs. However, an analysis of a number of demographic indicators presents quite a different picture. Counties with higher levels of property valuations, government expenditures, and population density were not overly represented among the most successful counties. In fact the majority of the most successful counties have moderate levels of property valuations and are rural rather than urban. Further, county officials who indicated on the survey that their counties had a sufficient tax base or sufficient political support were no more likely to be successful than counties whose respondents indicated the opposite.

While these findings may seem to leave us at something of a loss to explain why some counties were more successful than others in reducing their volume of solid waste, the counties that were part of the case studies provide evidence that may be useful in answering this question. In contrasting the most successful and least successful of the six case study counties, there are a number of factors whose presence seemed to contribute to the ability of a county to achieve the intended goal. The most important of these factors are discussed below. (All of the six case studies were assigned fictitious names to protect the confidentiality of the interviews.)

The ability to market its recyclables. The ability to market recyclables produced two very different types of responses. Piedmont and Collegia counties had developed strategies that enabled them to largely neutralize this as a potentially adverse factor. Piedmont awarded the rights to recyclables to a waste management firm and let the company worry about the markets. Piedmont had also carefully looked at the markets of a range of recyclables before targeting a select group to ban from the landfill. The solid waste manager in Collegia County had made a conscious decision to gain full control over the recyclables they collected. He obtained old trailers for storing and hauling various materials. Once a large enough load was collected,

he was then able to bargain for a good price. He refused to sign any contracts with private firms that would give them the rights to recyclables over any period of time.

In contrast, officials in Eastern and Bay counties stated that their counties were too small and too distant from major markets to be able to net a decent return on the sale of their recyclables. The recycling coordinator for Bay County noted that "the larger volume that you have, the better you can bargain with your price. The rural counties get kind of screwed on that."

Devising an approach to reducing solid waste that will be accepted in the community. County officials revealed that they thought it was very important to find an approach to reducing solid waste that was consistent with what they saw as the character of their community. Officials in most of the case study counties thought that their citizens were too independent-minded for any approach that wasn't voluntary. Yet Piedmont County had the most successful program of the six counties and basically used a mandatory approach by means of banning a series of recyclables from disposal at the landfill.

Education of the public about the problem and how they can help. The importance of educating the public was widely cited by study participants. Piedmont, Eastern, and Bay County officials felt that this had been a crucial factor in their success. Several officials mentioned that they thought it had been helpful to have personnel in the collection centers at all times because they were able to hand out informational materials, assist people in understanding the policies on separating recyclables, and promote separation by those who hadn't been doing so. In contrast, county officials in Lake and Collegia suggested that the lack of educational activities to date had hampered their efforts.

Interestingly, several factors that might have played an important role did not seem to do so in the view of the case study participants. Factors that were not important for the majority of the case study counties included the availability of financial resources, political support, a willingness of elected officials to make tough decisions, help of volunteers, or the composition of the county's waste stream.

Conclusion

The Solid Waste Management Act of 1989 was a major piece of legislation affecting local governments throughout the state. Even though the state, due to budgetary constraints, was not able to provide the financial assistance originally intended in the law, many counties were able to make substantial progress in reducing their volume of solid waste over the period from 1989 to 1993.

Most county officials recognized the need for a state mandate in this policy area and that success in meeting state requirements and expectations would ultimately prove to be to their own benefit. Though the cooperation of some counties may have been reluctant at times (possibly due to the cumulative impact of numerous national and state mandates), most counties demonstrated a good working relationship with state officials. Possibly the most interesting finding of this analysis is that counties from a variety of circumstances could be successful in reducing their solid waste, in some cases by rather astounding margins. While further research is still needed on the cost implications of various methods to reducing solid waste, North Carolina does seem to have come up with an approach that relies on a good balance of state authority and local responsibilities.

Notes

1. Resource Conservation and Recovery Act, 42 U.S.C. § 6901.

2. Claire L. Felbinger and Robert R. Whitehead, "Management of Solid-Wastes Disposal," in *Managing Local Government: Public Administration in Practice*, ed. Richard D. Bingham, et al. (Newbury Park, Calif.: SAGE, 1991).

3. Legislative Research Commission, *Solid Waste Management: Report to the 1989 General Assembly of North Carolina, 1989 Session* (Raleigh, N.C.: State of North Carolina, 1988): 33–34.

4. N.C. Gen. Stat. Ch. 784.

5. Ed Regan, "NCACC Addresses Committee on Solid Waste Management," *County Lines* 13 (Dec. 16, 1987): 1.

6. Regan, "NCACC Addresses Committee on Solid Waste Management," 12.

7. Mike McLaughlin and Amy Carr, "Recycling North Carolina's Resources: The Long Campaign to Cut Tar Heel Waste," *North Carolina Insight* 12 (Dec. 1989): 4 (hereinafter "Recycling North Carolina's Resources").

8. "Recycling North Carolina's Resources," 36.

9. "Recycling North Carolina's Resources," 33.

10. "Recycling North Carolina's Resources," 14–27.

11. The North Carolina Rural Economic Development Commission classified seventy-five counties as rural and twenty-five as urban in 1991.

12. "Recycling North Carolina's Resources," 18.

13. Computerized information, State Data Center of North Carolina, 1990.

14. The actual number of responses for particular questions on the survey varies slightly, as not all respondents answered every question, but the total number of responses does not fall below 195 for any question.

15. Mary Beth Powell, "Waste Reduction Office Offers Help as 1993 Deadline Nears," *County Lines* 18 (May 27, 1992): 3.

16. N.C. Department of Environment, Health, and Natural Resources, *1993 Special Report: North Carolina Solid Waste Disposal* (Raleigh, N.C.: NCDEHNR, 1994). ■


EXIT 287
Cary
Harrison Ave
3/4 MILE

Rate Plan for Automobile Liability Insurance: An Update

Ben F. Loeb, Jr.

Fred, a motorist residing in Raleigh, had been carrying a fairly standard automobile insurance package: $100,000 per person/$300,000 per accident bodily injury coverage at a cost of $181 per year and $50,000 property damage coverage at a cost of $102 per year (for a total of $283 annually). Then last New Year's Eve he was arrested and convicted of driving while impaired. His policy was transferred (ceded) to the Reinsurance Facility (which he had never heard of before), so for the next three years Fred's liability insurance will be calculated as follows: (1) the bodily injury coverage will rise to $334 and the property damage coverage to $131, for a total of $465; and (2) this $465 will be increased by 400 percent (twelve insurance points) because of the driving-while-impaired conviction, for a total of $2,325.[1] Going from $283 to $2,325 constitutes more than an 800 percent increase for the one conviction.

The rates that all North Carolinians pay for automobile liability insurance coverage depend on several factors: the basic premium rates found in the *North Carolina Personal Auto Manual*; insurance points they have accumulated in the past three years for moving violations and accidents;[2] whether their insurance company has transferred their coverage to the Reinsurance Facility; where in the state they live; and whether the policy covers a driver with less than three years' experience. This article explains how the costs of insurance are set for North Carolina motor vehicle owners.[3]

The author is an Institute of Government faculty member who specializes in motor vehicle law.

The Safe Driver Insurance Plan

All insurance companies approved to provide automobile liability insurance coverage in North Carolina must be members of the North Carolina Rate Bureau.[4] The Rate Bureau is required by law to develop and recommend to the North Carolina commissioner of insurance a Safe Driver Insurance Plan (SDIP) classifying drivers on the basis of their histories of accidents and convictions for violations.[5] The SDIP, once approved—and then as modified over time—sets the basic automobile insurance rates. The SDIP is most conveniently found in the *North Carolina Personal Auto Manual.*

Insurance Points

A major factor in determining how much a motor vehicle owner pays for liability insurance coverage under the SDIP is the number of insurance points on his or her driving record (or on the record of members of the household covered by the same insurance policy). The number of points on the driving record determines the percentage surcharge to be added under the SDIP to the owner's insurance costs. Table 1 (see page 37) shows how points determine the surcharge. Points are assessed according to a schedule for convictions of various moving violations and for accidents in which the insured was at fault (see Table 2, page 37).

For points to be assessed, the conviction or accident must have occurred during the "experience period," defined as the three years immediately preceding the date of application or the preparation of the renewal of the insured's policy. SDIP points are applied to a policy for a period of not less nor more than three policy years; and

Bob Donnan Photography

the surcharge is, in effect, added to the cost of insurance on the car on which the owner already pays the highest total for liability, comprehensive, and collision coverages combined.[6] *Please note that insurance points are completely different from driver's license points, which are used by the North Carolina Division of Motor Vehicles for the purpose of revoking licenses.*

Points for Convictions

Table 2 shows the convictions that will result in points and insurance surcharges.[7] For purposes of the SDIP the word "conviction" includes a plea of guilty or *nolo contendere*. It also includes a determination of guilt by a jury or by a court even when no sentence is imposed (which is a prayer for judgment continued, or PJC) or, when a sentence is imposed, if it has been suspended. And it includes a forfeiture of bail or collateral deposited to secure appearance in court, unless the forfeiture has been vacated. The SDIP provides that a conviction does not include a PJC if it is the first PJC for all licensed operators in the insured's household. (This provision is commonly interpreted to mean the first PJC within the three-year experience period. Apparently, each household can receive one PJC every three years without it counting as a conviction, with the resulting insurance points.)[8] The term "moving traffic violation" includes infractions as described in Section 14-3.1 of the North Carolina General Statutes (G.S.)—noncriminal violations of law not punishable by imprisonment.

Points for Accidents

Points are assigned for each accident that occurs during a three-year experience period as follows:

- Three points are assigned for an at-fault accident that results in bodily injury or death or total property damage (including the insured's property) of $2,000 or more.
- Two points are assigned for an at-fault accident that results in total damage to all property in excess of $1,000 but less than $2,000.
- One point is assigned for each at-fault accident that results in total damage of $1,000 or less.

"At-fault" means negligent; no points are assigned for accidents when the operator of the insured vehicle is free of negligence. The initial determination of negligence is made by the insurance company. The insurance company usually will pay under the liability coverage only if the operator is negligent. If it pays, it probably will assess "at-fault" points. In addition, the SDIP specifically provides that no points are assigned under the following circumstances:

- The auto was lawfully parked when damaged.
- The vehicle owner was reimbursed by the person who was responsible for the accident, or there was a judgment against the person responsible for the accident.
- The auto was struck in the rear, and the operator was not convicted of a moving violation in connection with the accident.
- The operator of the other auto was convicted of a moving traffic violation, and the insured was not convicted of a moving traffic violation in connection with the accident.
- The auto was struck by a hit-and-run vehicle, and the accident was reported to the proper authority within twenty-four hours by the insured.
- The accident involved damage from contact with animals or fowl.
- The accident involved physical damage caused by flying gravel, missiles, or falling objects.
- The accident occurred as a result of the operation of a fire-fighting, rescue, or law enforcement vehicle responding to an emergency if the operator was a paid or volunteer member of any fire department, rescue squad, or law enforcement agency.

In the case of "one point accidents" that occurred on or after January 1, 1992, there is no surcharge if (1) the operator was not convicted of a moving traffic violation in connection with the accident, and (2) the vehicle owner, principal operator, and all licensed operators in the owner's household had no convictions for moving traffic violations and no other at-fault accidents during the three-year period immediately preceding the date of application or the date of preparation of renewal of the policy. In the event of a moving violation in connection with an accident, only the higher surcharge points are assigned (a driver will not get points for both).[9]

The Reinsurance Facility

After points, the second major factor affecting the cost of liability insurance is whether a motor vehicle owner has been transferred (through a process known as "ceding") to the North Carolina Motor Vehicle Reinsurance Facility. The Reinsurance Facility is a nonprofit legal entity consisting of all insurers engaged in writing

Table 1
Surcharge per Insurance Point

Points	Surcharge
One	25%
Two	45
Three	65
Four	90
Five	120
Six	150
Seven	180
Eight	220
Nine	260
Ten	300
Eleven	350
Twelve	400

motor vehicle insurance in North Carolina. Its purpose is to provide liability insurance for drivers or vehicle owners whom companies do not wish to insure as part of their regular voluntary business. In brief, it is a method of transferring the risk of loss from the individual insurance company to all insurance companies.

North Carolina law makes no provision regarding which individuals are to be ceded to the Reinsurance Facility. The decision belongs entirely to each particular insurance company. If an applicant for motor vehicle liability insurance is, for any reason, considered an undesirable risk by the company, it may cede the applicant to the Reinsurance Facility even though the person has a clean driving record. In other words, it is possible for a person who has never received a traffic citation or had an accident to be ceded to the Reinsurance Facility. Obviously, those with bad driving records are prime candidates, but a company may transfer anyone it considers a bad risk for any reason. Reportedly young drivers, the elderly, and some occupational groups often fall within this category. There is no appeal process, but applicants may seek coverage with another company that would not cede them to the Reinsurance Facility.

Because the Reinsurance Facility has many high-risk drivers, the SDIP provides that it may charge a higher base rate than is allowed in the voluntary market. But insureds ceded to the Reinsurance Facility who are *clean risks*—meaning, for this purpose, that no one on the policy has any points and no driver on the policy has less than two years' driving experience—pay the same as other policy holders with clean driving records who have not been ceded.[4] However, a driver in the Reinsurance Facility who has *any points at all* pays the higher base

Table 2
Number of Insurance Points per Moving Violation or Accident (Convictions)

Twelve points
- Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle
- Prearranged highway racing or knowingly lending a motor vehicle to be used in a prearranged race
- Failure to stop and render aid when involved in an accident resulting in bodily injury or death (hit-and-run driving)
- Impaired driving, including driving a vehicle while under the influence of an impairing substance; driving a vehicle with an alcohol concentration of 0.08% or more; and driving a commercial vehicle with an alcohol concentration of 0.04% or more (a revocation pursuant to G.S. 20-16.5 is not a conviction)
- Transportation of intoxicating liquors for the purpose of sale

Ten points
- Highway racing (not prearranged) or knowingly lending a motor vehicle to be used in the race

Eight points
- Operating a motor vehicle during a period of revocation or suspension of either the driver's license or vehicle registration

Four points
- Failure to stop and report when involved in a motor vehicle accident resulting in property damage only (hit-and-run)
- Reckless driving
- Passing a stopped school bus
- Speeding in excess of 75 miles per hour (mph)

Two points
- Illegal passing
- Speeding more than 10 mph over the limit, provided total speed was in excess of 55 mph but less than 76 mph
- Speeding from 66 to 75 mph when the limit is 65 mph*
- Speeding from 56 to 65 mph when the speed limit is 55 mph*
- Following too closely
- Driving on the wrong side of the road

One Point
- Speeding 10 mph or less in excess of speed limit of less than 55 mph*
- Any other moving violation

*Points are not assigned for these violations unless the same driver has been convicted of at least one other moving violation during the experience period (the last three years).

Table 3
Annual Cost of Insurance for Regular (Voluntary) Business

Territory	Bodily Injury Limit (by thousands, per person and per accident) $25/ $50	$50/ $100	$100/ $300	$300/ $300	Property Damage Limit $10,000	$15,000	$25,000	$50,000	Medical Payments $500	$750	$1,000	$2,000	$5,000
11	$108	$132	$156	$167	$ 77	$ 79	$ 81	$ 82	$20	$21	$22	$24	$27
13	124	151	179	192	89	92	93	95	23	24	25	27	30
14	129	157	186	200	94	97	99	101	24	25	26	28	31
15	162	198	233	251	96	99	101	103	30	31	32	34	37
16	126	154	181	195	95	98	100	102	23	24	25	27	30
17	150	183	216	233	92	95	97	98	27	28	29	31	34
18	107	131	154	166	87	90	91	93	20	21	22	24	27
24	118	144	170	183	81	83	85	87	22	23	24	26	29
25	141	172	203	219	100	103	105	107	26	27	28	30	33
26	161	196	232	250	81	83	85	87	29	30	31	33	36
31	140	171	202	217	85	88	89	91	26	27	28	30	33
32	126	154	181	195	87	90	91	93	23	24	25	27	30
33	138	168	199	214	77	79	81	82	25	26	27	29	32
40	172	210	248	267	99	102	104	106	31	32	33	35	38
41	145	177	209	225	83	85	87	89	26	27	28	30	33
43	142	173	204	220	80	82	84	86	26	27	28	30	33
47	139	170	200	215	80	82	84	86	25	26	27	29	32
51	126	154	181	195	87	90	91	93	23	24	25	27	30
52	175	214	252	271	109	112	114	117	32	33	34	36	39

Note: Regular business costs include "clean risks" ceded to the North Carolina Reinsurance Facility. The North Carolina Rate Bureau put new rates into effect on January 1, 1995, for both regular business and ceded business, but these were not approved by the insurance commissioner. This matter will be the subject of lengthy litigation.

rate. In the 1970s this rate was only slightly higher; but by 1994 rates for drivers in the Reinsurance Facility who had insurance points were more than 60 percent higher. And those drivers pay the surcharge for their points on top of that higher rate.

Table 3 shows the base cost for insurance before any surcharge for points is added when the insurance is handled as regular business (that is, not ceded to the Reinsurance Facility). Table 4 shows the comparable base cost for an owner with points whose policy has been ceded to the Reinsurance Facility.

Territory

The third factor determining a person's automobile liability insurance costs is where the person lives in North Carolina. The state is divided into nineteen territories, each with its own base rate. The cost of insurance varies considerably from territory to territory. For example, the base cost for $100,000/$300,000 bodily injury coverage for a motor vehicle owner with no points is $156 in Asheville (Territory 11), while the identical coverage in Charlotte (Territory 52) is $252. For a vehicle owner whose policy has been ceded to the Reinsurance Facility (and who has even one point, therefore paying the higher Reinsurance Facility base rate), the cost for the same coverage would be $265 in Asheville and $554 in Charlotte (plus, in each case, the surcharge for the points). Table 5 (see pages 40–41) lists the areas covered in the nineteen territories.[12]

Age but Not Sex

A fourth factor that can raise an insured's liability insurance cost is inexperience as a driver, which usually correlates closely with age.

The 1975 session of the North Carolina General Assembly enacted legislation intended to prohibit insur-

Table 4
Annual Cost of Insurance for Business Ceded to Reinsurance Facility

Territory	Bodily Injury Limit (by thousands, per person and per accident) $25/$50	$50/$100	$100/$300	Property Damage Limit $10,000	$15,000	$25,000	$50,000	Medical Payments $500	$750	$1,000	$2,000
11	$184	$224	$265	$101	$104	$106	$108	$30	$31	$32	$34
13	258	315	372	119	123	125	127	42	43	44	46
14	248	303	357	124	128	130	133	40	41	42	44
15	260	317	374	116	119	122	124	42	43	44	46
16	232	283	334	122	126	128	131	38	39	40	42
17	273	333	393	119	123	125	127	44	45	46	48
18	202	246	291	110	113	116	118	33	34	35	37
24	211	257	304	100	103	105	107	34	35	36	38
25	308	376	444	153	158	161	164	50	51	52	54
26	395	482	569	111	114	117	119	64	65	66	68
31	289	353	416	112	115	118	120	47	48	49	51
32	211	257	304	107	110	112	114	34	35	36	38
33	249	304	359	94	97	99	101	40	41	42	44
40	371	453	534	135	139	142	144	60	61	62	64
41	279	340	402	127	131	133	136	45	46	47	49
43	261	318	376	97	100	102	104	42	43	44	46
47	235	287	338	101	104	106	108	38	39	40	42
51	273	333	393	137	141	144	147	44	45	46	48
52	355	470	554	155	160	163	166	62	63	64	66

Note: Business ceded to the Reinsurance Facility excludes "clean risks," who pay the same as regular (voluntary) business even though they are in the facility. The North Carolina Rate Bureau put new rates into effect on January 1, 1995, for both regular business and ceded business, but these were not approved by the insurance commissioner. This matter will be the subject of lengthy litigation.

ance rates from being based on the age or sex of the insured. Specifically, G.S. 58-3-25 provides: "No insurer shall . . . base any standard or rating plan for private passenger automobiles or motorcycles, in whole or in part, directly or indirectly, upon the age or sex of the persons insured." But the youngest drivers typically pay higher insurance rates (or have their parents pay the higher rates for them), because a surcharge is added to policies that cover drivers who have fewer than three years' driving experience as a licensed driver. (The surcharge is not added when a member of the household begins driving under a learner's permit; and time spent driving on a learner's permit does not count toward the three years.) For most drivers, the surcharge is applied from age sixteen to nineteen, causing its impact to be felt most by young people and those who pay the insurance for young people, but the same rule would be applicable to a fifty-year-old if that person had no previous driving experience. This surcharge approximately doubles the cost of liability insurance on the car the inexperienced driver "principally operates."[13]

Recoupment Surcharge

A fifth factor that has raised insurance costs for some drivers—the recoupment surcharge—is being phased out and by July 1, 1995, will be replaced by an across-the-board charge that will not make a difference in liability insurance costs between drivers. The recoupment surcharge was enacted because the higher rates that have been permitted for policies ceded to the Reinsurance Facility have not been enough to prevent the Reinsurance Facility from sustaining financial losses. To recoup the losses, an additional surcharge was levied on all drivers with insurance points, whether or not they were in the Reinsurance Facility. The recoupment surcharge has been politically unpopular for years, and the 1987 General Assembly

Continued on page 42

Table 5
North Carolina Territories for Automobile Liability Insurance Coverage

Alamance County—*see Burlington-Graham and remainder of state.*

Asheville (Territory 11) comprises the entire city of Asheville and all territory in Buncombe County included in the townships of Asheville, Limestone, and Lower Hominy, including all of the following towns, cities, or places:

Acton, Arden, Asheville School, Biltmore Forest, Boswell, Buena Vista, Busbee, Craggy, Emma, Enka, Haw Creek, Hominy, Luthers, New Bridge, Oakley, Oteen, Shiloh, Skyland, Woodfin

Beaufort County (Territory 33) comprises all territory in Beaufort County

Bertie County (Territory 33) comprises all territory in Bertie County

Bladen County (Territory 33) comprises all territory in Bladen County

Brunswick County (Territory 26) comprises all territory in Brunswick County not included in Wilmington territory

Buncombe County (Territory 32) comprises all territory in Buncombe County not included in Asheville territory

Burlington-Graham (Territory 32) comprises the entire city of Burlington; the entire town of Graham; all territory in Alamance County included in townships 5 (Boon Station), 6 (Graham), 10 (Melville), 12 (Burlington), and 13 (Haw River); the entire town of Mebane in Alamance and Orange counties; and all of the following towns, cities, or places:

Elon College, Gibsonville, Glen Raven, Haw River, Kirkpatrick Heights, Lake Latham, Ossipee, Richmond Hill

Cabarrus County—*see Concord-Kannapolis-Salisbury and remainder of state.*

Camden County (Territory 33) comprises all territory in Camden County

Carteret County (Territory 33) comprises all territory in Carteret County

Charlotte (Territory 52) comprises the entire city of Charlotte and all areas in Mecklenburg County except those areas with U.S. postal ZIP codes 28025, 28026, 28031, 28036, 28075, 28078, and 28115

Chowan County (Territory 33) comprises all territory in Chowan County

Columbus County (Territory 26) comprises all territory in Columbus County

Concord-Kannapolis-Salisbury (Territory 32) comprises the entire cities of Concord, Kannapolis, and Salisbury; all territory in Cabarrus County included in townships 1 (Rocky River), 2 (Poplar Tent), 4 (Kannapolis), 5 (Mount Gilead), 11 (Baptist Church), and 12 (Concord); and all territory in Rowan County included in the townships of China Grove, Franklin, Litaka, and Salisbury, including all of the following towns, cities, or places:

Brown-Norcott Mills, China Grove, Cooks Crossing, East Spencer, Faggarts Crossroads, Faith, Franklin, Glass, Harrisburg, Jackson Park, Landis, Majolica, Mount Gilead, Pharrs Mills, Pioneer Mills, Roberta Mills, Rocky Ridge, Rocky River, South River, Spencer, Yadkin Junction, Yost

Craven County (Territory 43) comprises all territory in Craven County

Cumberland County (Territory 26) comprises all territory in Cumberland County not included in Fayetteville territory

Currituck County (Territory 33) comprises all territory in Currituck County

Dare County (Territory 33) comprises all territory in Dare County

Davidson County—*see Lexington-Thomasville and remainder of state.*

Duplin County (Territory 33) comprises all territory in Duplin County

Durham (Territory 13) comprises the entire city of Durham and all territory in Durham County included in the townships of Durham, Oak Grove, and Patterson, including all of the following towns, cities, or places:

Bethesda, Bilboa, Few, Gorman, Hope Valley, Joyland, North Durham, Oak Grove, Redwood

Durham County (Territory 32) comprises all territory in Durham County not included in Durham territory

Edgecombe County (Territory 33) comprises all territory in Edgecombe County not included in Rocky Mount territory

Fayetteville (Territory 40) comprises the entire city of Fayetteville; all territory in the Fort Bragg and Pope Air Force Base Military Reservations in Cumberland County; and all territory in Cumberland County included in the townships of Carvers Creek, Cross Creek, Eastover, Manchester, Pearces Mill, Rockfish, and Seventy First, including all of the following towns, cities, or places:

Beard, Bonnie Doone, Cliffdale, Cumberland, Fenix, Gardners Chapel, Hope Mills, Lakedale, Linden, Manchester, Milan, Myrtle Hill, Owens, Roslin, Shaws, Slocomb, South Fayetteville, Spring Lake, Tokay, Victory Wade

Forsyth County (Territory 32) comprises all territory in Forsyth County not included in Winston-Salem territory

Franklin County (Territory 33) comprises all territory in Franklin County

Gaston County (Territory 25) comprises all territory in Gaston County

Gates County (Territory 33) comprises all territory in Gates County

Greene County (Territory 33) comprises all territory in Greene County

Greensboro-Hamilton Lakes (Territory 14) comprises the entire city of Greensboro; the entire town of Hamilton Lakes; and all territory in Guilford County included in the townships of Morehead and Gilmer, including all of the following towns, cities, and places:

Battle Ground, Bessemer, Four Mile, Hamtown, Hill Top, Pomona

Greenville (Territory 31) comprises the entire town of Greenville and all territory in Pitt County included in Greenville townships, including the following towns, cities, or places:

House, James Mill, Staton

Guilford County (Territory 32) comprises all territory in Guilford County not included in either Greensboro–Hamilton Lakes territory or High Point territory

Table 5 (*continued*)
North Carolina Territories for Automobile Liability Insurance Coverage

Halifax County (Territory 33) comprises all territory in Halifax County

Harnett County (Territory 26) comprises all territory in Harnett County

Hertford County (Territory 33) comprises all territory in Hertford County

High Point (Territory 15) comprises the entire city of High Point, the town of Westend, and all territory in Guilford County included in High Point township

Hoke County (Territory 26) comprises all territory in Hoke County

Hyde County (Territory 33) comprises all territory in Hyde County

Johnston County (Territory 26) comprises all territory in Johnston County

Jones County (Territory 33) comprises all territory in Jones County

Kinston (Territory 31) comprises the entire city of Kinston and all territory in Lenoir County included in Kinston townships, including the following towns, cities, or places:
Georgetown, Hines Junction

Lee County (Territory 26) comprises all territory in Lee County

Lenoir County (Territory 33) comprises all territory in Lenoir County not included in Kinston territory

Lexington-Thomasville (Territory 32) comprises the entire cities of Lexington and Thomasville; all territory in Davidson County included in the townships of Lexington and Thomasville; and all territory in Randolph County included in Trinity township, including all of the following towns, cities, or places:
Archdale, Arnold, Cedar Lodge, Fraziers, Glen Anna, Lake, Trinity, Welcome

Martin County (Territory 33) comprises all territory in Martin County

Mecklenburg County (Territory 51) comprises all territory in Mecklenburg County not included in Charlotte territory

Nash County (Territory 33) comprises all territory in Nash County not included in Rocky Mount territory

New Hanover County—*see Wilmington.*

Northampton County (Territory 33) comprises all territory in Northampton County

Onslow County (Territory 41) comprises all territory in Onslow County

Orange County—*see Burlington-Graham and remainder of state.*

Pamlico County (Territory 33) comprises all territory in Pamlico County

Pasquotank County (Territory 33) comprises all territory in Pasquotank County

Pender County (Territory 33) comprises all territory in Pender County

Perquimans County (Territory 33) comprises all territory in Perquimans County

Pitt County (Territory 33) comprises all territory in Pitt County not included in Greenville territory

Raleigh (Territory 16) comprises the entire city of Raleigh; all territory in Wake County included in the townships of Cary, House Creek, Meredith, Neuse River, Raleigh, St. Mary's, St. Matthews, and Swift Creek; and the entire town of Knightdale in St. Matthews and Marks Creek townships, including all of the following towns, cities, or places:
Asbury, Auburn, Boushell, Camp Polk, Caraleigh, Carolina Pines, Cary, College View, Edgeton, Fetner, Garner, Macedonia, McCullers, Method, Milburnie, Milbrook, Neuse, Oakdale, South Raleigh, Westover, Wilders Grove

Randolph County—*see Lexington-Thomasville and remainder of state.*

Robeson County (Territory 26) comprises all territory in Robeson County

Rocky Mount (Territory 31) comprises the entire city of Rocky Mount; all territory in Nash County included in Rocky Mount and Stony Creek townships; all territory in Edgecombe County included in Township 12 (Rocky Mount); and the entire town of Sharpsburg in Edgecombe, Nash, and Wilson counties, including all of the following towns, cities, or places:
Armstrong, Brake, Dortches, Winsteads Chapel

Rowan County—*see Concord-Kannapolis-Salisbury and remainder of state.*

Sampson County (Territory 33) comprises all territory in Sampson County

Scotland County (Territory 26) comprises all territory in Scotland County

Tyrrell County (Territory 33) comprises all territory in Tyrrell County

Vance County (Territory 33) comprises all territory in Vance County

Wake County (Territory 31) comprises all territory in Wake County not included in Raleigh territory

Warren County (Territory 33) comprises all territory in Warren County

Washington County (Territory 33) comprises all territory in Washington County

Wayne County (Territory 47) comprises all territory in Wayne County

Wilmington (Territory 17) comprises all of New Hanover County and the following towns, cities, or places:
Belville, Clairmont, El Paso, Lanvale, Leland, Navassa, Woodburn

Wilson (Territory 31) comprises the entire town of Wilson and all territory in Wilson County included in the township of Wilson

Wilson County (Territory 33) comprises all territory in Wilson County not included in the Rocky Mount or Wilson territories

Winston-Salem (Territory 18) comprises the entire city of Winston-Salem and all territory in Forsyth County included in the townships of Broadbay, Middle Fork, Old Town, South Fork, and Winston, including all of the following towns, cities, or places:
Alspaugh, Atwood, Daisy, Fisherville, Frontis, Hanes, Ogburntown, Oldtown, Reynolda, Tiretown, Walkertown

Remainder of State (Territory 24)

Continued from page 39
made major revisions to legislation covering the surcharge, including the exemption of minor offenses from the surcharge. Those violations still subject to the surcharge are contained in G.S. 58-36-75(c) and include such serious offenses as driving with a revoked license, reckless driving, driving while impaired, and death by vehicle.

In addition to eliminating minor offenses from the recoupment surcharge, the 1987 General Assembly enacted a new statute to eliminate the surcharge on drivers with points altogether, over a period of years, and replace it with a surcharge payable by all drivers. The recoupment surcharge, which at one time exceeded 40 percent, was reduced in a series of steps to 6 percent in 1993 and will go to zero on July 1, 1995. Beginning on that date the new surcharge will be applied to all policies, rather than just to those of drivers who have points. The effect of this change may be higher rates for those with clean driving records and lower rates for drivers who have points on their record.[14]

Calculation of Rate Increase

An insured who has received insurance points—like Fred from Raleigh at the beginning of this article—can calculate the cost of his or her liability insurance in the following manner:[15]

1. Determine the territory from Table 5. (Fred lives in Raleigh, Territory 16.)

2. Using the territory number, determine the basic cost of liability insurance from Table 3 (for those who are not in the Reinsurance Facility) or Table 4 (for those who have been ceded). (Fred's ceded business in Territory 16 for $100,000/$300,000 bodily injury coverage and $50,000 property damage coverage totals $465 per year.)

3. Determine the total number of insurance points for the driver's offense (or offenses) and accidents for the past three years from Table 2. (Fred's one driving-while-impaired conviction results in twelve insurance points.)

4. Determine the surcharge from Table 1. (Fred's twelve points result in a 400 percent surcharge.)

5. Add the cost of the surcharge to the basic cost of the insurance from Step 2 above to get the total cost. (Fred's ceded basic cost is $465. The 400 percent surcharge totals $1,860. The resulting total insurance cost is $2,325.)

Conclusion

Fred from Raleigh paid reasonably low automobile liability insurance bills while he was a clean risk. But his one driving-while-impaired conviction caused him to pay the higher Reinsurance Facility base rate and the surcharge for his points. He is an example of the cost of convictions or negligently caused accidents.

North Carolina still has reasonably priced automobile insurance for clean-risk drivers, but the cost of liability insurance for those accumulating insurance points can be devastating. Also, it should be remembered that these points and rates apply to almost all forms of vehicle insurance, not just to liability coverage. The North Carolina rate system furnishes a strong incentive for prudent operation of a motor vehicle.

Notes

1. The 400 percent surcharge of $1,860 is added to the Reinsurance Facility rate of $465, for a total of $2,325.

2. The Safe Driver Insurance Plan, which is contained in the *Personal Auto Manual*, applies not only to premiums for bodily injury and property damage liability insurance but also to premiums for medical payments, fire, theft, and various other coverages. This article is devoted to liability insurance, because that coverage is required by the laws of North Carolina. *North Carolina Personal Auto Manual* (Raleigh, N.C.: Insurance Services Office, Inc., published yearly) (hereinafter *Auto Manual*).

3. Auto insurance rules and rates are under almost constant revision; these data are effective through December 31, 1994. Except as otherwise indicated, all information in this article was derived from the *Auto Manual*.

4. N.C. Gen. Stat. Ch. 58, Art. 36. (Hereinafter the General Statutes will be cited as G.S.)

5. G.S. 58-36-65.

6. *Auto Manual*, NC-GR-8.

7. As contained on page NC-GR-5 of the *Auto Manual*.

8. *See* G.S. 58-36-75(F).

9. *Auto Manual*, NC-GR-6, 7, and 11.

10. G.S. Ch. 58, Art. 37.

11. *Auto Manual*, NC-GR-2.

12. *Auto Manual*, NC-T-1 to NC-T-3 and PA-R-1,002.

13. *Auto Manual*, NC-GR-4.

14. G.S. 58-37-75.

15. Because the recoupment charge is being eliminated for those with points on July 1, 1995, it is not included in these calculations. ■

Around the State

National Recognition for North Carolina Public Servants

Two North Carolinians have received national recognition for the high quality of their public service. Longtime Charlotte city attorney **Henry Underhill** has retired from that position to become executive director and general counsel of the National Institute of Municipal Law Officers (NIMLO), the national professional group for attorneys who represent local governments. And Superior Court Judge **Thomas W. Ross** of Greensboro has been named one of the nation's ten outstanding public officials by *Governing* magazine.

City Attorney Henry Underhill

Henry Underhill had been on the staff of the city attorney's office in Charlotte a very short time when the city attorney left for the private sector. The city council named Underhill acting city attorney and then, in 1968, just three years out of The University of North Carolina School of Law, Underhill became city attorney. On December 31, 1994, seven mayors and three city managers later, he retired from that position. He is now headed for Washington, D.C., where he will assume leadership of NIMLO.

Underhill leaves behind an impressive record of achievement as a leader in municipal law, both in North Carolina and nationally. A past president of the North Carolina Association of Municipal Attorneys, in 1993 he received that association's highest honor, the Distinguished Service Award for Excellence in Municipal Law. His work with NIMLO includes serving several years as an officer and then as president for the 1982–83 term.

Local Government Innovator

Charlotte has been a leader in local government innovation, and Underhill and his staff have provided the legal foundation for the city's initiatives. The past quarter century has seen the impressive development of Charlotte's downtown, much of it the result of public-private development partnerships based on elaborate agreements negotiated by the city attorney's office. Charlotte, now a major league sports city, looks forward to the NFL stadium being built on the edge of downtown, thanks to Underhill's three years of negotiations.

When Underhill came to city government, he encountered an all-male and, with one exception, all-white council. Often most council members lived within a few blocks of each other. In the mid-1970s, however, neighborhood groups passed a referendum that succeeded in restructuring the council. This created a larger board with most members representing districts. Charlotte thus became an early leader in the growth of diversity—in race, gender, and economic interest—among the state's local government elected officials.

During Underhill's tenure, Charlotte has been a pioneer among cities in several other areas. For example, as the federal government pulled away from housing and urban redevelopment, Charlotte took over by facilitating local initiatives in those areas. But in the 1990s the mood has changed; government is thought too large, and a flexible Charlotte has responded by downsizing and privatizing city operations.

City-county consolidation is an issue Underhill has seen come full circle in Charlotte. Not long after he went to work for the city, community leaders began a several-year effort to consolidate the city with Mecklenburg County that resulted in an unsuccessful referendum

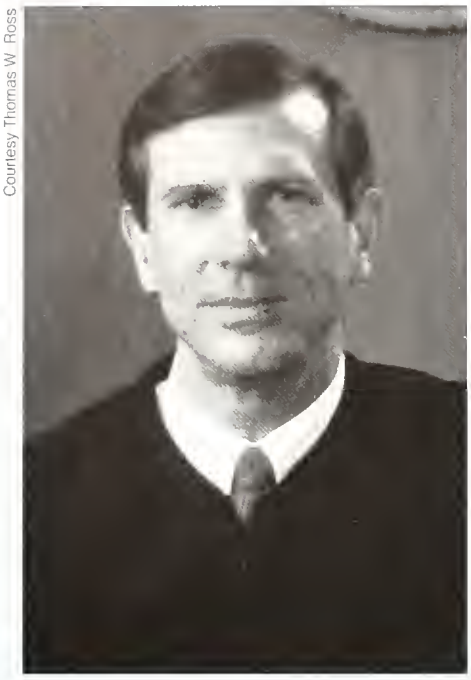
Courtesy Charlotte City Attorney's Office

Henry Underhill

in 1971. Now, as he leaves city government, city-county consolidation is again at the top of the community's agenda, with a Charter Drafting Commission developing a plan for consolidation that is expected to go to the voters later this year. Perhaps this attempt will succeed; Underhill believes it stands an excellent chance at success.

NIMLO, the organization that Underhill will now lead, provides a broad range of services to local government attorneys. It sponsors two conferences a year, develops and maintains a model ordinance service, responds to telephone and letter inquiries from its members, and participates as amicus curiae in litigation affecting the interests of city and county governments. NIMLO combines, at the national level, many services that the Institute of Government and the North Carolina League of Municipalities provide to city attorneys in North Carolina. Underhill expects to focus his efforts during his first year at NIMLO on expanding the membership of the organization.

Henry Underhill has served Charlotte and North Carolina with distinction for


Courtesy Thomas W. Ross

The Hon. Thomas W. Ross

thirty years. It is certain he will continue providing superior service on a national level.

Judge Thomas W. Ross

A key architect of North Carolina's new sentencing law, Judge Thomas W. Ross of the 18th Judicial District, has been named as one of the nation's ten outstanding public officials in 1994 by the publishers of Congressional Quarterly's *Governing* magazine. *Governing* is intended for those interested in local and state government, and its December 1994 issue cited the new sentencing law as "something of a model for states that want a sentencing policy that is truthful, utilizes [corrections] resources well and goes a long way toward ensuring public safety." Judge Ross was honored by the magazine's publishers at a January 1995 banquet in Washington, D.C.

Chair of Sentencing Commission

Ross's work as chair of the North Carolina Sentencing and Policy Advisory Commission attracted *Governing*'s attention. The commission—comprising twenty-eight legislators, academicians, business people, private citizens, and public officials—worked for nearly three years to improve the way North Carolina sentences convicted criminals.

The commission grappled with tough issues. How long should prisoners be confined? How can the state use corrections resources most efficiently in an era of declining public funds? How can North Carolina assure that the sentences judges hand out bear a meaningful relationship to the time that inmates actually serve in prison? How can the corrections system use more economical resources, such as probation and house arrest, that are less expensive punishments than prison? The commission made its recommendations to the General Assembly, and Ross's work shepherding the proposals through the 1993 session culminated in the passage of the structured sentencing legislation. The law, which incorporated many of the commission's original concepts, along with modifications introduced in both the House and Senate, became effective for criminal offenses committed on or after October 1, 1994.

Lauded by Chief Justice Exum

James G. Exum, Jr., who retired in December 1994 as Chief Justice of the North Carolina Supreme Court, appointed Ross as chair. Chief Justice Exum has said, "Judge Ross led the Sentencing and Policy Advisory Commission in coming up with one of the most rational approaches to criminal sentencing existent in the country today . . . . The sentencing scheme we now have, largely as the result of Judge Ross's leadership and the legislature's wisdom, will go a long way toward helping North Carolina deal more effectively with the serious problem of crime."

Ross continues to chair the Sentencing Commission as it examines new ways to improve the state's sentencing laws.

Ross, a native of Greensboro and a graduate of Davidson College and The University of North Carolina School of Law, began his public service career as an assistant professor here at the Institute of Government, working in the health law area. In 1976 he entered private law practice with the Greensboro firm of Smith, Patterson, Follin, Curtis, James, and Harkavy. In 1983 he became administrative assistant to Congressman Robin Britt in Washington, D.C. Ross has been on the superior court bench since 1984.

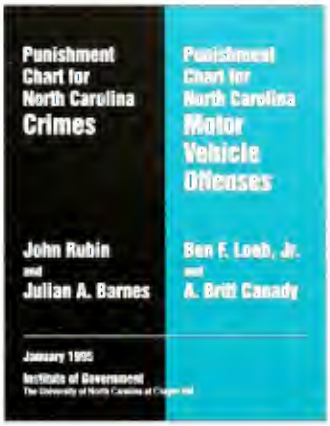
While on the bench, Ross has worked for a number of years with the Institute of Government in training new superior court judges, and he has taken on a more active leadership role in that program in the last three years. In the late 1980s he was a member of the Joint Judicial Selection Study Commission, which examined how judges are selected in North Carolina and subsequently recommended that the state replace election with appointment of judges. Additionally, Ross serves on the Pattern Jury Instruction Committee, a committee of judges that meets monthly to revise sample jury instructions used by the state's judges. The instructions guide juries in ways to consider the legal issues presented in each particular case.

Ross also chairs the state board of governors for Summit House, a community corrections program located in several North Carolina cities that assists women convicted of nonviolent offenses and their children. He is active in the Boy Scouts and serves as an elder in the First Presbyterian Church of Greensboro.

Here's what Ross says about his *Governing* recognition: "Receiving this kind of award is a lot like being a turtle on a fence post . . . you don't get here by yourself." The work of many people, he says—members and staff of the Sentencing Commission, court administrators, other judges and court personnel, and Institute of Government faculty—made it possible for him to receive the award.

—David M. Lawrence and Thomas H. Thornburg

Off the Press

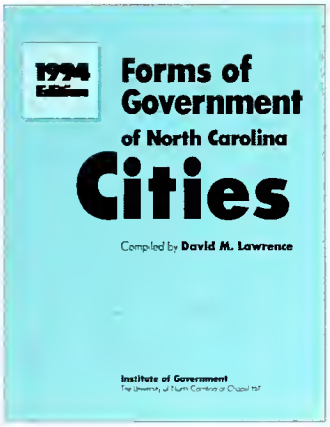


Punishment Chart for North Carolina Crimes / Punishment Chart for North Carolina Motor Vehicle Offenses

John Rubin and Julian A. Barnes/Ben F. Loeb, Jr., and A. Britt Canady

[95.02] ISBN 1-56011-238-7 $10.00 plus 6% tax for North Carolina residents

This year, for the first time, the Institute of Government has made these two punishment charts available under the same cover. In addition to an introductory section on the new structured sentencing laws, each of the two main sections of this publication contains a detailed table of contents, a usage guide, the chart itself, and an index. Both charts have been extensively revised, reflecting the most recent, relevant changes in the law.



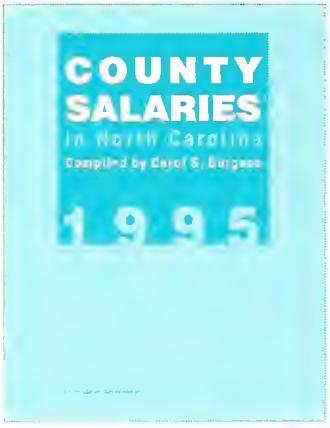
Forms of Government of North Carolina Cities

1994 Edition

David M. Lawrence

[94.21] ISBN 1-56011-233-6 $10.00 plus 6% tax for North Carolina residents

Revised bienially, this publication features statistics regarding the number of mayor-council versus council-manager forms of government, staggered versus concurrent terms, and partisan versus nonpartisan elections. It also lists the size of each town or city's council, the acts of the General Assembly that are the legal basis of each government, and more.

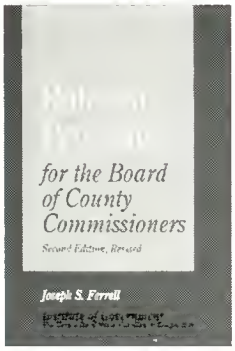


County Salaries in North Carolina 1995

Compiled by Carol S. Burgess

[95.01] ISBN 1-56011-237-9 $15.00 plus 6% tax for North Carolina residents

This annual publication contains salary, wage, and fringe benefit profiles listed by county and position; estimated county population projections for 1995; information about the Consumer Price Index; and the assessed property valuations for each county in North Carolina.



Rules of Procedure for the Board of County Commissioners, Second Edition, Revised

Joseph S. Ferrell

[94.24] ISBN 1-56011-236-0 $7.00 plus 6% tax for North Carolina residents

This revised second edition contains procedural guidelines based on *Robert's Rules* but tailored for a North Carolina board of county commissioners. The rules suggested here comply with generally accepted principles of parliamentary procedure and are consistent with the most current, applicable laws, including the state's newly enacted open-meetings law.

To order Orders and inquiries should be sent to the Publications Office, Institute of Government, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330. Please include a check or purchase order for the amount of the order plus 6 percent sales tax. A complete publications catalog is available from the Publications Office on request. For a copy, call (919) 966-4119.

Popular Government
(ISSN 0032-4515)
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